MASSACHUSETTS ACADEMY OF TRIAL ATTORNEYS

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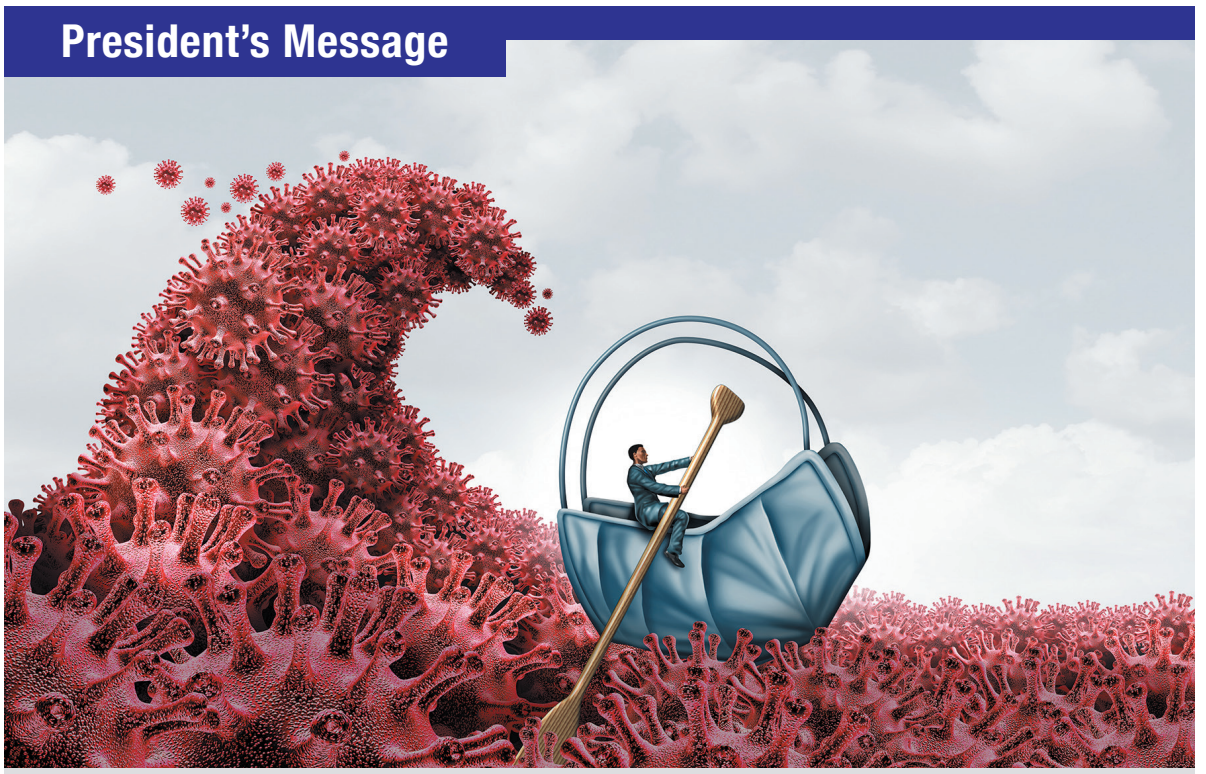
President's Message



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Getting through it together

"But I know, somehow, that only when it is dark enough can you see the stars."

— Martin Luther King Jr.

By Brendan G. Carney

When I assumed the presidency of MATA on July 1, 2020, I knew this year was going to be different. The COVID pandemic did not allow the traditional in-person passing of the gavel that we see in typical years. By that time, working from home was the norm and "Zoom" had become a household word. Unfortunately, it was just the beginning of the changes we have weathered over the past months.

In that first week of July, we learned that MATA Past President Edwin "Ed" Wallace had passed away suddenly, years into a Parkinson's diagnosis that never seemed to slow him down. Ed inspired many of us, and I was lucky to have known him personally for much of my life.

Ed was part of the fabric of MATA, and the organization will never be the same without him. As trial lawyers, we know that tragedy is part of life, but when it hits so close to home, our professional objectivity is not really helpful. (See in memoriam statement in this issue.)

The following months brought even more heartbreak to our legal community and the nation at large. We were shocked to learn of the untimely death of beloved SJC Chief Justice Ralph Gants, closely followed by the

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EDITOR'S NOTE

Turn and face the strange changes

By Jonathan A. Karon

My last column was written in April. At that time, courts were handling emergency business only, jury trials were on hold, and we were learning how to work remotely. We've come a long way since then, but our practices are still quite different. Below is a list of some of the most significant changes and my thoughts on them.

Remote depositions

This may be the biggest. Once the SJC allowed Zoom depositions as of right, we were able to start moving our cases forward again. In practice, I've found that Zoom depositions work remarkably well and that the technical obstacles are minimal.

The biggest difference is the handling of exhibits. Previously, when preparing for a deposition, I'd complete my outline and then assemble the exhibits. Now I have to decide on exhibits first, so that they can be forwarded to the court reporter and opposing counsel.

Although you can have the court reporter mark and share the exhibits, I prefer to do this myself. I'm getting much better with screen sharing, although it's still an adventure. By the way, it is possible to have a witness mark a document while it's being shared on Zoom.

There are some other logistical issues. You have to make it clear that the witness is not allowed to communicate with counsel during

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Animations in personal injury cases

By Doug Sheff

Often times the difference between a good lawyer and a great one is his or her ability to use demonstrative evidence in a frequent and effective manner. Whether at trial or mediation, a constant and coherent presentation of visual aids can make a huge difference in both presentation and results.

