



# Journal

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## President's Message



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## Getting through it together

*"But I know, somehow, that only when it is dark enough can you see the stars."*  
— Martin Luther King Jr.

By Brendan G. Carney



When I assumed the presidency of MATA on July 1, 2020, I knew this year was going to be different. The COVID pandemic did not allow the traditional in-person passing of the gavel that we see in typical years.

By that time, working from home was the norm and "Zoom" had become a household word. Unfortunately, it was just the beginning of the changes we have weathered over the past months.

In that first week of July, we learned that MATA Past President Edwin "Ed" Wallace had passed away suddenly, years into a Parkinson's diagnosis that never seemed to slow him down. Ed inspired many of us, and I was lucky to have known him personally for much of my life.

Ed was part of the fabric of MATA, and the organization will never be the same without him. As trial lawyers, we know that tragedy is part of life, but when it hits so close to home, our professional objectivity is not really helpful. (See in memoriam statement in this issue.)

The following months brought even more heartbreak to our legal community and the nation at large. We were shocked to learn of the untimely death of beloved SJC Chief Justice Ralph Gants, closely followed by the

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## EDITOR'S NOTE

## Turn and face the strange changes

By Jonathan A. Karon



My last column was written in April. At that time, courts were handling emergency business only, jury trials were on hold, and we were learning how to work remotely. We've come a long way since

then, but our practices are still quite different. Below is a list of some of the most significant changes and my thoughts on them.

### Remote depositions

This may be the biggest. Once the SJC allowed Zoom depositions as of right, we were able to start moving our cases forward again. In practice, I've found that Zoom depositions work remarkably well and that the technical obstacles are minimal.

The biggest difference is the handling of exhibits. Previously, when preparing for a deposition, I'd complete my outline and then assemble the exhibits. Now I have to decide on exhibits first, so that they can be forwarded to the court reporter and opposing counsel.

Although you can have the court reporter mark and share the exhibits, I prefer to do this myself. I'm getting much better with screen sharing, although it's still an adventure. By the way, it is possible to have a witness mark a document while it's being shared on Zoom.

There are some other logistical issues. You have to make it clear that the witness is not allowed to communicate with counsel during

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## Animations in personal injury cases

By Doug Sheff



Often times the difference between a good lawyer and a great one is his or her ability to use demonstrative evidence in a frequent

and effective manner. Whether at trial or mediation, a constant and coherent presentation of visual aids can make a huge difference in both presentation and results.

One example of demonstrative evidence is an animation. Actually,

animations may be admitted as evidence or utilized simply as a chalk (see *Lally v. Volkswagen*, 45 Mass. App. Ct. 317 (1998); John W. Strong et al., *McCormick on Evidence* §214, at 21 (West 5th ed. 1999 & Supp. 2003). In either instance,

they can advance your case in many ways.

Over the past several years, the attention span of jurors has grown

increasingly shorter. Technology has created an expectation to receive

“For today's increasingly inattentive jurors, an animation can mean the difference between victory and defeat.

information in a quick, concise and easy-to-understand manner. In addition, the old saying “seeing is

believing” applies to jurors more now than ever before. For these reasons, we now see animations viewed favorably in focus groups as compared to similar groups in the past.

Properly done, an animation can summarize years of investigation, discovery, witness testimony and expert analysis in a matter of seconds. It can distill complex and sometimes technical information into a simple, easy-to-digest and persuasive expression of an event.

In order to make your animation relevant or even admissible,

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# An appellate roadmap, Part 2

Part 1 appeared in the June 2020 issue of the MATA Journal.

By Kevin J. Powers  
and Thomas R. Murphy



POWERS



MURPHY

### IV. Transcript

**A. Deadline 1: 14 days after filing notice of appeal: Appellant must order transcript and/or file and serve transcript order or certification with trial court.**

A 14-day deadline, regardless of what the appellant must do.

