



# Journal

March 2021  
Vol. 13, No. 1

## President's Message

### As world around us continues to change, MATA adapts accordingly

By Brendan G. Carney



It is February 2021 and by now all clichés to describe the effects of the pandemic have been exhausted. It has been

over 10 months since COVID-19 changed the world as we knew it. All of us have been impacted in unique ways.

As I write this article, I am already stressing out about tomorrow morning. I have court hearings being conducted via videoconference scheduled for 10 a.m. and 11:45 a.m., my daughter in second grade must be logged into her Google classroom at 9:15 for remote school, my kindergartner at 9:30, all while my wife brings my 3-year-old to preschool at 9 a.m. This is a lot to keep track of, but this is my “new normal.” I feel very fortunate that my wife, children and my parents have all stayed healthy and have not been stricken with the virus.

As trial lawyers, parents, husbands and wives, we are all adapting to this new world in our own unique ways. As the organization that represents the interests of plaintiffs’ lawyers

in Massachusetts, we too have adapted in order to meet the challenges posed by COVID-19 to our members.

My predecessor, Kathy Jo Cook, deftly sprang into action in late March of 2020 and set up MATA’s COVID Task Force. The early days of the pandemic brought with it great uncertainty. The courts had

When I speak to fellow plaintiffs’ lawyers, the complaint I hear most often is that people feel isolated.

closed, and we were then faced with an onslaught of emergency standing orders issued by the SJC that required interpretation and clarification.

Through our longstanding relationships, we were able to substantially limit the scope of a bill proposing nearly blanket liability protection for health care workers. If the bill had passed as originally proposed, all health care workers and providers

Continued on page 7

## EDITOR’S NOTE



©grantmg

### Trials: the 800-pound gorilla

By Jonathan A. Karon



Every time I tried to come up with a topic for this issue’s Editor’s Note, I was reminded of the old joke:

“But apart from that, how was the play Mrs. Lincoln?” Because looming over everything is the inescapable reality of no civil jury trials. Until jury trials resume all of our other adaptations, remote depositions, e-filing, Zoom hearings, etc. are

just re-arranging deck chairs on the Titanic.

COVID has taken civil jury trials off the table. As I write this (early February), the courts have paused jury trials to evaluate the results so far of Phase I (in which a limited number of jury of six trials were conducted). That the courts were able to conduct even a small number of criminal trials is encouraging. But given the extreme backlog of criminal trials, no one I’ve spoken to anticipates civil jury trials until the end of this year or possibly sometime into 2022.

Continued on page 8

## Learning how to prepare your case for trial

By Kathy Jo Cook

*Before anything else, preparation is the key to success.*

— Alexander Graham Bell



Trials have been the subject of TV shows and movies for as long as I can remember, from classics like “Perry Mason,” “Matlock” and

“My Cousin Vinny” to this year’s Golden Globes and likely Academy Awards nominee “The Trial of the Chicago 7.” What is the fascination? I

think it is the mesmerizing eloquence of the spoken word and its ability to persuade, sometimes against all odds.

### ALL STAR TIPS

the courtroom, stands up, looks the witness or jury in the eye, and simply begins to speak. It’s the culmination of years of preparation that go into the

We all know that those jaw-dropping cross-examinations and riveting summations don’t typically happen, and if they do, it’s not because a lawyer strolls into the

making of such a moment.

There’s an old Proverb that says simply, “Prepare the umbrella before it rains.” It’s not sexy, and it’s often not fun. But learning how to prepare to present your case for trial is not only key to having a good day in court, but to winning your case.

1. Learn everything that you can about your case, the points in your favor and those against you. Understand them all, and if you don’t, talk to an expert or a colleague who can help you understand. Then boil them down. Even the most complicated case can be summed up in a limited number of simple points that a jury can understand.

2. Throw out weak arguments or arguments that require over-reaching. Your points must be ones that you can present to be the “truth” fairly. Jurors will only believe you if you guide them to the truth, from start to finish.

