

President's Message

What is your legacy?

By Lee Dawn Daniel

"Legacy noun ... 2: something transmitted by or received from an ancestor or predecessor or from the past"

— Mirriam-Webster Dictionary

"A teacher affects eternity: he can never tell where his influence stops."

— Henry Adams



It is not an original observation that our own "Lawyer Wellness" impacts all around us. It impacts our colleagues, our employees or staff, our family, our friends, our clients, the community which forms an impression of our profession, and the casual contact we have with the person who hands us our lunch, rings up our purchase, or delivers our mail. Are we merely judged by the more visible means of "success," by the things we produce, whether a compelling Summary Judgment opposition, a favorable verdict, a client landed, or our Adjusted Gross Income found on Line 11, Form 1040? Do we dare ask: "Is there something more? Is not the visceral more important?" Most of what we do and say in life is not truly lasting; is not our personal legacy the only thing which is "permanent," until that too is lost to the ages?

My first trial in about 1986 had a profound impact upon teaching a 20-something about personal legacy. I was assigned the task of preparing and presenting the testimony of the economist and damages witnesses for a medical negligence trial in New York of a woman in her late 50s/early 60s who had died as a result of a bowel perforation during the course of a barium enema. At that time, it was still relatively novel to present testimony by an economist as to the dollar value of the specific services performed by a "housewife" for her family, and doing so required me to interview many family members and friends of the deceased to determine the daily and weekly tasks of her "doing" for her adult daughter and

husband. After interviewing three of them, what became redundant were the details of the wealth of things that she did for her family. What did not become redundant was the recognition by each of those interviewed about how she made them feel, both as a result of her devotion in "doing" for them, and in her caring. After interviewing about 8 or so family members, neighbors, or friends, I had a very difficult time deciding whose testimony of the group was more compelling. And this woman who I had never met, became indelibly embedded in my mind. What she had left her family and friends, in the end, was a priceless personal legacy. (Although a jury did value that particular element of the claim at \$277,000, which was a good recovery for same under existing NY law in 1986.) This woman also left me her personal legacy. As a parent and friend, this has been the legacy I want to leave as well.

Who in your personal life has left you such a legacy? In times when we are weary, depleted, frustrated or self-absorbed, can we sit quietly for a moment and recall those who have done a small act of service for us, or given us their caring and friendship, and changed our day for the better, even for a moment? What do we do in our personal lives to leave that sort of legacy behind us? Are we even concerned with doing so?

I also had the benefit of the legacy of great teachers. I will put aside the fact that the Henry Adams quote I referenced is frequently used to glorify teachers (I have two 20-somethings working in high schools so I am partial to teachers), although Adams was actually lamenting about his own ignorance, lack of knowledge concerning his subject matter, and lack of utility in his first years teaching at Harvard in the late 1800s. (Ironically, his quote appears in the book chapter of his autobiography, "The Education of Henry Adams," entitled "Failure.") Nonetheless, it is still an accurate observation. As a lawyer, employer and sometimes "teacher", I was given a six (6) year lesson about work legacy by the first attorney I

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EDITOR'S NOTE

Post-COVID practice: Are we there yet?

By Jonathan A. Karon



Random Thoughts While Wondering if Jeans are now "Business Casual" ...

Are we going back to in-person depositions or not? I am fully vaxxed and boosted. I ride the T. I eat indoors. I've been to the movies and flown on airplanes. I have a nice conference room. Yet I haven't done an in-person deposition since COVID. I'm not scared, but maybe lazy. The idea of having to pack a file, travel to someone's office, etc., just seems like such a hassle, compared to simply logging in. At some point is the culture going to shift and we're going to start doing these in person again? Or are we never going back? I think the next year will tell us.