One example of demonstrative evidence is an animation. Actually, animations may be admitted as evidence or utilized simply as a chalk (see *Lally v. Volkswagen*, 45 Mass. App. Ct. 317 (1998); John W. Strong et al., McCormick on Evidence §214, at 21 (West 5th ed. 1999 & Supp. 2003). In either instance, they can advance your case in many ways.

ALL STAR TIPS

Over the past several years, the attention span of jurors has grown increasingly shorter. Technology has created an expectation to receive information in a quick, concise and easy-to-understand manner. In addition, the old saying "seeing is believing" applies to jurors more now than ever before. For these reasons, we now see animations viewed favorably in focus groups as compared to similar groups in the past.

> For today's increasingly inattentive jurors, an animation can mean the difference between victory and defeat.

Properly done, an animation can summarize years of investigation, discovery, witness testimony and expert analysis in a matter of seconds. It can distill complex and sometimes technical information into a simple, easy-to-digest and persuasive expression of an event.

In order to make your animation relevant or even admissible,

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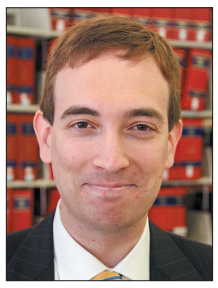
An appellate roadmap, Part 2

Part 1 appeared in the June 2020 issue of the MATA Journal.

By Kevin J. Powers and Thomas R. Murphy



POWERS

MURPHY

IV. Transcript

A. Deadline 1: 14 days after filing notice of appeal: Appellant must order transcript and/or file and serve transcript order or certification with trial court.

A 14-day deadline, regardless of what the appellant must do. Depending upon whether the proceedings were recorded, how the proceedings were recorded, whether the recording equipment malfunctioned, and whether the case involves child welfare litigation, the method of memorializing the trial court proceedings will take different forms. See Mass. R. App. P. 8. Regardless of what the appellant must do, however, the deadline is 14 days after filing the notice of appeal.

Proceedings recorded by court reporter — order transcript. If a court reporter recorded the trial court proceedings, then "the appellant shall order a transcript of those proceedings within 14 days of filing the notice of appeal in accordance with procedures set by the Chief Justice of the Trial Court," unless no such proceedings are relevant to the appeal or the transcript is on file with the court. Mass. R. App. P. 8(b)(1)(A); see also Trial Court Administrative Order 19-1(4)(a)(i).

Proceedings recorded electronically — request transmission of audio recording and order transcript. If the trial court proceedings were electronically recorded, then "the appellant shall request the transmission of the audio recording of those proceedings and order the transcription of those proceedings within 14 days of the filing of the notice of appeal in accordance with procedures set by the Chief Justice of the Trial Court," unless no such proceedings are relevant to the appeal or the transcript is on file with the court. Mass. R. App. P. 8(b)(1)(A); see also Trial Court Administrative Order 19-1(4)(b)(i) (For the Record (FTR) recording system; transmit FTR-generated transcript order form to Office of Transcription Services); Trial Court Administrative Order 19-1(4)(c)(i) (JAVS/CourtSmart recording system; order transcript from trial court clerk's office).

Certify no proceedings relevant to appeal. If "no lower court proceedings are relevant to the appeal," then the appellant shall so certify to the trial court clerk "and serve a copy on all other parties." Mass. R. App. P. 8(b)(1)(A).

Certify transcript is on file with court. If "the transcript is on file with the court," then the appellant shall so certify to the trial court clerk "and serve a copy on all other parties." Mass. R. App. P. 8(b)(1)(A).

Child welfare cases. In child welfare cases, "the [trial court clerk] shall order, within 14 days and in accordance with procedures set by the Chief Justice of the Trial Court, a transcript of the proceedings relevant to the appeal and shall serve a copy of the transcript order

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In Memoriam: Edwin Wallace

It is with extreme sadness that the leadership and staff of the Massachusetts Academy of Trial Attorneys acknowledge the passing of MATA Past President and longtime friend Edwin Wallace.

We were heartbroken to hear of the untimely death of Ed Wallace on the Fourth of July. Ed was a longtime champion of MATA, and his career was dedicated to tireless representation of "the little guy" through his landmark representation of injured people — particularly those harmed by the tobacco and asbestos industries.

Ed Wallace was always there when MATA needed him. He was one of the people who were instrumental in bringing attorney-conducted voir dire to Massachusetts. Ed was also an important resource in helping our members learn the skills needed to succeed in that area.

Ed was always eager and willing to mentor young lawyers. I first met Ed when I was a teenager, through his friendship with my father. Like many of you, I shared many good laughs with Ed. He was instrumental in my development as a lawyer and my involvement with MATA, providing necessary guidance and encouragement along the way. I am sure he has provided the same for many of you.

We are all going to miss Ed's quick wit, intelligence, experience and fundamental human decency.

In recent years, as Ed faced his own health challenges (and yet never complained), he remained an active participant in MATA and inspired many of us by continuing to offer good advice and funny quips during his participation in MATA Board of Governors' meetings. Ed was to be the recipient of the 2020 MATA Courageous Advocacy Award.

Our hearts go out to Ed's wife, Lisa, his three sons, colleagues and friends. We already miss him very much.

Brendan G. Carney
President

In Memoriam: Hon. Ralph D. Gants

The Massachusetts Academy of Trial Attorneys mourns the recent, tragic loss of the chief justice of the Commonwealth who was taken from us all too early.

Chief Justice Gants was extraordinarily brilliant with a quick wit and a razor-sharp mind, and at the same time he had a genuine, down-to-earth way. A judge's judge, he was forever mindful of the underrepresented, the less fortunate, and the forgotten.

Owing to his tremendous contributions and commitment to the bar, the community, and to society at-large, his loss is deeply personal. We will miss him tremendously. May his memory be a blessing.

