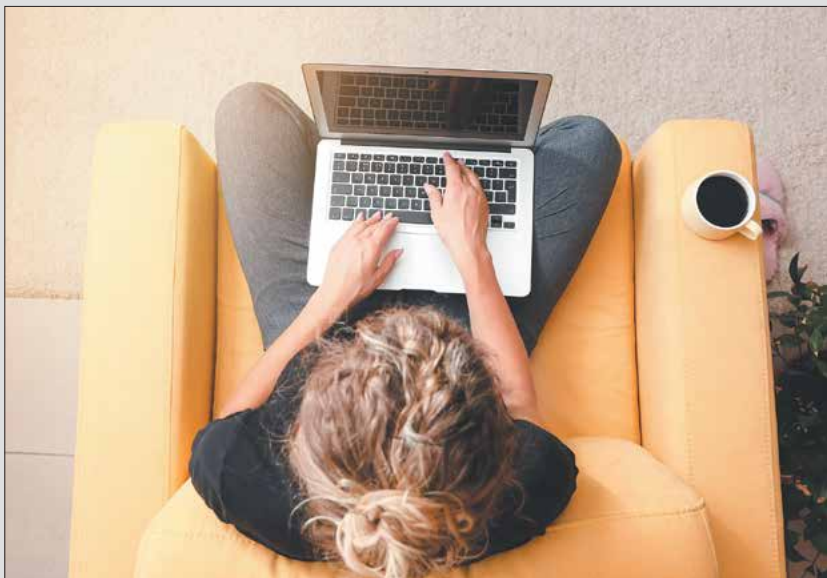




# Journal

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## President's Message



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## How fast life changes

By Kathy Jo Cook



When I last wrote this column, I was waiting for a Suffolk Superior Court jury to return a verdict at the end of a very long trial. It never occurred to me that just a couple of months later, I would be writing this, my final President's Message, from my home office after having been quarantined for nearly a month. Who would have ever thought that something like the COVID-19 pandemic could happen and we would all be at home?

A lot has changed in the last month.

We lost our dear friend and colleague, Mike Mone. Mike was a well-known trial attorney across the country. He held prominent positions in many organizations, including serving as president of the American College of Trial Attorneys, the American Trial Lawyers Association (AAJ), the Massachusetts Bar Association, and MATA.

More importantly, though, Mike was one of us. We look forward to celebrating his extraordinary life with his family in the future.

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## EDITOR'S NOTE

## Staying sane: Rick Friedman to the rescue

By Jonathan A. Karon



This is not the column I expected to write. I had planned on sharing some thoughts on cross-examining expert

witnesses. Then coronavirus hit, the MATA Journal submission deadline was extended, and the world turned upside down.

I'm writing this in mid-April with an expected publication date in June. Presently, all jury trials are on hold, trial courts are essentially handling emergency business only, and everyone is working from home. It's possible things will be back to "normal" by the time you read this, but I doubt it.

So, rather than providing suggestions on how to conduct cross-examinations in trials that will likely be pushed back for at least a few months, I'm going to discuss a more pressing topic. Specifically, staying sane in this crazy profession we've chosen.

Being a trial lawyer is a crazy way to make a living. It requires us to be riverboat gamblers, social workers, teachers, performers, quick study experts, probing inter-

rogators, shrewd negotiators and private investigators.

We know we have to be fearless warriors for justice, always putting our clients' interests first, while warding off that nagging thought that, hey, we might not get paid for any of this.

Most of us are naturally competitive and can't stop from comparing ourselves to our colleagues. It always seems like there's someone else who does better, gets bigger verdicts, gets larger settlements, and knows all the answers. Not only that, but we have to be able to face losing trials and usually never really knowing why.

On top of all that, for the time being, we're stuck at home, trying to find ways to move our cases forward, with no idea when trials will resume.