Depending upon whether the proceedings were recorded, how the proceedings were recorded, whether the recording equipment malfunctioned, and whether the case involves child welfare litigation, the method of memorializing the trial court proceedings will take different forms. See Mass. R. App. P. 8. Regardless of what the appellant must do, however, the deadline is 14 days after filing the notice of appeal.

*Proceedings recorded by court reporter — order transcript.* If a court reporter recorded the trial court proceedings, then “the appellant shall order a transcript of those proceedings within 14 days of filing the notice of appeal in accordance with procedures set by the Chief Justice of the Trial Court,” unless no such proceedings are relevant to the appeal or the transcript is on file with the court. Mass. R. App.

P. 8(b)(1)(A); see also Trial Court Administrative Order 19-1(4)(a)(i). *Proceedings recorded electronically — request transmission of audio recording and order transcript.* If the trial court proceedings were electronically recorded, then “the appellant shall request the transmission of the audio recording of those proceedings and order the transcription of those proceedings within 14 days of the filing of the notice of appeal in accordance with procedures set by the Chief Justice of the Trial Court,” unless no such proceedings are relevant to the appeal or the transcript is on file with the court. Mass. R. App. P. 8(b)(1)(A); see also Trial Court Administrative Order 19-1(4)(b) (i) (For the Record (FTR) recording system; transmit FTR-generated transcript order form to Office of Transcription Services); Trial Court Administrative Order 19-1(4)(c) (i) (JAVS/CourtSmart recording

system; order transcript from trial court clerk’s office). *Certify no proceedings relevant to appeal.* If “no lower court proceedings are relevant to the appeal,” then the appellant shall so certify to the trial court clerk “and serve a copy on all other parties.” Mass. R. App. P. 8(b)(1)(A). *Certify transcript is on file with court.* If “the transcript is on file with the court,” then the appellant shall so certify to the trial court clerk “and serve a copy on all other parties.” Mass. R. App. P. 8(b)(1)(A). *Child welfare cases.* In child welfare cases, “the [trial court clerk] shall order, within 14 days and in accordance with procedures set by the Chief Justice of the Trial Court, a transcript of the proceedings relevant to the appeal and shall serve a copy of the transcript order

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## In Memoriam: Edwin Wallace

It is with extreme sadness that the leadership and staff of the Massachusetts Academy of Trial Attorneys acknowledge the passing of MATA Past President and longtime friend Edwin Wallace. We were heartbroken to hear of the untimely death of Ed Wallace on the Fourth of July. Ed was a longtime champion of MATA, and his career was dedicated to tireless representation of “the little guy” through his landmark representation of injured people — particularly those harmed by the tobacco and asbestos industries. Ed Wallace was always there when MATA needed him. He was one of the people who were instrumental

in bringing attorney-conducted voir dire to Massachusetts. Ed was also an important resource in helping our members learn the skills needed to succeed in that area. Ed was always eager and willing to mentor young lawyers. I first met Ed when I was a teenager, through his friendship with my father. Like many of you, I shared many good laughs with Ed. He was instrumental in my development as a lawyer and my involvement with MATA, providing necessary guidance and encouragement along the way. I am sure he has provided the same for many of you. We are all going to miss Ed’s quick

wit, intelligence, experience and fundamental human decency. In recent years, as Ed faced his own health challenges (and yet never complained), he remained an active participant in MATA and inspired many of us by continuing to offer good advice and funny quips during his participation in MATA Board of Governors’ meetings. Ed was to be the recipient of the 2020 MATA Courageous Advocacy Award. Our hearts go out to Ed’s wife, Lisa, his three sons, colleagues and friends. We already miss him very much. Brendan G. Carney President