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Sources of duty in construction injury cases

Part 2: liability of property owners; Part 1 appeared in the June 2020 issue of the MATA Journal.

By J. Michael Conley and Brendan Quinn

CONLEY

QUINN

At times, representing injured workers in third-party tort claims requires consideration whether the property owner bears or shares responsibility for a worker's injury.

Whether circumventing workers' compensation immunity, seeking a collectable defendant, trying to add weight to the defense side of the comparative negligence scale, or merely establishing a good-faith basis to avoid federal diversity jurisdiction, the potential avenues to property owner liability should be considered in every construction site injury case.

Part 1 focused primarily on responsibility among general and subordinate contractors for construction site injuries. This article addresses the responsibility and liability of property owners within the context of employing independent contractors for construction activities, and the limiting concept of "collateral negligence."

A property owner has a duty to exercise reasonable care for the safety of persons lawfully on the premises considering all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk. *Mounsey v. Ellard*, 363 Mass 693, 708 (1973). This duty applies equally to employees of independent contractors. *Poirier v. Town of Plymouth*, 374 Mass. 206 (1978).

Accordingly, the property owner has a duty to remedy or warn against conditions that endanger workers on the property. However, when a transient dangerous condition arises because of the independent contractor's work, the premises owner ordinarily owes no duty to the independent contractor's employees, perhaps subject to exceptions discussed below. See J.D. Lee & Barry A. Lindahl, 4 Modern Tort Law: Liability and Litigation §38:40 (2d. ed. 1990).

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However, if the condition is created by a different contractor, the owner's duty remains intact. See *Farren v. General Motors Corp.*, 708 F. Supp. 436 (D. Mass. 1989).

The State Building Code generally requires at least a licensed construction supervisor to oversee any significant project. However, the Code provides an exemption allowing a homeowner — defined as a person who owns a parcel of land on which he/she resides or intends to reside, on which there is, or is intended to be, a one- or two-family dwelling, and who does not construct more than one home in a two-year period — to undertake a project without a license.

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SINCE THE BEGINNING OF THE PANDEMIC, MATA HAS HOSTED WEEKLY MEMBER ROUNDTABLE 'COFFEE HOURS.' THESE VIRTUAL GATHERINGS HAVE BEEN VERY POPULAR AS A WAY TO EXCHANGE IMPORTANT INFORMATION AND CONNECT WITH FELLOW MATA MEMBERS DURING A CHALLENGING TIME.

Update on HITECH medical records requests

By Kevin J. Powers

This article updates an earlier discussion from the March 2020 issue of the MATA Journal regarding the HITECH Act, 42 U.S.C. §17935(e), and associated regulations at 45 C.F.R. §164.524.

In January, the federal District Court for the District of Columbia struck down a Department of Health and Human Services (DHHS) rule that had previously applied the HITECH patient rate not only to medical records requests in which the records are to be sent directly to the client/patient, but also to medical records requests in which the records are to be sent to "an entity or person designated" by the patient. See generally *Ciox Health, LLC v. Azar*, 435 F. Supp. 3d 30 (D.D.C. 2020).

Although Judge Mehta grounded the decision in *Ciox* on procedural point — the failure of DHHS to provide notice and opportunity for comment on the rule by interested persons pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §553 — the result of the decision was a very substantive change in how attorneys facilitate HITECH requests for clients.

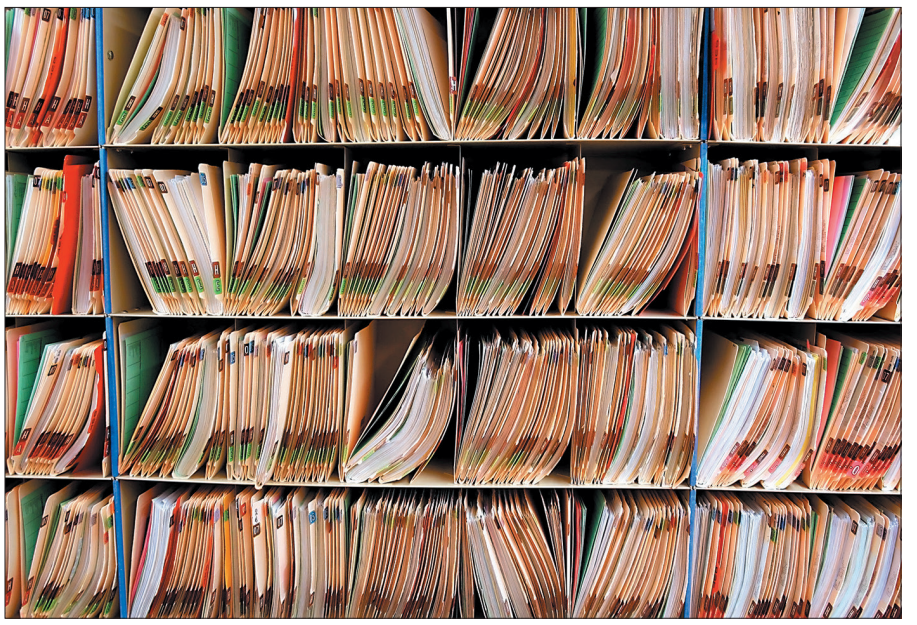
After *Ciox*, counsel was faced with two options: either draft the HITECH request letter to direct that the provider send the records directly to the client/patient or prepare the client/patient for a big bill reflecting the fact that records shipped to counsel no longer fell within the low HITECH patient rate.

All hope is not lost, however. This article will discuss new DHHS regulations that may provide a new enforcement mechanism for HITECH requests, but that may also create opportunities for medical records contractors to continue to erect roadblocks on the way between patients and their medical records.

