MASSACHUSETTS ACADEMY OF TRIAL ATTORNEYS

# Journal

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## President's Message

# Combatting delay in disclosure of experts

**By Lee Dawn Daniel**

A bane of any litigator is the late disclosure of an expert witness by opposing counsel. The scheduling of many a trial date has been frustrated or delayed by "eleventh hour" disclosure of an expert or multiple experts, revealed for the very first time on the eve of the Pretrial Conference. The requirement of M.R.C.P. Rule 26(e) to "seasonably" disclose experts applies to all litigants. Yet, if you have ever had the experience of receiving within the week or days prior to the Pretrial Conference, voluminous submissions to the Joint Pretrial Memorandum from the defense that suggest experts were retained and opinions were developed many, many months (or even a year or more) ago, you understand the frustration of having your belief that your case was ready for trial turned on its head. Particularly upsetting is receiving with the submissions of opposing counsel an expert report that actually bears a remote date, sometimes a date even prior to the filing date of the Complaint, where there is no good faith reason why disclosure of the expert and report to you has been delayed. In the same vein, on more than one occasion, I have been in the position of not opposing a request by defense counsel to continue the Pretrial Conference for a month or two due to scheduling issues, only to receive on the eve of the rescheduled Pretrial Conference date an expert report from the defense bearing a date *after* the original Pretrial

Conference date; this caused the light bulb to go off that the request for the delay was perhaps not a "scheduling" issue but an "expert disclosure" issue. In one of those cases, the expert report I received from the defense was 48 pages long! While there are indeed cases where late disclosure by a plaintiff (done at tremendous risk and peril by the plaintiff, and never recommended by this writer!) excuses late disclosure by the defense, there has been a noticeable trend by some in the defense bar over the last decade (or longer in medical negligence cases) towards first disclosure of experts on the eve of the Pretrial Conference, regardless of how early the plaintiff has produced either an expert's report or served answers to

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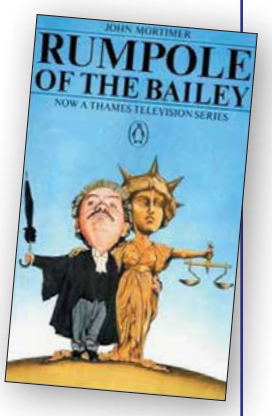
## EDITOR'S NOTE

# With a trial approaching, it's Rumpole to the rescue

**By Jonathan A. Karon**

With an imminent trial approaching, I turned, as I always do, to my favorite source of wisdom and comfort, British barrister Horace Rumpole. Rumpole is the fictional creation of John Mortimer, who was himself a barrister before becoming a playwright. Mortimer once bragged that he was the only man to both defend a murder and have one of his plays produced in London's West End. Rumpole is in his late 60s, overweight, with a fondness for small cigars (whose ashes are constantly falling on his waistcoat), mediocre claret, quoting Shakespeare and Wordsworth, and defending murder cases. He lives in a "mansion flat" in London with his wife Hilda whom he refers to (but not to her face) as "She Who Must Be Obeyed." He is featured in 14 books of short stories, two novels, and a delightful series of television episodes on the BBC, which are available on

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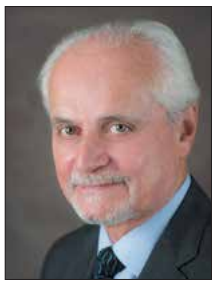
# 'Listen to her, she's trying to tell you something'

**By Kenneth I. Kolpan**



Many years ago, I had a chance meeting with mediator Chris Kauders during my commuter ride to Boston. I was ruminating on a failed mediation due, in my mind, to the adjuster making insulting low-ball offers that I took personally. Chris heard my frustration, nodding as if to agree with my assessment. When I finished, Chris simply said, "Listen to her [the adjuster], she is trying to tell you something." Chris' advice was not only prophetic about that case, but it also caused me to wonder whether I was truly listening in my practice. While my law school and practice had honed my verbal and analytical abilities, I needed to improve my listening skills.

I now think of Chris' advice when taking depositions, not that my preparation has changed:

**ALL STAR TIPS**

I still maintain an extensive memorandum of questions and topics to cover, but the memorandum is no longer a script to be followed but a reminder, should I forget an issue or question to cover. I keep the reminder memorandum face down on the table, while I engage the witness in a back and forth, watching their eyes to see if they are making eye contact with me or not, observing their facial expressions looking for emotional cues, listening to the witness' silence of what is not said, all to determine if they are trying to tell me something.

During a deposition, the witness' facial expression changed as the day wore on. He looked upset and I asked about what I observed. "You look angry. Are you?" After answering he was, he told me he had recently quit his profession because of what occurred in this case. Questions and answers that followed revealed his former employer's culture and response to being named as a defendant. I would have missed what his facial expressions were telling me if I was head down focused on my script rather than listening with my eyes.

Listen for silences for they may be a window into what a witness is not telling you. A defendant doctor answered my questions about his role in a surgical catastrophe when he claimed the plaintiff was not a patient of his because he was briefly in the OR as a consultant only. He was silent about what he did

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# ‘All means all’ in ‘Shaw’s v. Melendez’ case

**By Kevin J. Powers**

*Shaw’s Supermarkets, Inc. v. Melendez*, 488 Mass. 338 (2021), marks another Supreme Judicial Court victory for your Amicus Committee.