Meanwhile, I've been advised by at least one Session Clerk to expect a lot more in-person court appearances. My gut tells me that's a good thing



although I hope that we continue to use Zoom for routine non-adversarial matters. Maybe I've been spoiled but does it really make sense to drive for an hour just to "get a date"? On the other hand, I think it's good when the lawyers actually have to see each other in person from time to time. More importantly, I think it's actually good to be in the same room with the Judge when something important is being decided. None of which will stop me from complaining when I have a long drive to court ahead of me.

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Three most important rules of trial practice

By Thomas R. Murphy



Others have written in these pages of the importance of being prepared for trial; no question about it: thorough preparation is

critical to success, or at least survival, in this line of work.

In fact, I would go so far as to say that the three most important rules of trial practice are these: 1) always, always, always be more prepared than the other side (more on that later); 2) never, ever, ever panic (because things go wrong all the time and you've got to have a plan B in your back pocket, at least for the big-ticket issues — or as someone told me early on, "there's the case you prepare and then there's the case you try," and as a corollary to that, "sometimes you try the case and sometimes you try the lawyer"); and finally 3) have fun! This is the



most enjoyable part of the practice and beats the heck out of answering interrogatories, reviewing documents, and dealing with brush fires — to say nothing of waiting for traffic lights and elevators and being put on hold.

ALL STAR TIPS

But preparation is much more than just reading (and re-reading) pre-trial discovery as the day for empanelment approaches; it's how you take that discovery. First off, remember what the late great Earl

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An appellate roadmap, Part 6

Prior parts of this series appeared in prior MATA Journal issues, beginning in June 2020. This article addresses general deadlines governing briefs and appendices and e-filing.

By Kevin J. Powers and Thomas R. Murphy



XII. BRIEFS AND APPENDICES: GENERAL DEADLINES

Exceptions to the general brief and appendix deadlines. This article will focus primarily on general brief and appendix deadlines applicable to direct appellate review, see Part 4, Section X of this series. See also Mass. R. App. P. 11(g)(4) (direct appellate review); Mass. R. App. P. 19(c) (first-degree murder appeals); Mass. R. App. P. 27.1(f) (further appellate review).

Deadline 1: Generally, within

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Mr. 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.

Mr. 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.

40 days after appeal docketed in appellate court: Appellant shall file and serve brief and appendix.

"The appellant shall serve and file a brief and appendix within 40 days after the date on which the appeal is docketed in the appellate court." Mass. R. App. P. 19(a)(1). See Mass. R. App. P. 19(b)(1) (same deadline for cross-appeals).

Counsel should agree as to contents of appendix. The best way to avoid the need for a supplemental appendix is for counsel to collegially collaborate in designating the contents of the appendix. Mass. R. App. P. 18(b)(1) ("parties are encouraged to agree as to the contents of the appendix"). Counsel can rely upon the Mass. R. App. P. 18(b)(1) procedure for designation of appendix contents "[i]n the absence of agreement," but it is a sorry state of affairs when counsel must resort to that mechanism rather than simply reaching agreement as to the contents of the appendix. Mass. R. App. P. 18(b)(1).

Deadline 2: Within 30 days after service of appellant brief: Appellee shall file and serve brief.

"The appellee shall serve and file a brief within 30 days after service of the brief of the appellant (or, in the case of multiple appellants, service of the last appellant brief)." Mass. R. App. P. 19(a)(2). See Mass. R. App. P. 19(b)(2) (same deadline for cross-appeals).

Supplemental appendix requires leave of court. "Except with leave of the appellate court or a single justice granted on motion, an appellee or cross-appellee in a civil case shall not file a supplemental appendix. Where such leave is granted, the appendix shall (A) be filed and served with the brief pursuant to Rule 18(f) and 19, unless otherwise ordered." Mass. R. App. P. 18(b)(5). See Mass. R. App. P. 18(f) ("Any appendix, including exhibits and transcripts or portions thereof in a civil case, shall be filed and served with the brief in accordance with Rule 19"). If a supplemental appendix is truly necessary, then the best practice is probably for counsel to move

pursuant to Mass. R. App. P. 18(b)(5) for leave to file a supplemental appendix prior to filing and serving that supplemental appendix. In the motion or associated affidavit, counsel should explain why a supplemental appendix is necessary.