45 C.F.R. §171.302. On June 30, 2020, DHHS regulations implementing the 21st Century Cures Act, 130 Stat. 1176 (2016), became effective. See, e.g., 45 C.F.R. §171.302 (2020).

Most relevant to HITECH are the regulations implementing "information blocking" prohibitions and penalties codified at 42 U.S.C. §§300jj-52 (2016). See 45 C.F.R. §171.100 (2020). "Information blocking means a practice that ... [e]xcept as required by law or covered by an exception ..., is likely to interfere with access, exchange, or use of electronic health information." 45 C.F.R. §171.103(a) (2020) (defining information blocking and delineating knowledge requirements for entities conducting information blocking).

The key regulation answers the question "when will an actor's practice of charging fees for accessing, exchanging, or using electronic health information not be considered information blocking?" 45 C.F.R. §171.302 (2020).



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An "actor" is "a health care provider, health IT developer of certified health IT, health information network or health information exchange." 45 C.F.R. §171.102 (2020). "An actor's practice of charging fees, including fees that result in a reasonable profit margin, for accessing, exchanging, or using electronic health information will not be considered information blocking when the practice ... does not include any of the excluded fees in paragraph (b) of this section ... ." 45 C.F.R. §171.302 (2020).

Paragraph (b) of 45 C.F.R. §171.302 is the connective tissue that links the 21st Century Cures Act to HITECH. Among the "excluded fees" to which the 45 C.F.R. §171.302 fees exception does not apply — that is, among the "excluded fees" that DHHS may consider "information blocking" — is "[a] fee based in any part on the electronic access of an individuals' [electronic health information (EHI)] by the individual, their personal representative, or another person or entity designated by the individual." 45 C.F.R. §171.302(b)(2) (2020).

DHHS contemplated HITECH. DHHS intended 45 C.F.R. §171.302(b)(2) to encompass HITECH requests, stating explicitly that "[t]he [fees] exception [in the first clause of 45 C.F.R. §171.302] does not apply to fees prohibited by 45 C.F.R. §164.524(c)(4)," which regulation implements HITECH. 21st Century Cures Act Regulations, 85 Fed. Reg. 25,885 (2020).

DHHS on scope of HITECH fees. Judge Mehta in *Ciox* held that the 2016 DHHS Guidance, which clarified that providers may charge a fee for "labor for copying" but may not charge any fee for the cost of labor associated with "locating the data," remains in force. *Ciox*, 435 F. Supp. 3d at 67-68.

DHHS stands by this limitation: "[t]he fee may include only the cost of: (1) [l]abor for copying ...; (2) supplies for creating the paper copy or electronic media (e.g., CD or USB drive); (3) postage ...; and (4) preparation of an explanation or summary." 21st Century Cures Act Regulations, 85 Fed. Reg. 25,885 (2020).

Focus on automated internet "portal" access. The DHHS Federal Register notes distinguishing between search costs and copying costs further suggest what the regulations now make clear: that the HITECH-related regulations implementing the 21st Century Cures Act are truly concerned not with medical records provided on USB sticks, CDs or DVDs, but instead with medical records provided through internet portals.

"Electronic access means an internet-based method that makes electronic health information available at the time the electronic health information is requested and where no manual effort is required to fulfill the request." 45 C.F.R. §171.302(d) (2020). Thus, "a health care provider that charges individuals a fee ... to receive access to their EHI *via the health care provider's patient portal or another internet-based method*, would not be able to benefit from [the fees] exception [in the first clause of 45 C.F.R. §171.302]." 21st Century Cures Act Regulations, 85 Fed. Reg. 25,886 (2020) (emphasis added).

On the other hand, portals present their own problems. The "patient portals" commonly used by clients/patients to view their ongoing medical information on-the-fly — perhaps the "health care provider's patient portal" referenced in the DHHS Federal Register notes — often offer only stripped-down versions of patient charts and of office or consultation notes.

"Patient portal" information is therefore often very different from what a HITECH request should yield, i.e., the actual and complete patient chart.

What, then, of "requestor portals" specifically provided by medical records contractors to records requestors — perhaps the "another internet-based method" referenced in the DHHS Federal Register notes?

Medical records contractors often preface access to "requestor portals" with draconian click-through agreements, which attempt to do via contract what the medical records contractors are not allowed to do via statute and regulation: charge ludicrously high medical records access fees. Such language often includes a stipulation that the user assents to paying any charges applied to his or her portal account by the medical records contractor. Consequently, it may be that the shift from USB sticks, CDs and DVDs to internet portals will simply mean that counsel will spend less time arguing with medical records contractors about non-compliant invoices for boxes of paper and spend more time arguing with medical records contractors about non-compliant portal access invoices.

All of this doubtless amounts to enough ambiguity to create disputes between requestors and medical records contractors for years to come.

Does counsel receive the HITECH rate? Arguably ... On the one hand, the regulations exclude from the fees exception a fee for electronic access "by the individual, their personal representative, *or another person or entity designated* by the individual." 45 C.F.R. §171.302(b)(2) (2020) (emphasis added).

On the other hand, the DHHS Federal Register notes suggest a different sort of designee, referring to "sharing it with an entity designated by the individual (e.g., allowing individuals to donate/share EHI with a biomedical research program of the individual's choice)." 21st Century Cures Act Regulations, 85 Fed. Reg. 25,887 (2020).

At another point, the DHHS Federal Register notes suggest an app rather than an attorney: "[t]hese other individuals or entities (e.g., a third-party app) receive access to EHI at the direction of the individual and individuals control whether the third-party receives access to the individual's EHI." *Id.* at 25,886.

The regulations also invoke ambiguous language in excluding from the definition of EHI "[i] nformation compiled in reasonable anticipation of, or for use in, a civil, criminal, or administrative action or proceeding." 45 C.F.R. §171.102 (2020).

