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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

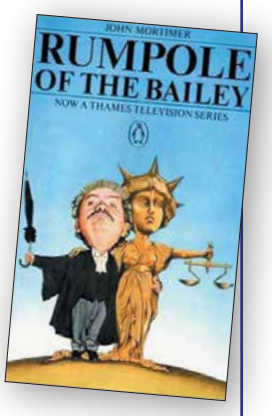
Continued on page 10

EDITOR'S NOTE

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

By Jonathan A. Karon

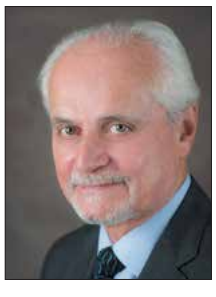
With an imminent trial approaching, I turned, as I always do, to my favorite source of wisdom and comfort, British barrister Horace Rumpole. Rumpole is the fictional creation of John Mortimer, who was himself a barrister before becoming a playwright. Mortimer once bragged that he was the only man to 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



Continued on page 11

'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

Continued on page 4

An appellate roadmap, Part 5

Prior parts of this series appeared in previous MATA Journal issues, beginning in June 2020.

By Kevin J. Powers and Thomas R. Murphy

POWERS

MURPHY

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This article addresses an occasional detour on the appellate journey, in which a clerk's office, a single justice, or an appellate court resolves motions.

XI. MOTION PRACTICE IN THE APPELLATE COURTS GENERALLY

This discussion will encompass motion practice generally, but will not encompass: motions for a stay or injunction pending appeal under Mass. R. App. P. 6; motions for reconsideration or modification under Mass. R. App. P. 27; or motions for new trial in a "capital case" under G.L. c. 278, § 33E, Mass. R. Crim. P. 30, and Mass. R. App. P. 15(d).

Many of the procedures in this discussion are seldom used, and with good reason: the oppositions to procedural motions and challenges to the motion decisions of a clerk or of a single justice often — though not always — signal a downward spiral of incivility between counsel. Cordiality, collegiality, and agreeability are usually the best tools for resolving appellate motions. Ideally, counsel will leave the procedural brass knuckles involved in this discussion to gather dust.

Power of single justice. Generally, "a single justice may entertain and may grant or deny any request for relief which under [the Massachusetts Rules of Appellate Procedure] may properly by sought by motion." Mass. R. App. P. 15(c). Massachusetts Supreme Judicial Court Rules 2:01-2:23 govern practice before the SJC single justice. Massachusetts Appeals Court Rule 15.0 governs motion practice before the Appeals Court single justice. See Mass. App. Ct. R. 15.0(a) (power of single justice).

But no dismissal by single justice. "[A] single justice may not dismiss or otherwise determine an appeal or other proceeding." Mass. R. App. P. 15(c).

Power of Appeals Court Clerk's Office. In the Appeals Court, in addition to a single justice, "the Clerk of the Appeals Court, including the court's assistant clerks and deputy clerks ('clerk'), has authority to act on behalf of the Appeals Court to enter actions and orders on procedural motions and matters." Mass. App. Ct. R. 15.0(a).

Procedural motions move fast. "[M]otions for procedural orders, including any motion under [Mass. R. App. P. 14(b)], may be acted upon at any time, without awaiting a response thereto." Mass. R. App. P. 15(b). "Any party adversely affected by such action may request reconsideration, vacation, or modification of such action." Mass. R. App. P. 15(b). This rule is consistent with the collegiality expected of appellate litigants; bickering over enlargements of time and other procedural matters is poor form and is unlikely to impress anyone in the appellate courts. Ideally, the title of any procedural motion in an appeal will include the words "assented-to" or the word "joint."

Form of motions. "The motion shall comply with [Mass. R. App. P. 20(b)(2)]." Mass. R. App. P. 15(a). A motion "shall contain a caption" that "shall appear on the first page." Mass. R. App. P. 20(b)(2)(A). "[T]ext shall be double-spaced and shall be in 12 point or larger font, with side and top margins no less than 1 inch." Mass. R. App. P. 20(b)(2)(A). This font size requirement, which does not distinguish between monospaced fonts and proportionally spaced fonts, stands in marked contrast to the now-standard 14 point or larger font for proportionally spaced fonts in briefs, direct appellate review (DAR) pleadings, and further appellate review (FAR) pleadings. Compare Mass. R. App. P. 20(a)(4)(B) (typeface for briefs, DAR pleadings, and FAR pleadings) with Mass. R. App. P. 20(b)(2)(A) (typeface for motions). In addition to the customary contents of any other signature block, an appellate motion must also contain the "electronic addresses, and telephone number(s)" of the filer. Mass. R. App. P. 20(b)(2)(B)(i). Signatories must date their signatures. Mass. R. App. P. 20(b)(2)(B)(ii).