The courts disfavor a supplemental appendix and favor collegiality. "[R]equiring leave of court in a civil matter encourages parties to abide by the provisions of Rule 18(b) regarding designation and agreement as to the contents of the record appendix at the outset of the case." Reporter's Notes to Mass. R. App. P. 18(b)(5) (2019).

Deadline 3: In cases not involving cross-appeals: By the earlier of 14 days after service of last appellee brief or 7 days before argument: Appellant may file and serve reply brief.

"Except by leave of court, any reply brief must be served and filed by the earlier of (A) 14 days after service of the brief of the appellee (or, in the case of multiple appellees, service of the last appellee brief), or (B) 7 days before argument." Mass. R. App. P. 19(a)(3).

Deadline 4: In cases involving cross-appeals: Within 30 days after service of brief of appellee / cross-appellant: Appellant / cross-appellee must file and serve reply brief.

"The appellant / cross-appellee reply brief must be served and filed within 30 days after service of the brief of the appellee / cross-appellant." Mass. R. App. P. 19(b)(3).

Deadline 5: In cases involving cross-appeals: By the earlier of 14 days after service of last appellant / cross-appellee brief or 7 days before argument: Appellee / cross-appellant may file and serve reply brief.

"Except by leave of court, any reply brief must be served and filed by the appellee / cross-appellant by the earlier of (A) 14 days after service of the brief of the appellant / cross-appellee (or, in the case of multiple appellant / cross-appellees, service of the last appellant / cross-appellee brief), or (B) 7 days before argument." Mass. R. App. P. 19(b)(4).

XIII. BRIEFS AND APPENDICES: E-FILING

E-filing in the Appeals Court. "All law firms and attorneys with cases pending in the Appeals Court shall register for electronic filing at eFileMA.com." Mass. App. Ct. R. 13.0(b). See generally Mass. S.J.C. R. 1:25 (Massachusetts Rules of Electronic Filing). "Attorney registrants are required to use their business email address on file with the Board of Bar Overseers and to maintain their name and business email address on the eFileMA.com 'Public List.'" Mass. App. Ct. R. 13.0(b).

Counsel must e-file nearly all public documents and partially impounded documents. Mass. App. Ct. R. 13.0(c) (listing documents subject to mandatory e-filing). "Impounded documents may be e-filed though eFileMA.com, but there is no requirement to e-file an impounded document." Mass. App. Ct. R. 13.0(e)(1). Nonetheless, regardless of whether a document is subject to mandatory e-filing, "[t]he Appeals Court encourages all attorneys and self-represented litigants in public, partially impounded, and impounded cases, to e-file all documents submitted to the court." Mass. App. Ct. R. 13.0(d)(1).

"All documents that are e-filed shall be submitted electronically only. Neither a paper original nor duplicate shall be filed unless specifically requested by the Court." Mass. App. Ct. R. 13.0(h). Counsel may move to waive the e-filing requirement via a motion showing "undue hardship, significant prejudice, exigency, or other good cause." Mass. App. Ct. R. 13.0(f)(1).

E-filing in the Supreme Judicial Court. E-filing in the SJC, as in other courts, is subject to Mass. S.J.C. R. 1:25. "After you e-file a brief in a full court case, the clerk's office will notify you to file a limited number of paper copies. If you e-file motions, letters, status reports and other similar documents, no paper is