The phrase arguably would not refer to information "provided" as maintained in the provider's electronic system, rather than "compiled" specifically for purposes of the medical records request. The phrase arguably would not refer to information compiled during the claim stage of a case, prior to filing suit. On the other hand, counsel should anticipate that even this sort of logic and good sense will be unlikely to stand in the way of medical records contractors offering even implausible arguments against compliance with HITECH.

Effective date is not compliance date. The DHHS regulations became effective on June 30, 2020, but compliance is required by Nov. 2, 2020. 45 C.F.R. §171.101(b) (2020).

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SNTs give disabled a break with settlements

By Brian F. Mahoney

A disabled plaintiff can have a settlement transferred into a so-called d4A SNT trust fund and not lose government assistance benefits. If it is done the right way, the settlement will *not* be a countable asset and no benefits will be lost.

This type of trust is also known as a First Party Special Needs Trust, which must be funded with the assets of the disabled person, typically from a settlement or an inheritance from an estate.

The idea of a d4A SNT is to use trust funds to supplement what is provided by Medicaid or other public benefits and cannot use funds to duplicate benefits, such as food and shelter without penalty.

What public assistance benefits is your client receiving?

To be eligible for SSI, a disabled client can own only $2,000 in countable assets. A settlement will cause losses under all benefits programs that have asset limits. That loss of benefits could be minimal or catastrophic.

So we must determine if the client's programs have asset limits. Unlike SSI, the SSDI program is available to disabled workers under age 65 who had a work history prior to their disability and had earned a certain amount of so-called "quarters of coverage."

There is no asset limit with SSDI and thus no need for a d4A SNT.

Most disabled clients never have any extra money and they want to spend their settlements. Who can blame them? But even a very large settlement can be quickly dissipated, given the high costs of care and the lack of a plan by the client.

Protecting a settlement with a trust and maintaining public assistance benefits is typically in the client's long-term financial interest.

Federal law allows for d4A SNTs

Self-settled special needs trusts must meet the requirements of federal law. See 42 U.S.C. 1396(d)(4)(A). How to draft a d4A SNT is beyond the scope of this article, but drafting counsel needs to be aware of the POMS, which are the regulations of the Social Security Administration and the CMR's re MassHealth. See generally 130 CMR 515.001.

Requirements of a d4A SNT

The following requirements must be met:

1. The claimant must be disabled as defined in the Social Security Act.
2. The disabled individual must be under the age of 65. If over age 65, a pooled trust operated by an entity is an option.
3. The trust must be created by the disabled client or by his/her parent, grandparent, guardian or court order.
4. It must be irrevocable and it cannot be a testamentary trust.
5. A power of attorney (POA) cannot establish a d4A SNT.
6. The trust must be funded by assets (settlement or inheritance) of the disabled client only.
7. The trust must be for the sole benefit of the disabled claimant, but it can have contingent beneficiaries who may take from it if the disabled beneficiary becomes deceased.
8. However, the trust requires a state Medicaid payback provision. Only after the government is paid back can the contingent beneficiaries take what is left, if anything.

Who would be a competent trustee?

The trustee is the boss of the trust and decides on what benefits the trust pays, not the disabled beneficiary. As a general rule, though, trust distributions never go directly to a beneficiary. This is often a sticking point for some plaintiffs who want to be able to spend their settlement money as they see fit.

Drafting is beyond the scope of this article, but clients will ask you who their trustee should be. Normally, a trustee of large trusts should be a professional. How many laypersons know how to be a trustee?

A trustee must know how to read a trust and needs some knowledge of trust law, accounting/bookkeeping, maintaining orderly records, timely filing of tax returns, and investing large sums of money while also understanding the applicable public assistance programs.

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We need a knowledgeable trustee because surely no one wants trust funds languishing in a savings bank account, nor do we want to allow funds to get clobbered by a stock market downturn, especially when a disabled client will likely never again get the chance to replenish assets that are lost.

Practice tips

If a disabled client is signing his/her own trust, it is best to have medical back-up of competence.

If your client is not competent, and if there are no parents, grandparents or guardian, then you can bring the matter before a judge in the Probate or Superior Court to establish the d4A SNT.

Many clients will be confused as to exactly what programs they are on, so get a list of all public assistance benefits programs from your client before the settlement checks issue, if not before the release is drafted.

The plaintiff's attorney can have the settlement distributed (pursuant to the release/agreement) directly to the d4A trustee. Once in the attorney's IOLTA, it is essentially the client's funds and the clock begins to tick on the time by which the check must be received by the trust and the government notified.

After the trust is funded from the settlement, a copy of the trust and the funding amount must be sent to SSA and MH.

The income in the d4A SNT is taxed to the disabled beneficiary, so his/her SS number could be used for tax purposes, but in reality, few financial institutions will open an account without a tax identification number from the IRS.

An ABLE account can help in limited circumstances if it is a small settlement and a trust is not economically feasible. An ABLE account could receive the settlement, but generally speaking an ABLE account can only be opened by or for someone who had suffered a disability or blindness that began before age 26. ABLE is capped at $100,000 and can annually accept only an amount limited by the federal gift tax rules, currently $15,000 per year.

What can a d4A SNT pay for?

If you'd like a copy of an article detailing what a special needs trust can pay for (which was written by me for members of the National Academy of Elder Law Attorneys, whose mission is to further the legal rights of seniors and the disabled of any age), then kindly drop me an email at brian@attybrianmahoney.com.

Attorney Brian F. Mahoney first joined MATA in 1985. He concentrates in trusts, estate planning and probate and has been practicing since 1982. His website is www.attybrianmahoney.com.