My trial lawyer friends know that I'm a big fan of Rick Friedman, the Washington plaintiffs' lawyer who wrote "Rules of the Road," "Polarizing the Case" and "The Elements of Trial." But my favorite Rick Friedman book is "Becoming a Trial Lawyer," which is not his autobiography but instead advice on staying sane and avoiding the mental traps that not only drive us crazy but can actually get in the way of

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## Videotape all Rule 35 examinations

By Andrew M. Abraham



Imagine if the defense requested to interview your client alone without your presence and no real way to record what was

said. The defense counsel could then create a report supposedly quoting or paraphrasing your client. They could claim that the client was able to perform tasks that are inconsistent with his injuries.

Would you let that happen? If you would, contact your malpractice carrier.

Why are we less lax with a defense

medical examination? The doctors are paid agents of the insurance companies or the defense lawyers.

### ALL STAR TIPS

Many of them make a substantial portion of their income doing these examinations. Why should we trust them?

I have personally observed the dishonesty in their reports in cases in which they knew they were being videotaped. Failure to report tests' damaging results, cueing witnesses for answers, and "forgetting" to include the fact that

they were cued are common.

Many times, the administration of the test is improper; a delayed memory test that requires a five-minute delay is actually two, or incorrect answers are marked as correct. I recently was given an examination that called for serial 7 subtractions. After the client made a mistake (and was cued that he made a mistake and allowed to repeat the test, making the mistake again), the defense medical examiner switched the test to a much easier serial 3 test. Her report failed to mention the failure of the serial 7, the cueing and additional attempt, and the switch to serial 3 examination.

In other cases, statements attributed to the client as quotes



are nowhere to be found. In one case, Dr. Price, a frequent DME, reported that my client stated he

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# An appellate roadmap, Part 1

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the first instance.

*Best practice: always serve any such motion.* Although Mass. R. App. P. 4(c) states only that a motion to extend “shall be made by motion with service upon all other parties” “if a request for an extension is made after [the time otherwise granted by Mass. R. App. P. 4] has expired,” the best practice is to file a motion and serve the motion upon all other parties. The type of gunboat diplomacy often seen in the trial court does not fly in an appellate court, and professional decorum demands that everyone adhere to the staid and respectful norms of appellate practice from day one.

**Deadline 5:** 1 Year after expiration of time to file appeal: Deadline to file and serve motion for extension of time (with notice of appeal attached!) in Appeals Court.

*An absolute one-year deadline.* The final Hail Mary, in an appellant’s attempt to overcome the failure to timely file a notice of appeal, is not before the trial court but before the Appeals Court. Mass. R. App. P. 14(b) (“[t]he appellate court or a single justice of the appellate court in which the appeal will be, or is, docketed for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time”). Even that long-shot gambit, however, has its own absolute deadline, and the expiration of one year will bolt

the door to the Appeals Court shut for all time. *Id.* (“but neither the appellate court nor a single justice may enlarge the time for filing a notice of appeal beyond 1 year from the date of entry of the judgment or order sought to be reviewed, or, in a criminal case, from the date of the verdict or finding of guilt or the date of imposition of sentence, whichever date is later”).

“There is no downside to the client for counsel filing too many notices of appeal; the downside for filing too few could be disastrous.

**Court-appointed counsel**

**Deadline 1:** Day of filing notice of appeal: Deadline to request appointment of appellate counsel.

*Appointed trial counsel must immediately request appointment of appellate counsel.* In criminal and non-child welfare civil cases, “assigned trial court counsel shall, no later than the day on which the notice of appeal is filed, notify the Committee for Public Counsel Services [CPCS] that appellate counsel should be assigned.” Mass. R. App. P. 3(e). In child welfare cases, appointed trial counsel “shall, on the day upon which the signed notice of appeal is filed, file, and request a hearing on, a motion to allow reasonable costs associated with the appeal in the lower court” and

“a motion to appoint counsel for appellate purposes in the lower court.” Mass. R. App. P. 3(f)(2).