Length of motions. Motions "shall be no longer than reasonably necessary." Mass. R. App. P. 20(b)(2)(A). "There is no page limit for motions, but motions 'shall be no longer than reasonably necessary.'" Reporter's Notes to Mass. R. App. P. 20(b)(2) (2019). "In some circumstances, the appellate courts have specified page limits of a motion." Reporter's Notes to Mass. R. App. P. 20(b)(2) (2019). See, e.g., Mass. App. Ct. R. 6.0(a) (five-page monospaced font limit or 1,000-word proportional font limit for motions to stay execution of judgment or sentence pursuant to Mass. R. App. P. 6). In general, counsel would do well to remember that less is often more, and that increasing the page count or word count of a motion does not necessarily increase the persuasiveness of that motion.

Content of motions. Motions shall contain: (i) grounds; (ii) the order or relief sought; (iii) whether the motion is assented to, or that no other party is in opposition, or if any party intends to file an opposition or other response; and, served with the motion, (iv) "briefs, affidavits, or other documents" supporting the motion. Mass. R. App. P. 15(a). The third requirement "express[es] the appellate courts' preference for knowing, at the time a motion is filed, whether the motion is assented to or if it is known that any party opposes the motion, and, if so, whether the party intends to file an opposition or other response." Reporter's Notes to Mass. R. App. P. 15(b) (2019). The requirement "is intended to encourage the parties to communicate about whether a response will be filed prior to the filing of a motion to avoid the unnecessary consumption of time, effort, and expense to both the parties and the appellate court." Reporter's Notes to Mass. R. App. P. 15(b) (2019).

Deadline 1: Within 7 days after service of motion: Any other party may file response.

"Any party may file a response to a motion other than for a procedural order (for which see [Mass. R. App. P. 15(b)]) within 7 days after service of the motion, but motions authorized by [Mass. R. App. P. 6] may be acted upon after reasonable notice, and the appellate court or a single justice may shorten or extend the time for responding to any motion." Mass. R. App. P. 15(a).

Deadline 2: 14 Days after Appeals Court Clerk's Office motion action or order: Party may file motion for reconsideration by Appeals Court single justice.

Further motion review from Appeals Court Clerk's Office to single justice. "An action or order of a clerk is subject to review by a single justice if a motion for reconsideration . . . is filed within 14 days of the action or the order." Mass. App. Ct. R. 15.0(a).

Deadline 3: 30 Days from date of entry of motion action (or 60 days if Commonwealth is party) before Appeals Court: Motion appellant files notice of appeal.

Further motion review to appellate court. "The action of a single justice may be reviewed by the appellate court." Mass. R. App. P. 15(c).

Further motion review in Appeals Court. In the Appeals Court, further review of a single justice motion action "shall be by a panel of the Appeals Court, shall be claimed by an appeal to such a panel pursuant to [Mass. R. App. P.] 3(a) and 4, and shall be prosecuted in the same manner as if the single justice were the 'lower court' within the meaning of [Mass. R. App. P.] 1(c)." Mass. App. Ct. R. 15.0(b)(1). See Mass. R. App. P. 4(a)(1) (30 days for civil cases where Commonwealth is not party; 30 days for child welfare cases; 60 days for non-child welfare civil cases where Commonwealth is party); Mass. R. App. P. 4(b)(1) (30 days).

Deadline 4: 14 Days after docketing new motion appeal or 14 days after entry of motion appeal consolidation order where underlying brief already filed: Motion appellant files and serves memorandum of law and record appendix.

Motion appeal may be new appeal or consolidated with pending appeal, but new motion appeal does not stay underlying appeal. "The appeal may be docketed as a new appeal or consolidated with any pending appeal." Mass. App. Ct. R. 15.0(b)(2). Massachusetts Appeals Court Rule 15.0(b)(2) contains mechanisms for avoiding superfluous briefing between parties already occupied with briefing the underlying appeal. Where possible, Mass. App. Ct. R. 15.0(b)(2) enables the Appeals

Kevin J. Powers is 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.

Thomas R. Murphy, a sole practitioner in Salem, is MATA's immediate past president and chair of our 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.

Court to consolidate briefing on the underlying appellate issues with briefing on the motion appeal issues; such consolidation may both spare the court additional filings and force parties to choose whether to spend precious page count or word count in a consolidated brief on underlying appellate issues or on continuing a motion skirmish. If the appeal is docketed as a new appeal, "[p]roceedings in the underlying appeal shall not be stayed unless by order of the court or a single justice." Mass. App. Ct. R. 15.0(b)(2)(A).

New appeal or consolidated motion appellant has already filed underlying brief? Motion appellant files short memorandum of law and record appendix. "If the appeal is docketed as a new appeal, ... the appellant shall file and serve within 14 days of the docketing of the new appeal, a memorandum of law, with citations to pertinent legal authorities, not to exceed 10 pages in monospaced font or 2,000 words in proportionally spaced font, identifying the claimed abuse of discretion or error of law committed by the single justice." Mass. App. Ct. R. 15.0(b)(2)(A). "The memorandum of law shall be accompanied by a record appendix that includes the papers filed to the single justice, including any memorandum of decision from the single justice." Mass. App. Ct. R. 15.0(b)(2)(A). The motion appellant also follows this procedure if the motion appeal is consolidated with the underlying appeal and the motion appellant has already filed a brief in the underlying appeal. Mass. App. Ct. R. 15.0(b)(2)(B).