Attorney, you make all the difference!

By William Rothrock, CSSC

Representation of injured clients requires attention to their unique attributes. These clients are different than traditional investors due to excessive medical expense, physical/emotional pain, and loss of social/economic identity.

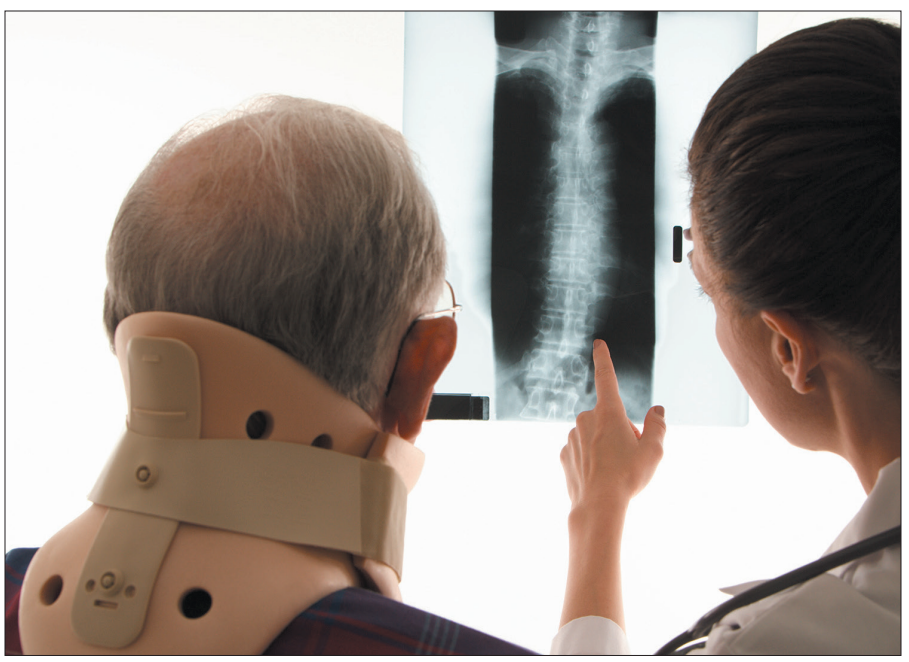
Additionally, they often have minimal investment experience and little access to needed information.

Their unique needs demand unbiased financial representation capable of understating their attributes and the impact of these issues on the want-need conversation.

If the goal is long-term financial health for the client, then a holistic financial strategy focused on guaranteed results constitutes the only appropriate path.

Most, if not all, injured clients have some of the circumstances described above. The financial position of any individual with just one of these attributes is optimized using an investment policy statement (IPS) incorporating limited financial risk as a cornerstone. Many injured clients possess multiple vulnerabilities warranting a reduction of risk in the IPS greater than needed by other clients.

Note that less than 3 percent of personal injury settlement dollars flow through the guaranteed option represented by structured settlements. This result suggests that some advisors do not use an IPS regime or lack experience



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with injured clients. So why tell an attorney all of this? Because you can be the difference-maker.

Prudential Insurance recently released a study of injured clients. Their research showed attorneys introduced the clients to structured settlements in 68 percent of applicable cases. Of those introduced to a structured settlement, 54 percent of clients chose the structured settlement option because they preferred the financial guarantees it affords.

Under-utilization of structured settlements occurs sometimes because clients don't receive the necessary information to make the best decision for them. The results can be devastating for these clients in the long term.

For example, the most frequently chosen plan is the lump-sum option. This option represents 97 percent of all dollars allocated for injury settlements annually. Unfortunately, clients often have less than half their settlement remaining within three years. In the worst cases, about 17 percent of the study respondents had no money left after those initial three years.

What can we do to change these outcomes? An option is to introduce a settlement consultant to your client early in the process.

As a settlement professional, I am confident that experienced settlement consultants can improve outcomes for many clients. However, we can do little until all stakeholders have a profound shift in how they view post-settlement investing.

According to Prudential's research, an attorney's influence on the course of post-settlement investing is significant. Clients should be guided to embrace their risk-averse instincts and protect their financial futures. The question then becomes how do we impact the perspectives that all stakeholders have on investing in a structured settlement plan?

Most successful attorneys defer their fees through a structured settlement. Why not ensure the injured client also receives the same advantages offered by a structured settlement? The best course of action for the injured clients' post-settlement dollars is clear: structured settlements protect clients. Your only question is who to call.

As a settlement consultant, I offer every IPS product including structured settlements. As fiduciaries, we are governed by the "Prudent Man Rule." Settlement consultants support the specialized needs of injured clients and their families. As their attorney, you are the single biggest determiner and protector of who guides your client in the post-litigation finance decision process.

You can help your client by hiring the most qualified professional, a MATA-approved settlement consultant, or allow an unvetted consultant to do the work. The decision is yours to make, but the client lives with the results.

Bill Rothrock is a certified structured settlement consultant (CSSC) who has worked with structured settlements since 2001. He graduated from RIT in Rochester, New York, in 1994 with a BS in accounting and finance. He holds FINRA series 7, 63 and 65 designations. Bill is a member of the National Structured Settlement Trade Association.

Getting through it together

Continued from page 1

death of Ruth Bader Ginsburg. All of these personal losses took place against the backdrop of the national coronavirus death toll surpassing 200,000 and watching our nation literally and figuratively burst into flames with protests against racism and uncontrollable wildfires on the West Coast.

It is completely understandable to be saddened, discouraged and maybe just exhausted during this series of events.

If I can offer one piece of advice to our members, please remember that you are not alone. MATA members know we need to stick together. These days, the connections our members have in our association are crucially important.

