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President's Message

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Protecting your client's rights during COVID

By Lee Dawn Daniel

"Fear: the best way out is through."
— Helen Keller

Each generation has had challenging times, and for some, many crises. Those in the profession of law, whether members of the judiciary, persons in judicial administration, attorneys, or support personnel, are fortunate to have the tremendous gift of intellect to think our way through obstacles. The challenges that our profession are facing in working through a pandemic will ultimately improve the technical aspects of practicing law — but it is most important that we preserve the rights of our clients while we are navigating our way through. This article will address the protection and preservation of important rights of your civil clients which are being placed at risk during COVID, and how to prevent their erosion.

Panel voir dire in danger

Attorney conducted voir dire is now required in the Superior Court under Massachusetts General Laws Chapter 234A § 67D and Superior Court Rule 6, as well as in District Court pursuant to D. Ct. Standing Order 1:18. The typical time limitation imposed upon attorney conducted panel voir dire is 20 minutes per party. Despite the fact that jurors are spending multiple days or weeks together in the courtroom during the presentation of evidence, and/or in a jury room during breaks and deliberation, the 40-60 minutes of time during which prospective jurors sit together in the box for panel voir dire is often being sacrificed to individual (and physically close) questioning at side bar. Is it possible to scientifically support the proposition that it is this particular hour or less of assemblage during panel voir dire which places the venire at greater risk for COVID, so that panel voir dire should be eliminated during the pandemic? If efficiency is the goal at trial, how can the extra hours necessary to conduct individual voir dire be justified?

We are to be mindful that Addendum A to Superior Court Rule 6, entitled "Sample Panel Voir Dire Protocol," demonstrates that attorney conducted panel voir dire, as opposed to individual

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EDITOR'S NOTE

Why do judges think we have mind control powers?

By Jonathan A. Karon

Why do perfectly reasonable judges think we have the power to hypnotize jurors? In the 1930's radio listeners thrilled to the adventures of "The Shadow" a superhero with "the power to cloud men's minds."[1] These days we routinely get bombarded with motions in limine seeking to restrict in advance what we can argue and how we can argue it. Some of these are styled as motions to prevent us from using "the Reptile Theory" (usually in terms that make it clear the author has no idea what the Reptile Theory actually is) and some are phrased so broadly that it seems like the Court is being asked to prevent us from making any closing argument at all.[2] These motions usually cite *Fitzpatrick v. Wendys Old Fashioned Hamburgers of New York, Inc.*, 487 Mass. 507 (2021) and *Fyffe v. Massachusetts Bay Transportation Authority*, 86 Mass. App. Ct. 457 (2014) two cases in which substantial plaintiff's verdicts were taken away based on "improper arguments" by plaintiff's counsel. In both cases liability was fairly clear cut (in *Fyffe* it was stipulated) and the Courts' concern was that plaintiff's counsel had somehow inflamed the jury into awarding excessive damages.

What is going on here? Was there a MATA seminar I missed on mind control? Do judges really think it's that easy for us to mesmerize jurors? I have a theory. I think judges are instinctively responding to plaintiff's attorneys as though we were prosecutors. I don't think they're doing this consciously. Rather, I think that when judges hear arguments that would be grossly improper in a criminal trial, their judicial

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Inherent diminished value: 'McGilloway v. Safety Ins. Co.'

By Kevin J. Powers

McGilloway v. Safety Ins. Co., 488 Mass. 610 (2021), marks another Supreme Judicial Court victory for your Amicus Committee.

In *McGilloway*, the SJC held that third-party claimants may recover inherent diminished value (IDV) damages under part 4 of the 2008 edition of the Massachusetts standard automobile policy. IDV is "the concept that a vehicle's fair market value may be less following a collision and repairs, and that it equals the difference between the resale market value of a motor vehicle immediately before a collision and the vehicle's market value after a collision and subsequent repairs."

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Part 4 of the standard policy allows recovery for "the amounts that [a claimant] is legally entitled to collect for property damage through a court judgment or settlement." Justice Georges wrote that "[b]ecause the plain language of part 4 of the standard policy does not limit recovery to merely repair or replacement costs, such recovery must compensate a claimant for any loss of value the claimant incurred as a result of a collision, offset by the increase in value that may occur from

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Is there legislative fix for medical records nightmare?