3. Prepare your direct and cross-examinations to present just your points and anything else that is necessary to meet your elements. Leave everything else out. Resist the temptation to expose all of the bad deeds that the defendant or the defendant’s expert has done, the details of the cases the expert has testified in, and the expert’s bad grades in college. Prepare your case to

Continued on page 7



# An appellate roadmap, Part 3

Parts 1 and 2 appeared in the June 2020 and November 2020 issues of the MATA Journal.

By Kevin J. Powers  
and Thomas R. Murphy



POWERS



MURPHY

This article continues the journey from transcription to docketing the appeal in the appellate court.

## IV. Addendum:

### Special transcript requirements

Two special requirements may govern production of the transcript. These requirements supplement the points made in Section IV, under Deadline 1:

*No electronic recording.* The rule that formerly governed production of the transcript before practically all Massachusetts court proceedings were electronically recorded, and that still applies in the rare instance in which a court proceeding was not electronically recorded, imposes requirements similar to those governing production of the transcript from electronically recorded proceedings. Each appellant must, within 14 days of filing the notice of appeal, file with the trial court either: (a) “a transcript or those portions of the transcript” which the appellant deems necessary; (b) a certification “that the appellant has ordered such portions”; or (c) a certification that the appellant does not intend to order a transcript. Mass. R. App. P. 9(d)(2).

*Denial of motion for post-conviction relief other than first-degree murder.* Where the appeal concerns the denial of a motion for post-conviction relief in a criminal case other than first-degree murder, each appellant must, within 14 days of filing the notice of appeal, file with the trial court either:

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 a past president of MATA 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).



©AndreyPopov

(a) a transcript; (b) “a statement that a transcript may not be obtained with due diligence, is not relevant, or has been ordered and not yet produced”; or (c) a certification that a transcript is in the appellate court. Mass. R. App. P. 9(d)(3).

## V. Assembly of the record

### A. Deadline 1: Promptly upon appellant filing notice of appeal: Trial court clerk assembles record.

*Responsibility of trial court clerk.* Many novice appellants mistakenly assume that “assembly of the record” refers to the process of the appellant copying exhibits and preparing a record appendix. Not so. The assembly of the record is the responsibility of the trial court clerk. To avoid confusion, we will refer to everyone in the trial court clerk’s office as the “trial court clerk,” and the rules also use the term “lower court clerk.” In most Massachusetts trial courts, the clerk has a designated assistant “appeals clerk” responsible for assembly of the record and other appellate steps. Therefore, at this stage, the appellant will almost invariably interact with the “appeals clerk in the trial court clerk’s office”; only later will the appellant interact with the “clerk’s office of the appellate court.”

*Promptly upon filing of a notice of appeal.* The trial court clerk begins assembling the record “promptly” “[u]pon the filing of a notice of appeal.” Mass. R. App. P. 9(a)(1).

*Trial court clerk gets everything in order.* The trial court clerk “shall review the file and ensure the accuracy of the docket entries,” “prepare a list of all exhibits,” and “maintain the file until the final disposition of the appeal, unless otherwise ordered by a judge.” Mass. R. App. P. 9(a)(1).

*Trial court clerk does not send exhibits to appellate court unless appellate court so orders.* The trial court clerk “shall not transmit any exhibit to the appellate court unless pursuant to an order of the appellate court or a justice thereof.” Mass. R. App. P. 9(b). The appellant must therefore scrupulously prepare copies of all necessary exhibits for the record appendix or risk the appellate court later concluding that the record on appeal — regardless

of what may or may not remain in the trial court clerk’s office — is inadequate for review. See Mass. R. App. P. 18(a) (duty of appellant to prepare and file appendix; required content of appendix).

### B. Deadline 2: Simultaneous with trial court clerk assembling record: Concurrent obligations of parties.

*Follow orders.* “[U]pon request by the clerk of the lower court, a party shall forthwith perform any act reasonably necessary to enable the clerk to assemble the record.” Mass. R. App. P. 9(d)(1). “The lower court shall make such orders as it deems necessary for the preservation of exhibits.” Mass. R. App. P. 9(b).