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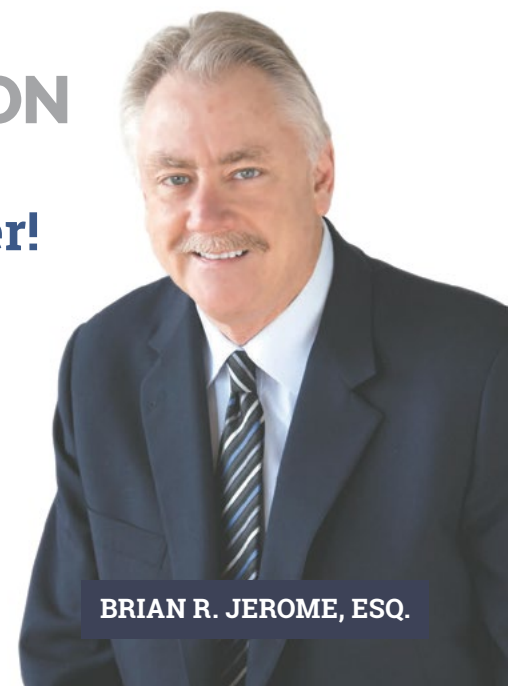
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An appellate roadmap, Part 6

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required.” E-filing in the Supreme Judicial Court Clerk’s Office for the Commonwealth, at <https://www.mass.gov/how-to/e-filing-in-the-supreme-judicial-court-clerks-office-for-the-commonwealth>. The best practice is for counsel to call the SJC Clerk’s Office for the Commonwealth before e-filing, ask how many paper copies will be necessary, obtain those paper copies immediately prior to or after e-filing, and send those copies to the SJC Clerk’s Office for the Commonwealth before the formal deadline.

Particular e-filing rules in all appellate courts. Counsel should read Mass. S.J.C. R. 1:25 in its entirety. However, several particular e-filing rules often function as traps for the unwary, and counsel would do well to read down these rules like a checklist before filing the brief. After all, the consequences of a non-conformity, while seldom fatal, can be embarrassing: “[t]he clerk may reject any document filed electronically for any technical nonconformance with the Rules of Court.” Mass. R.E.F. 5. The SJC contemplates that, at least on rare occasions, a technical non-conformity may be fatal: “[t]his rule shall not, however, extend the mandatory or statutory time, including any statute of limitations, for the filing of such document.” Mass. R.E.F. 5.

• *Electronic signatures.* “[A]ll documents submitted for e-filing must include either a scan of the individual’s handwritten signature, an electronically inserted image intended to substitute for a signature, or a ‘/s/ name of signatory’ block, which shall have the same validity and effect as a handwritten signature, and must set forth the attorney’s name, Board of Bar Overseers number, address, telephone number, and e-mail address.” Mass. R.E.F. 13(a). See Mass. R.E.F. 13(c) (“all signatures [must] comply with [Mass. R.E.F.] 13(a) and (b)”). The SJC made this rule effective June 1, 2020, at the height of the COVID-19 pandemic, and shortly thereafter extended its core principles to all

electronic signatures throughout the Massachusetts court system. See *In re: COVID-19 (Coronavirus) Pandemic*, Mass., No. OE-144 (June 11, 2020) (Updated Order Authorizing Use of Electronic Signatures by Attorneys and Self-Represented Parties).

• *Object character recognition (OCR) of text in PDF files.* “Except where specifically provided, all documents submitted for e-filing must be in searchable Portable Document Format (PDF).” Mass. R.E.F. 9(a). Many attorneys continue to indulge in the bad habit of scanning documents as pure images, without setting the scanner to detect text and embed a layer of searchable text beneath the image; this must end. When counsel must include a scanned page not already searchable, e.g., in an addendum or in a record appendix, counsel must process that scanned page through the appropriate OCR function in a full-featured professional PDF editor, such as Adobe Acrobat Pro or Kofax Power PDF Advanced.

• *Convert word processor files directly to PDF, and avoid scanning printouts when possible.* The SJC and the Appeals Court prefer “electronically converted PDFs” — direct conversions of word processor documents into PDF files containing native text — “rather than scanned PDFs whenever possible.” Mass. R.E.F. 9(a). Electronically converted PDFs, as compared to scanned images, are far cleaner visually when enlarged for reading and far smaller when saved. Mass. R.E.F. 2.

• *Do not lock PDF files.* “Documents shall not be locked or otherwise password protected.” Mass. R.E.F. 9(a).