Consolidated appeals and motion appellant has not yet filed underlying brief? Motion appellant consolidates motion appeal arguments in underlying brief. "If the party claiming the appeal from the action of the single justice has not filed a brief in the underlying appeal prior to entry of the consolidation order, the party's brief shall include all of the party's arguments in the consolidated appeal." Mass. App. Ct. R. 15.0(b)(2)(B).

Deadline 5: 14 Days after service of motion appellant's memorandum of law in new motion appeal or in consolidated appeals where motion appellee's underlying brief already filed: Motion appellee files and serves responsive memorandum of law.

New appeal or consolidated motion appellee has already filed underlying brief? Motion appellee files short memorandum of law. If the appeal is docketed as a new appeal, "[t]he appellee shall file and serve a responsive memorandum of law not to exceed 10 pages in monospaced font or 2,000 words in proportionally spaced font, within 14 days after service of the appellant's memorandum of law." Mass. App. Ct. R. 15.0(b)(2)(A). The motion appellee also follows this procedure if the motion appeal is consolidated with the underlying appeal and the motion appellee has already filed a brief in the underlying appeal. Mass. App. Ct. R. 15.0(b)(2)(B).

Consolidated appeals and motion appellee has not yet filed underlying brief? Motion appellee consolidates motion appeal arguments in underlying brief. "If the responding party has not yet filed a brief in the underlying appeal prior to entry of the consolidation order, the responding party's brief shall include all of the party's arguments in the consolidated appeal." Mass. App. Ct. R. 15.0(b)(2)(B).

Steps for the Chapter 93A/176D claim

By Hans Hailey

The procedural predicate for a 93A/176D claim, as everyone knows, is the demand letter. If the insurer fails to see the light, suit is filed and discovery follows. With the completion of discovery, a motion for summary judgment is almost always appropriate and resolves the case probably 90 percent of the time. This article takes a look at these familiar steps.

The Demand Letter. When writing a 93A demand, keep in mind that the demand has five requirements.

Hans Hailey has a long history of involvement with insurance bad faith litigation. He authored Chapter 580 of the Acts of 1989 (clarifying that actual damages are the amount of the judgment, not just the loss of interest) and ushered it into becoming law. He handled the first case decided under that new law and several appellate cases thereafter. He frequently speaks and writes on the subject.

The demand must identify the claimant and notify the recipient that it is a demand under Chapter 93A, §9. It must describe the client's injuries and explain the unfair or deceptive act or practice for which the respondent is responsible. And it must be mailed to (or otherwise served on) the respondent.

Must the letter contain a dollar figure demand? No, but it's certainly better practice. Must the letter be mailed by certified mail? No, but it certainly makes proving that it was sent to and received by the respondent much easier. *Leck v. Pope's Landing Marine, Inc.*, 2014 Mass. App. Div. 210 (2014). May the demand be sent to a respondent's attorney instead of directly to the respondent? Yes. *Whelihan v. Markowski*, 37 Mass. App. Ct. 209 (1994).

The demand letter is required for §9 claims, but not for §11 claims.[1] It is a jurisdictional requirement. *Entrialgo v. Twin City Dodge, Inc.*, 368 Mass. 812, 813 (1975). Even though jurisdictional, it can be waived if not raised as a defense. Moreover, the judge ought not raise it on his own. *Fredericks v. Rosenblatt*, 40 Mass. App. Ct. 713, 717 (1996). In a somewhat contradictory holding, the Supreme Judicial Court ruled that violations not set out in the demand letter are precluded, although a judge may nevertheless consider them. *Clegg v. Butler*, 424 Mass. 413, 423 (1997). See also *Bressel v. Jolicoeur*, 34 Mass. App. Ct. 205, 211 (1993) (not a 176D case, but it illustrates the point). The lesson from *Clegg* is that multiple demands might be in order if additional violations are committed or discovered after the initial demand.

The Unfair Claims Settlement Practices Act, G.L.c. 176D, §3(9), identifies several acts or practices that are unfair or deceptive.[2] The all-important subsection is (f), declaring unlawful the "[f]ailing to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear."

A fair and reasonable settlement is the goal of every personal injury attorney in every case. Does anyone really think that the attorney who handled *Cohen v. Liberty Mutual*, 41 Mass. App. Ct. 748 (1996) (and who is now the president of the MBA) cared whether he also had a claim against Liberty Mutual for "misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue," or several other subsections of §3(9)?

A final note on demand letters. Damages under 93A are not limited to economic damages; noneconomic damages caused by the Chapter 176D violation(s) are also available. All available damages should be included in the demand letter in detail.

Discovery. As is true of most civil actions, discovery starts with interrogatories and requests for production of documents. Here are samples of each:

PLAINTIFF'S INTERROGATORIES TO INS. CO.

Pursuant to Rule 33 of the Massachusetts Rules of Civil Procedure, the Plaintiff in the above matter hereby requires that the Defendant, United States Fidelity and Guaranty Ins. Co. answer the following written interrogatories.

Rule 33 requires that each interrogatory must be answered separately and fully in writing under

Continued on page 6