

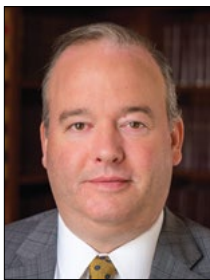
Journal

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President's Message

A nod to the past, a look to the future

By Peter Ainsworth



What an honor to deliver my first President's Message to this wonderful organization. As we continue to emerge from

the pandemic, I'd like to start with a nod to the past and a look to the future. John Carroll has submitted a wonderful history of MATA for the good of the order, and I recommend that if you read one article in this issue, it be that. If you want to read it now, I'll wait.

Isn't it incredible to see how far the organization has come since its creation in 1975? Thanks to the visionary leadership of titans such as Charlie Barrett, John J.C. Herlihy, Jim Meehan, Mike Mone, Jim Reardon, Camille Sarrouf, and Paul Sugarman, MATA went from a small group of dedicated attorneys trying to help the public and one another, to the 1,000-member strong organization it is today. Our commitment to the public good, and our ability to effect meaningful change, has only grown over the years, and I look forward to the continuing the mission laid out by our founders.

With that in mind, let's look ahead. As I've mentioned before, this is a year to focus on the three pillars of our organization: 1) protecting the civil justice system for our clients; 2) supporting our existing membership through CLEs and other programs; and 3) growing our membership so that we can better serve the public and one another. We are off to a great start.

Protecting the civil justice system

MATA leadership is meeting with the Chiefs of the various courts

Peter Ainsworth is the Managing Director of Meehan, Boyle, Black & Bogdanow. He joined the firm as an attorney in 2003. He handles many of the firm's medical malpractice, product liability, and general liability cases. He is the current President of the Massachusetts Academy of Trial Attorneys.

with an eye to finding ways we can work together to take what we've learned over the past couple years to strengthen the civil justice system. To date we have met with the Hon. Stacey J. Fortes, Chief Justice of the District Court; the Hon. Heidi E. Brieger, Chief Justice of the Superior Court; and the Hon. Jeffrey A. Locke, Chief Justice of the Trial Court. By the time of this publication, we will also have met with the Hon. Kimberly S. Budd, Chief Justice of the Supreme Judicial Court. The main topics of discussion have been keeping civil trials moving with firm trial dates and greater uniformity in conducting remote hearings. Across the board, the Chiefs have been open, honest, and genuinely motivated to keep civil cases moving, and we were pleased to provide positive

“As humbling as it is to read about our origins, it's the recent past that is truly inspiring.”

feedback on the new Superior Court Standing Order 1-22 governing remote sessions.

CJ Fortes is exploring initiatives in the District Court to, among other things, increase communication between the Court and the bar. MATA will hopefully be involved in this process, and I will be looking for volunteers to help in this effort.

CJ Brieger similarly wants to increase communication and highlighted the benefit of small bench/bar meetings to candidly exchange ideas. We explored ideas on how the bench and bar can work together to move cases along and maximize the court's resources. Specifically, we discussed ways to deal with the issue of scheduled cases not going forward and the wasted opportunities for other trials to proceed when these openings present themselves. Good news on that front, the clearance rate (i.e.,

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EDITOR'S NOTE

Tips for conducting focus groups

By Jonathan A. Karon

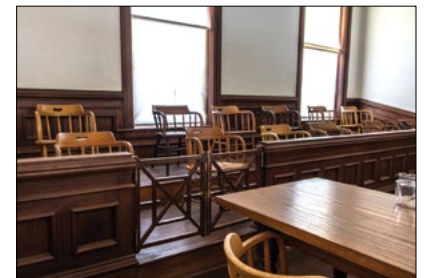


I've been doing my own focus groups for years and you can too. Some folks prefer to work

with trial consultants who help design the groups and analyze the results. But you don't have to. You can easily conduct your own cost-effective focus groups. There are a number of good videos and books that can teach you the basics.¹ But whether you want to start doing them or you've already been running your own, here's some tips you may find helpful.