Through the use of our listserv and weekly virtual member roundtables, I am happy to know that MATA continues to play a role in keeping lawyers connected during a very challenging and isolating time. MATA members have been instrumental in helping each other figure out new technology, navigate changes in the courts, and generally how to get through this together.

One of the many great accomplishments of Chief Justice Gants was his focus on equality, access to justice, and the recognition that behind every bar card there is a human being and sometimes that human being is having a hard time managing everything. This insight led Chief Justice Gants to launch the SJC Standing Committee on Attorney Well-Being.

MATA board members Marianne LeBlanc and Mala Rafik have helped introduce the resources of this group to our membership, and we hope to forge a stronger relationship with this group in the months and years to come.

If you are having a hard time, please look into the work of the SJC Standing Committee on Attorney Well-Being or Lawyers Concerned for Lawyers.

Looking forward, we know that we will continue to face changes but hope these changes will be less tragic and more of the garden variety that we are used to tackling. We know that the transition back to in-person court appearances and trials will happen. MATA will be there to continue to work with the court as we transition back into the courthouses in a safe way.

> These days, the connections our members have in our association are crucially important.

We know that corporations are going to try to limit plaintiffs' access to justice by seeking all kinds of corporate immunity, while at the same time pushing to bring customers and employees back into their premises. MATA will be there to push back on these attempts to limit public safety and minimize individuals' rights.

Finally, we know that our members will continue to need guidance, training and advice to succeed in the brave new future we face. MATA will continue to be there for them to navigate through this new unknown landscape.

Brendan G. Carney is president of the Massachusetts Academy of Trial Attorneys. At Carney Law Firm, he has successfully represented clients in a wide variety of complex personal injury matters, including construction site accidents, product liability, wrongful death, premises liability and motor vehicle collisions. Brendan also represents injured workers and their families, including professional athletes, in workers' compensation claims at the Department of Industrial Accidents. He has frequently lectured on the topic of workplace safety, workplace injuries and workers' compensation benefits to various local building trades unions and to members of the National Football League Players' Association (NFLPA).

An appellate roadmap, Part 2

Continued from page 2

on the parties." Mass. R. App. P. 8(b)(2); see also Trial Court Administrative Order 19-1(5).

Stipulation that transcript is unnecessary. "[T]he parties may stipulate that the transcription of some or all of the proceedings relevant to the appeal is unnecessary to the adjudication of the appeal, in which case the appellant need order only the transcript of the proceedings, if any, that the parties agree are necessary to the adjudication of the appeal. The parties shall file the stipulation with the clerk within 14 days of the filing of the notice of appeal." Mass. R. App. P. 8(b)(1)(B).

Statement of the proceedings. "If no report of the evidence or proceedings at a hearing or trial was made and a transcript is unavailable, the appellant shall file a motion to reconstruct the record within 14 days of the filing of the notice of appeal. The parties shall confer and reconstruct the record." Mass. R. App. P. 8(c). This is another instance in which the parties should make every effort to cooperate in the preparation of a record for purposes of the appeal, because cordiality and a respectful working relationship between adversaries is the name of the game on appeal.

Agreed statement as the record on appeal. "If the parties intend to submit an agreed statement as the record on appeal in lieu of the procedures set forth in [Mass. R. App. P.] 8(a)-(c), the parties shall notify the [trial court] clerk in writing within 14 days of the filing of the notice of appeal." Mass. R. App. P. 8(d).

Costs of transcription — criminal defendants and indigent appellants. In all criminal cases and civil cases in which the appellant is entitled to court-appointed counsel, "the Commonwealth shall pay for the cost" of the transcript, "including those [proceedings] designated by the appellee[.]" Mass. R. App. P. 8(b)(1)(C); see also Trial Court Administrative Order 19-1(4)(b)(iii) (For the Record (FTR) recording system); Trial Court Administrative Order 19-1(4)(c)(iii) (JAVS/CourtSmart recording system); Trial Court Administrative Order 19-1(7)(c)("The appellant shall be responsible for providing the court reporter or approved transcriber with all information necessary to obtain payment from the Commonwealth or other responsible entity").

Costs of transcription — non-indigent civil appellants. "In all other cases, unless ordered otherwise by the lower court, the appellant shall pay for such costs. If the parties cannot agree on which proceedings are relevant to the appeal, the lower court shall settle the matter upon motion." Mass. R. App. P. 8(b)(1)(C); see also Trial Court Administrative Order 19-1(7)(a) (same). "In the case of cross appeals, the party ordering any transcript shall be responsible for making arrangements for payment for those transcripts as if that party was the appellant." Trial Court Administrative Order 19-1(7)(a). Trial Court Administrative Order 19-1 sets forth the logistics for payment to the court reporter or approved transcriber, as well as logistics for cancellation by the appellant or cross-appellant. See Trial Court Administrative Order 19-1(7)(b) (deposit; notice of completion; balance); Trial Court Administrative Order 19-1(7)(d) (cancellation).

B. Deadline 2: 14 days after appellant serves transcript order or certification: Appellee orders transcript of additional proceedings and files and serves transcript order with trial court.

Appellee orders transcript of additional proceedings. "Within 14 days of service of the appellant's transcript orders or certifications, any other party may order a transcript of additional proceedings in accordance with procedures set by the Chief Justice of the Trial Court" and "shall at the same time file a copy of the transcript order with the [trial court] clerk and serve a copy on all other parties." Mass. R. App. P. 8(b)(1)(A); Trial Court Administrative Order 19-1(4)(a)(ii) (court reporter); Trial Court Administrative Order 19-1(4)(b)(ii) (For the Record recording system); Trial Court Administrative Order 19-1(4)(c)(ii) (JAVS/CourtSmart recording system).