*Appointed trial counsel continues representation until appellate counsel appointed.* Appointed trial counsel “shall continue to represent [the client] on appeal until an appearance is filed by substitute counsel, if such assignment of counsel is made by [CPCS].” Mass. R. App. P. 3(e)

(criminal and non-child welfare civil cases); see also Mass. R. App. P. 3(f)(1) (child welfare cases). In child welfare cases, appointed trial court counsel “shall continue to represent the party at all lower court proceedings.” Mass. R. App. P. 3(f)(2). Further, in child welfare cases, if the trial court has not allowed a motion to withdraw by appointed trial counsel “prior to the date on which the lower court transmits to the appellate court the notice of assembly of the record pursuant to [Mass. R. App. P. 9], lower court counsel will be designated as counsel in the appellate court.” Mass. R. App. P. 3(f)(4).

**Stay or injunction pending appeal**

*Stay must ordinarily be sought in*

*trial court.* “In civil cases, an application for a stay of the judgment or order of a lower court pending appeal, or for approval of a bond under [Mass. R. App. P.] 6(a)(2), or for an order suspending, modifying, restoring, or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the lower court.” Mass. R. App. P. 6(a)(1). Likewise, “[i]n criminal cases, an application for a stay of execution of a sentence pending appeal must ordinarily be made in the first instance in the lower court.” Mass. R. App. P. 6(b)(1).

*Specificity required in a motion to the appellate court or single justice.* “A motion for such relief may be made to the appellate court or to a single justice, but the motion shall show that application to the lower court for the relief sought is not practicable, or that the lower court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the lower court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute, the motion shall be supported by affidavits. ... With the motion shall be filed such parts of the record as are relevant. Reasonable notice shall be given to all parties.” Mass. R. App. P. 6(a)(1) (civil cases); see also Mass. R. App. P. 6(b) (analogous rule for criminal cases). Additional details appear in Mass. R. App. P. 6. **MATA**

## President’s message: How fast life changes

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The flurry of spring events, what I call “prom season” for lawyers, has been postponed or cancelled. Educational programs, similarly, including the Keith Mitnick program, have been postponed.

Our professional and personal lives have changed. I am sure I am

“My challenge to you is put a positive spin on this. We are lawyers. We know how to argue both sides of a case.

not alone in saying that the last month has been challenging, learning to run a law firm from home, using Instacart to buy groceries, not going out to dinner, and not seeing the real faces of friends and family. Not many cars on the highway, so no car accidents. Not many people out and about, so no premises liabil-

ity claims. And the list goes on.

What can we do in these uncertain times? The answer is: all of the things that we never had time to do before that will help us run a better law practice, be a better friend, and be a better family member.

Here are some concrete ideas that have worked for me ...

On the business side, my law firm has stepped up our marketing on social media, and it is working. We are getting a great response, probably because people are at home with less to do.

We have purchased new case management and intake software, and with any luck, we will have it up and running when we return to the office.

We have increased the productivity of our team by having daily Zoom meetings, admitting and discussing challenges, personal and professional, and committing to goals above and beyond our usual law work.

We have increased our social interaction in the law firm as well, with cocktails and mocktails on Thursday nights. And we have stepped up our education, attending more webinars and learning new practice areas.



On the personal side, my husband (the only real human being whom I have contact with) and I have learned how to engage with others creatively. We celebrated our first virtual Easter dinner last weekend, with the grandkids in charge of games. We regularly FaceTime our friends. We also put together puzzles, exercise, take walks and try to avoid watching too much news.

These are just a few of the positive takeaways from the COVID-19 pandemic. When we return to work, we may have more downtime than we did before. My challenge to you, my

friends and colleagues, is put a positive spin on this. We are lawyers. We know how to argue both sides of a case.

Many thanks to all of you for allowing me to serve as your president this year. It has been a wonderful experience, and I will miss it greatly. I may not have the opportunity to pass the baton formally (although I am still hopeful that I will), but you will be in good hands next year with Brendan Carney. He is a good lawyer, a good friend, and he is dedicated to our cause. He will serve you well as your next president. **MATA**

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*Kathy Jo Cook, the 2019-2020 MATA president, is the managing member of KJC Law Firm, LLC, which represents individuals and businesses in civil and criminal cases, including personal injury, wrongful death, medical and legal malpractice, consumer protection and employment discrimination. She was the 2008-2009 president of the WBA of Massachusetts, and she has served on the boards and committees of a number of bar associations. She is an honors graduate of Suffolk University Law School and the University of Houston.*