*Copy necessary exhibits for record appendix.* “The parties may reproduce exhibits for inclusion in the record appendix insofar as necessary to their appeal, pursuant to [Mass. R. App. P.] 18.” Mass. R. App. P. 9(b). The time during which the trial court clerk is assembling the record and the parties are awaiting the transcription is a great time for the appellant to copy all necessary exhibits for the record appendix. Ideally, by the time that the transcript arrives from the transcriber, the appellant should be able to add the transcript to the docket report and the exhibits, prepare a table of contents, paginate the combined document, and have a finished record appendix with which to prepare all of the citations in the brief.

*Abide by transcript obligations.* While the trial court clerk assembles the record, each appellant must move forward with his or her own responsibilities regarding the transcript. See Section IV, *supra*.

*Remain cognizant of impounded materials.* The parties must bear in mind that materials impounded in the trial court will remain impounded on appeal. See Mass. R. App. P. 9(c).

*Do not delay.* “The lower court or the appellate court or a single justice thereof may order the record to be assembled, and the appellate court or a single justice thereof may order the appeal to be docketed, at any time.” Mass. R. App. P. 9(a)(2). The starting gun could fire “at any time,” and the appellant must therefore never assume that an abundance of

time remains in which to prepare for briefing. *Id.*

### C. Deadline 3: 21 Days after compliance with transcript obligations: Trial court transmits notice of assembly to appellate court.

*Triggering transcript events.* The trial court clerk “shall complete the assembly of the record and transmit notice of the assembled record to the parties and the clerk of the appellate court” within 21 days from the last act necessary for compliance with transcript-related obligations. Mass. R. App. P. 9(e)(1). That act is the latest of: (a) the filing of the transcript in the trial court; (b) the filing of notice that the appellant will not order a transcript; (c) expiration of the time for filing of any additional notice of appeal; or (d) the trial court’s approval of an agreed statement as to the record on appeal pursuant to Mass. R. App. P. 8(d). Mass. R. App. P. 9(e)(1).

*Responsibility of trial court clerk.* The trial court clerk, and not any party, transmits the notice of assembly to the parties and to the appellate court. Mass. R. App. P. 9(e)(1).

*Accompaniments to notice of assembly.* The notice of assembly does not contain the record, but, instead, simply notifies the appellate court that the trial court clerk’s office has the trial court file in order. The notice of assembly is accompanied by: (a) an appellate court entry statement; (b) the notice of assembly; (c) the notice(s) of appeal; (d) the docket entries; (e) any notice of impounded materials; (f) an exhibit list; and (g) in criminal cases, a transcript. Mass. R. App. P. 9(e)(2).

## VI. Docketing the appeal

### A. Deadline 1: 14 Days after appellant receives notice of assembly from trial court: Appellant pays docket fee and appellate court clerk enters appeal.

*Criminal appeals enter immediately.* In criminal cases, “[u]pon receipt of the notice of assembly,” “the clerk of the appellate court shall enter the appeal upon the docket.” Mass. R. App. P. 10(a)(2).

*Civil appeals authorized without fees enter upon written request.* “If an appellant is authorized to prosecute the appeal without payment of fees, the [appellate court] clerk shall enter the appeal upon the docket at the written request of a party.” Mass. R. App. P. 10(a)(1)(A).

*All other civil appeals require docket fee or waiver.* “Within 14 days after receiving” the notice of assembly from the trial court clerk, “each appellant, including each cross-appellant and each appellant in a joint appeal, shall pay to the [appellate court clerk] the docket fee [or] request waiver of the fee.” Mass. R. App. P. 10(a)(1)(A). Upon receipt of the fee or waiver request, the appellate court clerk “shall thereupon enter the appeal of such appellant or cross-appellant.” *Id.*

*Current fee.* Before mailing the fee, the appellant should call the appellate court clerk’s office to confirm the current fee. With that proviso, as of



January 2021, the statutory docket fee for an appeal in either the Appeals Court or the Supreme Judicial Court is \$300. G.L.c. 262, §4.