• *Massachusetts appellate courts encourage internal links but prohibit external links.* At least several justices of the Appeals Court have commented in seminars for the appellate bar that they greatly appreciate internal hyperlinks and bookmarks, which enable a reader to quickly jump to various headings, sub-headings, and citations in the brief. Such hyperlinks and bookmarks, however, must

remain internal, and may not link to Internet sites or other locations outside of the document containing the hyperlink. Mass. R.E.F. 9(c) (permitting “electronic links, but only to navigate within the same document”). Some attorneys run afoul of this rule by copying citations from Westlaw, Lexis, or other legal research databases wholesale, with an external hyperlink to the Internet site for the relevant database intact. Counsel must take care to remove these hyperlinks; in Microsoft Word, for example, counsel may remove a hyperlink by right-clicking on the hyperlinked text and selecting “remove hyperlink.”

• *Compress all PDF files.* “EFileMA.com imposes size limits on filings. No individual PDF document may be more than 25 MB in size.” Electronic Filing at the Appeals Court, at <https://www.mass.gov/guides/electronic-filing-at-the-appeals-court>. Compress all PDF files in a full-featured professional PDF editor, such as Adobe Acrobat Pro or Kofax Power PDF Advanced.

• *Scan in black-and-white rather than in color.* “To minimize file size, Users must configure their scanners to scan text documents at 200 dpi and in black and white rather than in color.” Mass. R.E.F. 10(c). “For documents that consist of images beyond text, such documents shall be scanned at sufficient resolution to ensure a legible and accurate representation of the image. Black and white images should be scanned in grayscale. Images should only be scanned in color if color is relevant, such as color photographs used as an exhibit.” Mass. R.E.F. 10(d). The amount of data necessary to account for each color for each pixel in a color scan is vastly greater than the amount of data necessary to account for each pixel in a black-and-white scan. To keep file sizes as low as possible, counsel should scan all scanned pages, e.g., in an addendum or in a record appendix, in black-and-white, unless the scanned page requires color in order to accurately reflect the record or in order to draw the reader’s attention to a significant detail. Even if the scanned page contains only text, a

scanner set to color mode will create very large files by writing data for thousands of varied color shades of white paper and black ink. Although these varied color shades are usually imperceptible to the naked eye, the resulting PDF file will waste large amounts of data trying to preserve them. PDF compression algorithms cannot compress color scans to the size of comparable black-and-white scans. Color scans generally become blurry and lose integrity after less compression than black-and-white scans subjected to the same level of compression.

• *Impoundment.* Note the requirements governing impounded filings. See Mass. R.E.F. 11.

• *Service.* “Users in a case may be served electronically through the e-filing system.” Mass. R.E.F. 7(b). “When the parties to a case comprise both Users and Non-Registered Participants, the User submitting the document for filing through the e-filing system is responsible for serving a copy of the document to all parties who are Non-Registered Participants in accordance with other Massachusetts Court Rules and Orders.” Mass. R.E.F. 7(b). Notwithstanding that all attorneys must list their names and email addresses on the “Public List” at eFileMA.com, some mistakenly fail to do so. See Mass. App. Ct. R. 13.0(b). In order to ensure service upon all attorneys and upon all *pro se* parties, counsel would do well to (1) serve all counsel and *pro se* parties listed at eFileMA.com via the formal “file and serve” option at eFileMA.com, (2) include all counsel and consenting *pro se* parties as “courtesy contacts” on the eFileMA.com envelope submission, (3) send an email attaching all e-filed pleadings to all counsel and consenting *pro se* parties, and (4) send the pleadings via First-Class Mail to all non-consenting *pro se* parties. See *In re: COVID-19 (Coronavirus) Pandemic*, Mass., No. OE-144 (Mar. 30, 2020) (Order Concerning Email Service in Cases Under Rule 5(b) of Mass. Rules of Civil Procedure (On Attorneys of Record Only, Unless Self-Represented Party Consents)).

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