In *Melendez*, the SJC held that its COVID-19 orders, which tolled “[a]ll civil statutes of limitations ... from March 17, 2020, through June 30, 2020,” included “each and every civil statute of limitations, not just those where the statutory period of limitation expired between March 17, 2020, and June 30, 2020.” The SJC held that, “[i]n light of ongoing State and local restrictions imposed to combat the spread of COVID-19, and the effect of such restrictions on the ability of attorneys and litigants to prepare civil claims,” it would not, as Shaw’s suggested, narrow its order to only cases in which the limitation period ran between March and June. In a direct rebuke to Shaw’s, and consistent with our amicus argument that the plain language of the orders was unambiguous, Justice Gaziano wrote that “‘[a]ll’ means all.” Plaintiffs filing actions in tort, contract, G.L.c. 93A, and other matters will benefit from the extra 100 or so days for years to come — and quite a few years at that, given the six-year contract statute of limitations under G.L.c. 260, §2 and the 20-year contract under seal statute of limitations under G.L.c. 260, §1.

*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.*


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The Court also directly tracked an argument in our amicus brief in noting that, “elsewhere in our COVID-19 orders, where this court sought exclusively to extend legal terms or deadlines that expired within a specific period, we did so explicitly.” The SJC recognized that “approximately twice as many other [jurisdictions] apply [their COVID-19 tolling policies], as here, more broadly.”

> The decision demonstrates the great extent to which the Massachusetts bench has a long and clear memory for, and a keen appreciation of, the daily work undertaken by diligent members of the Massachusetts bar.

To the extent that any limited confusion arose from the orders, that confusion might have been due to the order providing a hypothetical example of a statute of limitations that was to expire between March 17, 2020, and June 30, 2020. The SJC clarified in no uncertain terms that this example “is just that, an example, and does not limit the plain and ordinary language of the extent of the order.”

In footnote 3, the SJC recognized that the burden of case preparation prior to filing suit is considerable, “specifically in tort claims,” and includes such tasks as “conduct[ing] an in-depth client interview, gather[ing] all medical records, collect[ing] narrative reports from key physicians and health care providers, identify[ing] and interview[ing] witnesses, inspect[ing] the incident site and involved instrumentalities, and photograph[ing] the incident site, instrumentalities, and the plaintiff’s injuries.” In so doing, the Court fused analysis of the plain language of its orders with a practical understanding of the burdens facing litigators on the ground. The decision thus demonstrates the great extent to which the Massachusetts bench has a long and clear memory for, and a keen appreciation of, the daily work undertaken by diligent members of the Massachusetts bar.

The SJC recognized that the issue is one of first impression nationwide, because “all of these orders are relatively new, and we are aware of no court in another jurisdiction that has been presented with the issue now before us.” That said, the extent to which *Melendez* guides other jurisdictions in construing their own COVID-19 orders will depend heavily upon the specific language in those other orders, “whether the result of executive decision-making, legislative action, or judicial order.” As the SJC noted, some orders of other jurisdictions expressly limited their tolling periods to statutes of limitations due to expire within the dates of the orders, while other jurisdictions expressly excluded the tolled period from any subsequent calculations of time.

The vast majority of interlocutory petitions from civil actions in the District Courts to the SJC Single Justice, which arise under the SJC’s broad powers of “superintendence of inferior courts” under G.L.c. 211, §3, die a swift death shortly after filing. *Melendez*, however, demonstrates that this route of interlocutory review — the route chosen by Shaw’s for its interlocutory appeal in this case — very occasionally will yield review by the full SJC. Here, the Single Justice — Justice Kafker — recognized that the issue was “novel, recurring, important, and very timely.” Nonetheless, review does not necessarily result in relief, and the journey of Shaw’s from Dudley District Court to the John Adams Courthouse ultimately proved unavailing. The long odds remain a worthwhile consideration for those contemplating an interlocutory petition out of the District Court.

Congratulations to victorious Attorney Mike Caplette of Sturbridge, who represented Mrs. Melendez. Undersigned counsel drafted MATA’s amicus brief, with invaluable editorial insight from former MATA Amicus Committee Chair Mike Conley and current MATA Amicus Committee Chair Tom Murphy. A good day for Massachusetts plaintiffs and their attorneys.

# ‘Listen to her, she’s trying to tell you something’

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during his “brief” OR stint. I asked about each consulting task. He proudly expounded on what he had done, albeit briefly. I carefully listened as he described pulling back the patient’s abdominal walls in order to determine the cause of the plaintiff’s bleeding. I asked him, “Did you think while you had your hands in his abdomen, he was your patient?” His facial expression changed, he took a silent deep breath and, with resignation, answered “Yes.” His silence was deafening.

Listening to people, whether in deposition, trial or during an examination, requires all of your senses. Dr. William Singer, a nationally renowned pediatric neurologist expert told me there are many ways to listen. At trial he told the jury that during his pretrial examination of the non-verbal minor plaintiff who had suffered an anoxic brain injury, he placed his hand on her quad to listen. Dr. Singer asked her to squeeze it tight. Though devoid of words, she gave a revealing non-verbal response when she made her quad muscle taut and firm. The 9-year-old was telling us she was aware, capable of learning, and would benefit from a life time of medical care and education.

When my dad wanted my attention when I was a kid, he did not call me by my given name, Kenny. He simply called me by a new name, “Hey, Listen.” I guess he was trying to tell me something.

*Kenneth Kolpan is a plaintiffs’ personal injury lawyer who has, for the last 40 years, devoted his practice to representing persons with traumatic brain injuries. For more than three decades, he has been Co-Chairman of the North American Brain Injury Society’s Legal Conference on brain injury. Mr. Kolpan served on the Board of Editors of the Journal of Head Trauma Rehabilitation, and the Neurolaw Letter; he has written several chapters in books on traumatic brain injury and was formerly an Assistant Professor of Community Medicine and Rehabilitation Medicine at the Tufts University School of Medicine, as well as Counsel to the McLean Hospital Institute of Law and Psychiatry. He served as President of the Brain Injury Association of Massachusetts and is currently a member of its Executive Board. He is a graduate of the University of Rochester and Boston College Law School.*