By Kevin J. Powers

The legislative process is a long and winding road, with no shortage of hazards and hairpin turns; for that reason, this article can only herald a long shot or a Hail Mary in the fight against unscrupulous medical records billing practices. Nonetheless, significant victories occasionally begin as long shots, and it is with that faint hope in mind that we follow the progress of Senate Bill No. 2600. The bill, presented by Senator Minority Leader Bruce E. Tarr (R-First Essex and Middlesex), is "An Act relative to personal health information portability and accessibility."

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Requests from attorneys treated as requests from patients. Section 1 of the bill would amend G.L. c. 211, § 1 to include in the definition of "[p]atient" various representatives of the individual patient, such as "any legal guardian, legal representative, administrator/executor of the patient's estate, attorney, power of attorney, health care proxy, guardian ad litem, conservator, medical advocate, or other court appointed representative." The definition of "[a]uthorized [t]hird [p]arty" would include "any individual, organization and/or other legal entity who [is] not the patient as defined above"; thus, as attorneys would be "the patient as defined above," attorneys would not be "authorized third parties." Ideally, this amendment would end the practice of medical records contractors treating records requests from attorneys as third-party records requests rather than patient records requests. At present, many medical records contractors assert this distinction in order to justify charging an exorbitant non-patient, non-HITECH Act rate for medical records, even when the request is printed on the patient's own letterhead and even when the patient personally signs the request.

Electronic records storage requirement. Section 2 of the bill would amend G.L. c. 111, § 70 to eliminate the present option for providers to maintain medical records in paper format if the records were originally created in paper format. Instead, the amended language would require that "records must be kept by secure, electronic digital media or converted to electronic digital media ... ." Ideally, this amendment would end the practice of medical records contractors refusing to provide electronic medical records to requestors. At present, many medical records contractors assert that responsive records exist only in paper format in order to justify charging an exorbitant non-electronic, non-HITECH Act rate for medical records, even when the request specifically calls for electronic records in an electronic format.

Record production fee limitation. Section 3 of the bill would further amend G.L. c. 111, § 70 to eliminate the present fee structure based upon per-page charges. Instead, the bill, in light of the requirement that providers keep all records electronically, would require that "the hospital or clinic is not permitted to charge the patient as defined in section 1 of this chapter by the page for the production of these records. Rather, a 'reasonable fee' shall mean a base administrative fee of not more than $15 for each request for a hospital or clinic medical records, plus the reasonable cost of the Electronic Digital Media Storage Device used to save the records and provide same to the patient, not to exceed $10 per device." For "an authorized third party" — a category which, per section 1 of the bill, would no longer include an attorney — the "base administrative fee" increases to $50. Ideally, this amendment would end the practice of medical records contractors charging a per-page fee. At present, many medical records contractors ignore explicit HITECH Act request language specifying electronic records and instead ship voluminous paper records to requestors, accompanied by invoices charging per-page fees.

One attorney's testimony. On January 27, 2022, the Joint Committee on Public Health received written testimony, including a statement from plaintiff tort Attorney Joseph M. Orlando, Jr. of Gloucester, who brought the issue to the attention of Senator Tarr and worked on the text of the bill with members of the Senator's office. In his statement, Orlando explains that the plaintiff's medical records and medical bills "are the primary evidence" in any personal injury case; "[i]t is nearly impossible to proceed without those records." He explains that the common practice among medical records contractors of producing paper records and charging by the page results in invoices in the hundreds or thousands of dollars. Although many attorneys pay these invoices, the client must ultimately reimburse the attorney through funds received via judgment or settlement. Thus, medical records contractors presently charge patients hundreds or thousands of dollars for copies of their own medical records.

> Significant victories occasionally begin as long shots, and it is with that faint hope in mind that we follow the progress of Senate Bill No. 2600.

Orlando calls foul on the notion that attorneys representing patients are "third parties." He recounts a death case in which a provider maintained records electronically but refused to produce the records electronically and charged the decedent's survivor over $1,100 for paper medical records; the funds used to pay the medical records invoice will never reach the minor children of the decedent.

As Orlando notes, high fees for medical records — and the knowledge that the client must pay those fees out of any settlement — impair settlements in smaller automobile accident cases. When efforts at settlement fail, plaintiffs file suit, and the civil docket grows. Poor and working-class plaintiffs suffer most, because they are the least able to bear hundreds or thousands of dollars in additional expenses. Senate Bill No. 2600 would help to expedite settlements, ease the burden on courts, ease the burden of health insurance carriers maintaining third-party liens, and ease the burden on the environment by discouraging providers from maintaining paper records.

Current status. The bill is currently pending before the Joint Committee on Public Health.

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.

The views expressed above represent the views of the author, not necessarily the official position of the Massachusetts Academy of Trial Attorneys.