Recruiting/screening

For me, this has always been the trickiest part. It is important that you get a panel that resides in the venue and is demographically representative. Keep in mind that you need a panel that reflects your



DEPOSIT PHOTOS

likely jury venire, which may not be the same as the county's census breakdown (for example, jury venires tend to be a little older than the general population). I generally recruit 8-10 subjects, on the assumption that this guarantees at least 6-8 will show up, and I look for a diverse panel that includes older and younger subjects, single and married, with and without children and includes persons of color. You can hire a focus group service to recruit panelists for you, but this will probably cost around \$150 per subject. The alternative is to recruit yourself. I've done this by placing a Craigslist ad, setting up

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A brief history of MATA

By John Carroll



The Massachusetts Academy of Trial Attorneys (MATA) was officially created in July 1975. Within that relatively short time, less than 50 years, it has secured its place in the legal firmament of the commonwealth.

Early years

After World War II, a loose confederation of attorneys that specialized in the rights of injured claimants began to coalesce around a group called the National Association of Claimant's Compensation Attorneys (NACCA). These were both attorneys that represented injured workers in the workplace and those who represented injured persons generally.

The catalyst was a seminal book entitled "Workers Compensation,"

authored by Samuel Horowitz.

Sam was a 1922 graduate of Harvard Law. He first went to work representing the U.S Casualty Company. Stunned by the quality of legal representation the injured worker received, he realized he had found his life's work. He quit working for U.S. Casualty and went to work for the Boston Legal Aid Society, where he represented hundreds of injured workmen before the state Industrial Accident Board.

In 1944, he published the above-mentioned book on worker's compensation. It was an "a-ha" moment for attorneys across the nation that specialized in this work and led to the formation of ad hoc groups in cities throughout the country. Soon the formation of NACCA followed. In 1964, NACCA changed its name to Association of Trial Lawyers of America (ATLA), essentially an extension and expansion of NACCA. Originally the ATLA was headquartered in Cambridge, but in 1965, ATLA

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An appellate roadmap, Part 7

By Kevin J. Powers

Earlier parts of this series appeared in prior MATA Journal issues, beginning in June 2020.



As this series has now reached the briefing stage in the appellate process, this article begins a discussion regarding the technical

requirements governing briefs. The lion's share of these technical requirements are set forth in Mass. R. App. P. 16 and Mass. R. App. P. 20.

XIV. APPELLANT'S BRIEF: TECHNICAL REQUIREMENTS

An appellant's brief must include up to fifteen core components, some universal and some specific to the circumstances of particular cases or appellants. See Mass. R. App. P. 16(a).

A. Requirement 1: Cover.

Cover. "The cover of the brief shall contain the information identified in [Mass. R. App. P.] 20(a)(6)(B)." Mass. R. App. P. 16(a)(1).

Color cover for paper brief but no color cover for electronically filed brief. The long-standing color codes for paper brief covers remain extant, but the most important modern rule governing brief cover color coding is that "[a] color cover is not required for any electronically filed brief." Mass. R. App. P. 20(a)(6)(A).

Information on cover. The cover must state: appellate court name and case number, Mass. R. App. P. 20(a)

Kevin 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.

(6)(B)(i); case title, Mass. R. App. P. 20(a)(6)(B)(ii); nature of the appellate proceeding, e.g., "Appeal From a Judgment of the [Name of Trial Court]," Mass. R. App. P. 20(a)(6)(B)(iii); lower court name, Mass. R. App. P. 20(a)(6)(B)(iii); document title, e.g., "Brief for Plaintiff-Appellant [Name of Plaintiff-Appellant]," Mass. R. App. P. 20(a)(6)(B)(iv); name(s), Board of Bar Overseers number(s), if any, mail and email address(es), telephone number(s), and any firm or office name, of counsel or pro se filer, Mass. R. App. P. 20(a)(6)(B)(v); where necessary, an impoundment notification, Mass. R. App. P. 16(m); Mass. R. App. P. 20(a)(6)(B)(vi).