**Certificate of mailing.** An appellant mailing payment or a waiver request should enclose “a certificate attesting that the day of mailing was within 14 days of receipt of the notice of assembly.” Mass. R. App. P. 10(a)(1) (B).

**Commonwealth pays no civil docket fee.** “[N]o fee shall be paid for the entry for an appeal ... by the commonwealth ..., but if the commonwealth prevails in the action, the fees shall be taxes against the other party.” G.L.c. 262, §4.

**Extension for cause shown.** “Upon motion, the lower court or a single justice of the appellate court may, for cause shown, enlarge the time for docketing the appeal or permit the appeal to be docketed out of time.” Mass. R. App. P. 10(a)(3).

**Dismissal for inexcusable neglect in civil case.** “If any appellant in a civil case shall fail to comply with [Mass. R. App. P.] 9(d) or [Mass. R. App. P.] 10(a)(1), the lower court may, on motion with notice by any appellee, dismiss the appeal, but only upon a finding of inexcusable neglect.” Mass. R. App. P. 10(c). “[O]therwise, the court shall enlarge the appellant’s time for taking the required action.” *Id.* If the appellant cures a noncompliance with Mass. R. App. P. 9(d) prior to a hearing on a motion to dismiss, “the appellant’s compliance shall be deemed timely.” Mass. R. App. P. 10(c). The core point here is that, once the issue of the timeliness of the notice of appeal is resolved, acrimonious motion practice centered upon subsequent filing deadlines will seldom avail a moving party. With a timely notice of appeal, the game is afoot, and it will be a rare and overwhelmingly unjustifiable mountain of delay upon delay that leads to disposition before the appellate court issues a decision.

**B. Deadline 2: Upon docketing appeal: Appellate court serves notice of entry.**

**Appellate court clerk sends notice.** “Upon docketing of the appeal, the clerk shall serve written notice thereof upon each party and the clerk of the lower court.” Mass. R. App. P. 10(a)(3).

**C. Deadline 3: Within 14 days after Appeals Court issues notice of entry:**

**Appellant files docketing statement in Appeals Court.**

**Appeals Court only.** The Appeals Court docketing statement is a requirement of the Appeals Court and does not apply to docketing cases in the Supreme Judicial Court. See Mass. App. Ct. R. 10.0.

**Within 14 days after issuance of notice of entry.** “The docketing statement is due within 14 days after the Appeals Court issues the ‘Notice of Entry’ of the appeal.” Mass. App. Ct. R. 10.0(a).

**Every appellant and every cross-appellant.** “Every separately represented appellant or cross-appellant shall file a separate docketing statement.” Mass. R. App. P. 10.0(c). “Counsel representing multiple appellants or cross-appellants shall file one docketing statement on behalf of all appellants or cross-appellants represented by that counsel.” *Id.* “Each appellant or cross-appellant who is not represented by counsel shall file one docketing statement.” *Id.*

**Sole exception is for an incarcerated pro se.** The only exception to the docketing statement requirement is for “a self-represented person who is incarcerated.” Mass. App. Ct. R. 10.0(a). Therefore, even an appellant or cross-appellant who is incarcerated but represented, or who is pro se and indigent but not incarcerated, must file a docketing statement. Mass. App. Ct. R. 10.0(c).

**Content and form.** “The docketing statement shall contain such information as required on the form located on the Appeals Court’s website.” Mass. App. Ct. R. 10.0(b). Links to the current versions of the civil docketing statement and criminal docketing statement are available on the Appeals Court web page containing Mass. App. Ct. R. 10.0. See <https://www.mass.gov/appeals-court-rules/appeals-court-rule-100-docketing-statement-for-all-appeals-civil-and-criminal>. Each docketing statement carries its own instructions, but perhaps the most noteworthy instruction on the civil docketing statement appears under “6. Appellate Issues”: “This statement is for informational purposes only and failure to raise an issue here will not preclude an appellant from raising the issue in its brief.” Those words justify a sigh of relief on the part of

any appellant or cross-appellant completing the docketing statement.