## In Memoriam: Hon. Ralph D. Gants

The Massachusetts Academy of Trial Attorneys mourns the recent, tragic loss of the chief justice of the Commonwealth who was taken from us all too early. Chief Justice Gants was extraordinarily brilliant with a quick wit and a razor-sharp mind, and at the same time he had a genuine, down-to-earth way. A judge’s judge, he was forever mindful of the underrepresented, the less fortunate, and the forgotten. Owing to his tremendous contributions and commitment to the bar, the community, and to society at-large, his loss is deeply personal. We will miss him tremendously. May his memory be a blessing. Officers Brendan G. Carney, President Lee Dawn Daniel, President-Elect



Peter J. Ainsworth, Treasurer  
Rhonda T. Maloney, Secretary  
Kathy Jo Cook, Immediate Past President

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# An appellate roadmap, Part 2

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on the parties.” Mass. R. App. P. 8(b)(2); see also Trial Court Administrative Order 19-1(5).

*Stipulation that transcript is unnecessary.* “[T]he parties may stipulate that the transcription of some or all of the proceedings relevant to the appeal is unnecessary to the adjudication of the appeal, in which case the appellant need order only the transcript of the proceedings, if any, that the parties agree are necessary to the adjudication of the appeal. The parties shall file the stipulation with the clerk within 14 days of the filing of the notice of appeal.” Mass. R. App. P. 8(b)(1)(B).

*Statement of the proceedings.* “If no report of the evidence or proceedings at a hearing or trial was made and a transcript is unavailable, the appellant shall file a motion to reconstruct the record within 14 days of the filing of the notice of appeal. The parties shall confer and reconstruct the record.” Mass. R. App. P. 8(c). This is another instance in which the parties should make every effort to cooperate in the preparation of a record for purposes of the appeal, because cordiality and a respectful working relationship between adversaries is the name of the game on appeal.

*Agreed statement as the record on appeal.* “If the parties intend to submit an agreed statement as the record on appeal in lieu of the procedures set forth in [Mass. R. App. P.] 8(a)-(c), the parties shall notify the [trial court] clerk in writing within 14 days of the filing of the notice of appeal.” Mass. R. App. P. 8(d).

*Costs of transcription — criminal defendants and indigent appellants.* In all criminal cases and civil cases in which the appellant is entitled to court-appointed counsel, “the Commonwealth shall pay for the cost” of the transcript, “including those [proceedings] designated by the appellee[.]” Mass. R. App. P. 8(b)(1)(C); see also Trial Court Administrative Order 19-1(4)(b)(iii) (For the Record (FTR) recording system); Trial Court Administrative Order 19-1(4)(c)(iii) (JAVS/CourtSmart recording system); Trial Court Administrative Order 19-1(7)(c) (“The appellant shall be responsible for providing the court reporter or approved transcriber with all information necessary to obtain payment from the Commonwealth or other responsible entity”).

*Costs of transcription — non-indigent civil appellants.* “In all other cases, unless ordered otherwise by the lower court, the appellant shall pay for such costs. If the parties cannot agree on which proceedings are relevant to the appeal, the lower court shall settle the matter upon motion.” Mass. R. App. P. 8(b)(1)(C); see also Trial

Court Administrative Order 19-1(7)(a) (same). “In the case of cross appeals, the party ordering any transcript shall be responsible for making arrangements for payment for those transcripts as if that party was the appellant.” Trial Court Administrative Order 19-1(7)(a). Trial Court Administrative Order 19-1 sets forth the logistics for payment to the court reporter or approved transcriber, as well as logistics for cancellation by the appellant or cross-appellant. See Trial Court Administrative Order 19-1(7)(b) (deposit; notice of completion; balance); Trial Court Administrative Order 19-1(7)(d) (cancellation).