Impoundment notification. "Whenever possible, the party shall not disclose impounded material. Where it is necessary to include impounded material in a brief, the cover of the brief shall clearly indicate that impounded material is included therein." Mass. R. App. P. 16(m). For more information on impoundment in the Supreme Judicial Court and the Appeals Court, see S.J.C. R. 1:15 (Impoundment procedure in the Supreme Judicial Court and Appeals Court); Trial Court R. VIII (Uniform Rules on Impoundment Procedure), applicable to Appeals Court via S.J.C. R. 1:15, § 1(b).

Pagination begins on cover. "The cover shall be paginated as page 1." Mass. R. App. P. 20(a)(6)(B)(vii). See Mass. R. App. P. 20(a)(4)(A). "This provision is intended to facilitate reading documents in electronic form." Reporter's Notes to Mass. R. App. P. 20(a)(4)(A) (2019). Under the former practice, in which the cover and front matter customarily bore lower-case Roman numerals "i, ii, iii," etc., and Arabic numeral "page 1" fell on the first page of the brief text proper, searching for pages in the PDF file would produce a page of the brief several numbers lower than the corresponding PDF page number. By numbering the cover as Arabic numeral "page 1," counsel enables a reader using the electronic file to search for pages in the PDF file and

produce the page of the brief bearing the same number.

B. Requirement 2: Corporate disclosure statement.

Required for any nongovernmental corporate party. "[A]ny nongovernmental corporate party to a proceeding must file a statement identifying all its parent corporations and listing any publicly held corporation that owns 10% or more of the party's stock or stating that there is no such corporation." S.J.C. R. 1:21(a). See Mass. R. App. P. 16(a)(2).

Required for any organizational crime victim. "In a criminal case, if any organization is a victim of the alleged criminal activity, the government must file" such a statement regarding the organizational victim. S.J.C. R. 1:21(a). See Mass. R. App. P. 16(a)(2).

File initial statement within thirty days of entry and disclose again in brief. "[A] party must file an original and nine copies of the statement required in [S.J.C. R. 1:21(a)] within thirty days of the entry of the appeal upon the docket." S.J.C. R. 1:21(b). "Even if such statement has already been filed, the party's principal brief must include the statement before the table of contents." *Id.* See Mass. R. App. P. 16(a)(2).

Prompt supplement required. "[A] party shall promptly file a supplemental statement upon any change in the information that the statement requires." S.J.C. R. 1:21(c).

C. Requirement 3: Table of contents.

"The table of contents shall list each section of the brief, including the headings and subheadings of each section, and the page on which they begin." Mass. R. App. P. 16(a)(3).

Tab stops. Counsel should use right-justified tab stops to ensure that page numbers in the table of contents align against the right margin. In Microsoft Word, the Paragraph options include Tabs options, and the Tabs options include Leader options for inserting a trail of periods in a long tab from a title to a page number; such "leaders" create a professional appearance in a table.

D. Requirement 4: Table of authorities.

"The table of authorities shall list each case, statute, rule, and other authority cited in the brief, with references to each page on which it is cited. The authorities shall be listed alphabetically or numerically, as applicable." Mass. R. App. P. 16(a)(4).

Always review and correct computer-generated tables. Many attorneys use built-in Microsoft Word functions or special scripts to generate tables of authorities, but counsel should always review and correct the table, particularly in light of short cites that automated functions and scripts may not detect.

E. Requirement 5: Statement of issues.

Concise and particular. "The statement of issues shall concisely and particularly describe each issue presented for review." Mass. R. App. P. 16(a)(5). The statement of issues should be direct. Although the statement of issues is an opportunity for advocacy in framing the case—through, for example, phrasing in the nature of "where the trial court [concise list of key facts supporting abuse of discretion], did the trial court abuse its discretion in ['finding' or 'ruling'] that [substance of finding or ruling]"—this sort of advocacy should not come at the expense of brevity.