**Failure to file.** As in the case of a motion for dismissal for “inexcusable neglect” under Mass. R. App. P. 10(c), the failure of a party to promptly comply with Mass. App. Ct. R. 10.0 may prompt remedial measures, but is unlikely to result in dismissal of the appeal and is not an appropriate justification for motion mortal combat by opposing counsel. “The court may take such action as necessary to ensure the filing of the docketing statement, including denying without prejudice any motion to enlarge time to file a brief or motion to stay appellate proceedings until the appellant has filed the docketing statement.” Mass. App. Ct. R. 10.0(d). This is the time for opposing counsel to cooperate rather than play a game of “gotcha.”

VII. Constitutional claims

**A. Deadline 1: Within 14 days of docketing appeal: Party asserting unconstitutionality of act of Legislature notifies Attorney General of constitutional challenge.**

**Notice to Attorney General.** “Within 14 days after the docketing of any civil appeal that draws into question the constitutionality of an act of the legislature, if neither the Commonwealth nor an officer, agency, or employee thereof is a party to the appeal, the party asserting the unconstitutionality of the act shall notify the attorney general of such challenge.” Mass. R. App. P. 10(a)(4).

**Form.** “Such notice shall be given either in writing or by use of any electronic method the attorney general may designate for this purpose.” Mass. R. App. P. 10(a)(4).

**B. Deadline 2: Immediately upon constitutional claim later becoming apparent: Party asserting unconstitutionality of act of Legislature notifies Attorney General of constitutional challenge.**

**If constitutional claim later becomes apparent.** “If such a question becomes apparent to a party after the 14-day period has expired, the party shall immediately notify the attorney general.” Mass. R. App. P. 10(a)(4).


VIII. Withdrawal

**A. Deadline 1: Prior to docketing appeal: Any withdrawing counsel files motion to withdraw in trial court.**

**Pre-docketing.** “[A]ny counsel who does not intend to continue representing a client on appeal, for any reason, should file a motion to withdraw his or her appearance in the lower court as soon as is practicable.” Mass. R. App. P. 10(d).

**B. Deadline 2: After docketing appeal: Any withdrawing counsel files motion to withdraw in appellate court.**

**Post-docketing.** “After an appeal has been docketed in an appellate court, any motion to withdraw appearance of counsel shall be filed with the appellate court.” Mass. R. App. P. 10(d).





TAKE  
CONTROL  
OF YOUR  
WELL-BEING

STRESS | BURNOUT  
DEPRESSION | ANXIETY  
ADHD | GRIEF | RECOVERY  
RELATIONSHIPS | RESILIENCE

LAW PRACTICE STARTUP  
MARKETING | BUSINESS DEV  
TECHNOLOGY | PRODUCTIVITY  
CLIENT RELATIONS | BILLING

Free & Confidential Services  
for Lawyers, Law Students, and Judges  
in Massachusetts



LCLMA.ORG | (617) 482 9600

TMG



The Mediation Group

Resolving legal, family and organizational disputes since 1985.

PRINCIPALS:

Brad Honoroff • Jane Honoroff • David Matz • Amy Gordon

FEATURING:

Robert Bordone, Isaac Borenstein, Elizabeth Butler, Robert Deetz,  
Loraine Della Porta, Talia Engelhart, Anthony Feeherry, Charles Ferrara,  
Jeffrey Fraser, Amy Gay, Janet Grogan, David Hoffman, George Jacobs,  
Rudolph Kass, Kenneth Laurence, Audrey Lee, Esther Lin, James McHugh,  
Noemi Razso, Joel Reck, Jeffrey Stern, Michael Stone,  
Madison Thompson, Nicola Truppin, Mary Jeanne Tufano

235 Cypress Street, Suite 300 | Brookline, MA 02445  
Tel: (617) 277-9232 | Fax: (617) 277-1699 | [www.TheMediationGroup.org](http://www.TheMediationGroup.org)

MEDIATION • ARBITRATION • ORGANIZATIONAL PRACTICE • TRAINING