**B. Deadline 2: 14 days after appellant serves transcript order or certification: Appellee orders transcript of additional proceedings and files and serves transcript order with trial court.**

*Appellee orders transcript of additional proceedings.* “Within 14 days of service of the appellant’s transcript orders or certifications, any other party may order a transcript of additional proceedings in accordance with procedures set

“The rules governing omissions, corrections and inaudible recordings boil down to this: Counsel owe it to each other, to the trial court, and eventually to the appellate court to cooperate and resolve difficulties or disagreements amicably.

by the Chief Justice of the Trial Court” and “shall at the same time file a copy of the transcript order with the [trial court] clerk and serve a copy on all other parties.” Mass. R. App. P. 8(b)(1)(A); Trial Court Administrative Order 19-1(4)(a)(ii) (court reporter); Trial Court Administrative Order 19-1(4)(b)(ii) (For the Record recording system); Trial Court Administrative Order 19-1(4)(c)(ii) (JAVS/CourtSmart recording system).

**C. Deadline 3: Upon completion of transcript: Transcriber delivers transcript to trial court clerk.**

*Delivery of transcript.* “Upon completion, the transcriber shall deliver the transcript to the clerk of the lower court in accordance with procedures set by the Chief Justice of the Trial Court.” Mass. R. App. P. 8(b)(3); see also Trial Court Administrative Order 19-1(8).

**D. Deadline 4: 14 days after trial court receives all ordered transcripts: Trial court notifies all parties that transcripts have been received.**



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*Delivery of transcript.* “Upon receipt of all of the transcripts ordered by the parties, the [trial court] clerk shall notify all parties within 14 days that the transcripts have been received.” Mass. R. App. P. 8(b)(3).

**E. Deadline 5: Within such time as trial court allows: Appellant files proposed statement of proceedings.**

*Statement of the proceedings.* Where

the transcript is unavailable and the appellant moved to reconstruct the record, “[w]ithin such time as the lower court shall allow, the appellant shall file a proposed statement of the proceedings.” Mass. R. App. P. 8(c).

**F. Deadline 6: 14 days after service of proposed statement: Appellee files objections or proposed amendments or additions.**

*Statement of the proceedings.* “Within 14 days of service of the proposed statement, any other party may file objections or proposed amendments or additions. The lower court shall promptly settle any disputes and approve a statement of the proceedings for inclusion in the record on appeal.” Mass. R. App. P. 8(c).

**G. Deadline 7: 28 days after filing of notice of intent to submit agreed statement: Parties submit to trial court agreed statement of record on appeal.**

*Agreed statement as the record*

*on appeal.* “Within 28 days of the filing of the notice to the clerk, the parties shall submit to the lower court an agreed statement of the record on appeal containing such information as is necessary for consideration of the appeal. If the statement conforms to the truth, the lower court shall approve the statement, along with any additions the lower court considers useful to the appellate court.” Mass. R. App. P. 8(d).

**H. General principles: Stop bickering and start cooperating.**

The rules governing omissions, corrections and inaudible recordings boil down to this: Counsel owe it to each other, to the trial court, and eventually to the appellate court to cooperate and resolve difficulties or disagreements amicably. See Mass. R. App. P. 8(e).

The trial court is empowered to resolve problems of the record on appeal, but it is a sad day when the parties are at such loggerheads that court supervision becomes truly necessary. Good luck.

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*Kevin J. Powers, a sole practitioner in Mansfield, has been active in the Massachusetts appellate bar since 2006, a member of MATA’s Amicus Committee since 2017, interim chair of the Amicus Committee from 2018 to 2019, and current vice chair of the Amicus Committee. His reported decisions include Meyer v. Veolia Energy N. Am., 482 Mass. 208 (2019), and he has co-written or edited several of MATA’s recent amicus filings. He can be reached at [kpowers@kevinpowerslaw.com](mailto:kpowers@kevinpowerslaw.com).*

*Thomas R. Murphy, a sole practitioner in Salem, is MATA’s immediate past president and chair of the Amicus Committee. He has been lead appellate counsel in many reported cases, among them DiCarlo v. Suffolk Construction Co., Inc., 473 Mass. 624 (2016), and he has written, co-written or edited more than 30 of MATA’s amicus filings. He can be reached at [trmurphy@trmlaw.net](mailto:trmurphy@trmlaw.net).*