F. Requirement 6: Statement of the case.

Procedural history. "The statement of the case shall briefly describe the nature of the appeal, the procedural history relevant to the issues presented for review, with page references to the record appendix or transcript in accordance with [Mass. R. App. P.] 16(e), and the disposition of these issues by the lower court." Mass. R. App. P. 16(a)(6). As the rule states, the function of the statement of the case is to chronicle the relevant procedural history of the litigation. *Id.*

Distinct from statement of the facts. The statement of the case should consist entirely of procedural history

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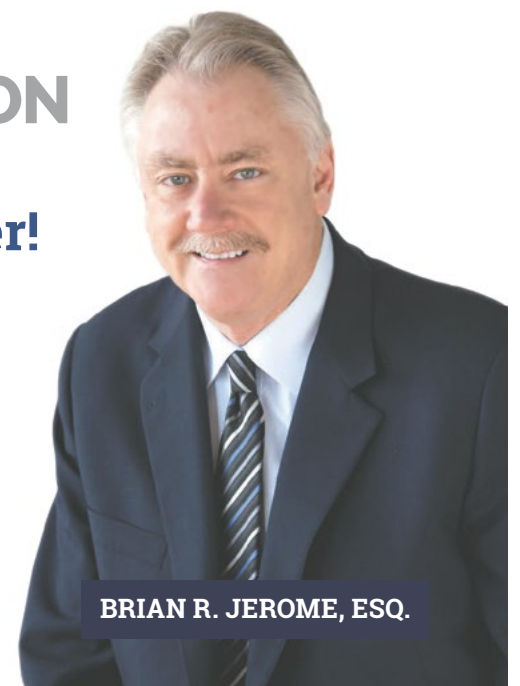
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BRIAN R. JEROME, ESQ.

A nod to the past, a look to the future

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the number of cases disposed against the number of new cases filed) in the Superior Court is over 100%, up more than 20% from last year.

CJ Locke was also very interested in MATA's views on six-person juries, remote hearings, panel voir dire, and the importance of peremptory challenges, which have been abolished in at least one state. Like with the other meetings, it was reassuring to see the level of concern and commitment our courts have for preserving the rights of our citizenry.

Supporting our membership

We are also off to a great start in

terms of educational programming. A special thanks to Jon Karon and all who have hosted or helped line up speakers for our Friday Virtual Roundtables. In addition to the invaluable support we gain by simply talking about our cases, we've also heard from a slew of guest speakers, including Artemis Malekpour, Jesse Wilson, Michael Neff, Lauren Fraser, Ken Levinson, and MATA members Thomas Bond and Christopher Earley. To have heard from so many nationally recognized speakers so early in the year is really incredible. I often say the Listserv alone is worth the price of admission to MATA. The same can now be said of the virtual coffee hours. Even if you can't be a regular, please do sign in when you can and you

will not be disappointed.

Growing our membership

There is strength in numbers. Growing our membership brings new voices to the table, providing for more robust discussion whether it's on the Listserv, at the Coffee Hour, or more frequently now, at our in-person and hybrid meetings. It's been years since we've made a big membership drive, however, so Cathryn Crowley, our Membership Chair, has set the ambitious goal of "100 New Members in 100 Days." I'm calling upon everyone, but especially our Board of Governors, to step up, reach out, and sign up one new member each. Whether it's a new

lawyer, a lapsed member, or someone who should have joined years ago, MATA has a lot to offer, and we all stand to benefit by increasing our numbers. Please take the time to spread the word.

MATA started as a small group of concerned trial attorneys almost 50 years ago. Who could have envisioned the strong, thousand-member (and growing!) organization that would continue fighting for the rights of the individual through challenging political climates, continual tort reform efforts, and even a pandemic that brought civil jury trials to a standstill. As humbling as it is to read about our origins, it's the recent past that is truly inspiring. I look forward to working with all of you to make the future even brighter.

An appellate roadmap, Part 7

Continued from page 4

regarding the litigation of the matter. Facts regarding the transaction or occurrence underlying the claim belong in the statement of the facts. The two sections should be distinct and separate, both in order to assist a reader in understanding the case without frequent vacillation between procedure and fact, and in order to assist a reader in quickly locating relevant information while reading the argument. Mass. R. App. P. 16(a)(7) (statement of the facts "need not repeat items otherwise included in the statement of the case").

Guided by standard of review. Counsel should hearken to the language in Mass. R. App. P. 16(a)(6) specifying procedural history "relevant to the issues presented for review" and allow the standard of review to guide his or her selection of information for the statement of the case. *Id.* Counsel should bear in mind that the record appendix will contain the trial court docket report and relevant pleadings, enabling a reader to fill in much tangentially relevant procedural history by consulting the primary source. Pedantic information about particular dates of various docket entries is usually unnecessary unless that information either assists the reviewing court in determining whether reversible error occurred or assists the reviewing court in understanding meaningful and necessary context surrounding an allegedly reversible error. For example, it is almost always unnecessary to recount that a party filed an opposition to a trial court motion, or to recite the date on which a party filed such an opposition, unless the appeal involves an issue of waiver and the filing of an opposition in the trial court is relevant to whether that party waived an issue.

Record citations for every sentence. Counsel should take great care to cite the record for every sentence in the statement of the case. Mass. R. App. P. 16(a)(6); Mass. R. App. P. 16(e). Although Mass. R. App. P. 16(e) technically applies this requirement to "[a]ny factual statement in a

brief," neither Mass. R. App. P. 16(e) nor the Reporter's Comments to Mass. R. App. P. 16(e) indicate that SJC intended the word "factual" in this context to exclude procedural history, and any reasonable reader is likely to be grateful to counsel as much for providing citations for procedural history as for providing citations for facts. Record citations after every sentence make the work of the reviewing court, in assimilating and verifying each proposition in the brief, much easier. A sentence in the statement of the case—or in the statement of the facts—without a record citation stands out like a sore thumb to a reader, who may be prompted to view the information in that sentence with heightened skepticism or, if the reader is opposing counsel, may be drawn to question that information and arguments reliant upon it.

Clear citation abbreviations. "Only clear abbreviations may be used." Mass. R. App. P. 16(e).

Addendum citations. "Any record material cited in a brief that is included in the addendum should also include a citation to the addendum." *Id.*

G. Requirement 7: Statement of the facts.

"The statement of the facts shall describe the facts relevant to the issues presented for review, but need not repeat items otherwise included in the statement of the case, and each statement of fact shall be supported by page references to the record appendix or transcript in accordance with [Mass. R. App. P.] 16(e)." Mass. R. App. P. 16(a)(7).

Distinct from statement of the case. The statement of the facts should consist entirely of facts regarding the transaction or occurrence underlying the claim. Procedural history regarding the litigation of the matter belongs in the statement of the case. The two sections should be distinct and separate, both in order to assist a reader in understanding the case without frequent vacillation between procedure and fact, and in order to

assist a reader in quickly locating relevant information while reading the argument. *Id.*

Guided by standard of review. Counsel should hearken to the language in Mass. R. App. P. 16(a)(7) specifying facts "relevant to the issues presented for review" and allow the standard of review to guide his or her selection of information for the statement of the facts. *Id.* Counsel should bear in mind that the record appendix will contain relevant transcripts and exhibits, enabling a reader to fill in much tangentially relevant factual detail by consulting the primary source. Pedantic, painstaking forced marches through detailed background of the parties or other relevant actors are usually unnecessary unless that information either assists the reviewing court in determining whether reversible error occurred or assists the reviewing court in understanding meaningful and necessary context surrounding an allegedly reversible error.

Record citations for every sentence.

"Any factual statement in a brief shall be supported by a citation to the volume number(s) and page number(s) at which it appears in an appendix, and if not contained in an appendix, to the volume number(s) and page number(s) at which it appears in the transcript(s) or exhibits volume(s)." Mass. R. App. P. 16(e). As in the statement of the case, counsel should take great care to cite the record for every sentence in the statement of the facts. Mass. R. App. P. 16(a)(7); Mass. R. App. P. 16(e). Record citations after every sentence make the work of the reviewing court, in assimilating and verifying each proposition in the brief, much easier.

Clear citation abbreviations. "Only clear abbreviations may be used." Mass. R. App. P. 16(e).

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