C. Deadline 3: Upon completion of transcript: Transcriber delivers transcript to trial court clerk.

Delivery of transcript. "Upon completion, the transcriber shall deliver the transcript to the clerk of the lower court in accordance with procedures set by the Chief Justice of the Trial Court." Mass. R. App. P. 8(b)(3); see also Trial Court Administrative Order 19-1(8).

D. Deadline 4: 14 days after trial court receives all ordered transcripts: Trial court notifies all parties that transcripts have been received.

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Delivery of transcript. "Upon receipt of all of the transcripts ordered by the parties, the [trial court] clerk shall notify all parties within 14 days that the transcripts have been received." Mass. R. App. P. 8(b)(3).

E. Deadline 5: Within such time as trial court allows: Appellant files proposed statement of proceedings.

Statement of the proceedings. Where the transcript is unavailable and the appellant moved to reconstruct the record, "[w]ithin such time as the lower court shall allow, the appellant shall file a proposed statement of the proceedings." Mass. R. App. P. 8(c).

F. Deadline 6: 14 days after service of proposed statement: Appellee files objections or proposed amendments or additions.

Statement of the proceedings. "Within 14 days of service of the proposed statement, any other party may file objections or proposed amendments or additions. The lower court shall promptly settle any disputes and approve a statement of the proceedings for inclusion in the record on appeal." Mass. R. App. P. 8(c).

G. Deadline 7: 28 days after filing of notice of intent to submit agreed statement: Parties submit to trial court agreed statement of record on appeal.

Agreed statement as the record on appeal. "Within 28 days of the filing of the notice to the clerk, the parties shall submit to the lower court an agreed statement of the record on appeal containing such information as is necessary for consideration of the appeal. If the statement conforms to the truth, the lower court shall approve the statement, along with any additions the lower court considers useful to the appellate court." Mass. R. App. P. 8(d).

> The rules governing omissions, corrections and inaudible recordings boil down to this: Counsel owe it to each other, to the trial court, and eventually to the appellate court to cooperate and resolve difficulties or disagreements amicably.

H. General principles: Stop bickering and start cooperating.

The rules governing omissions, corrections and inaudible recordings boil down to this: Counsel owe it to each other, to the trial court, and eventually to the appellate court to cooperate and resolve difficulties or disagreements amicably. See Mass. R. App. P. 8(e).

The trial court is empowered to resolve problems of the record on appeal, but it is a sad day when the parties are at such loggerheads that court supervision becomes truly necessary. Good luck.

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.

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

Turn and face the strange changes

Continued from page 1

the deposition by text or email. If you want to take a break to confer with your client, that can be accomplished by either a separate breakout room or my preferred option: muting the audio and video and simply calling the client on his or her cellphone.

I have not had a situation where opposing counsel wanted to be in the room with the witness during a Zoom deposition, but I know one lawyer who has, whose response was to insist that he also be allowed in the room. Apparently, the deposition was taken with all counsel participating remotely.

I think this change is going to last when/if there's a vaccine and we start meeting in person again. The convenience factor for both witnesses and counsel is just too high, and so far I haven't seen any major problems.

[Editor's Note: On 10/23/20, the SJC issued an Updated Order Regarding Remote Deposition fixing the problem with video depositions discussed above by allowing the videographer to record from a remote location.]

Zoom hearings

For the most part, my Zoom hearings have worked remarkably well, although the Superior Court Zoom link times out after 45 minutes, so if you have a time-consuming motion, you could get kicked off and have to log back in.

For me, the biggest challenge is not getting distracted looking at myself on the screen. This is also a problem with Zoom depositions. I'm still working on it.

The other big issue with Zoom hearings is what to wear. Do you only need to wear lawyer clothes from the waist up? Personally, I dress for Zoom hearings the same way I would for court, right down to my wingtips. I'm not sure this is mentally healthy, but like Batman, if I'm not wearing the full suit, I can't do the job.

Like Zoom depositions, I think this change is also here to stay. For example, I received a notice of a scheduling conference during my vacation week at the beach (vacations are also way different these days, but that's another story). Normally, I would have had to re-schedule, but instead I packed my computer and a suit and spent 20 minutes "in court." Then, back to the beach.

Trials

Here's the great unknown. On Sept. 17, the SJC issued an order essentially adopting the recommendations of the Jury Management Advisory Committee in an attempt to resume jury trials. We are presently in "Phase I" in which the courts are attempting to conduct one six-person jury trial at a time in each county, to determine if this can be done safely and effectively.

This has meant that most previously scheduled civil jury trials have been continued, although uncertainty remains in many cases. One major concern going forward is the status of attorney-conducted juror voir dire.

It is anticipated that many persons will be excused from jury service based upon their (or a household member's) vulnerability to COVID-19 or upon a legitimate fear of contracting the disease. Accordingly, our jury pools will likely be younger, less ethnically diverse (since COVID-19 disproportionately affects communities of color), and consist of persons with a higher than average risk tolerance.

> "Why wasn't service by email a thing before COVID?

Under such circumstances, seating an unbiased jury will be even more challenging. It is essential that whatever methods are adopted to protect jurors, attorneys be given a full opportunity to uncover juror biases.

Video depositions

Here's a giant glitch in the system. A few years ago, the rules were changed to allow video depositions as of right. This was a giant step forward, bringing Massachusetts in line with virtually every other state.

But when the SJC issued its order allowing remote (Zoom) depositions as of right, it also stated that for video depositions, the videographer must be in the same room as the deponent absent agreement of the parties.

This makes no sense. The Jury Management Advisory Committee specifically recommended increased use of video-recorded testimony in civil cases to reduce the number of people in the courtroom. Instead, requiring consent of all counsel has ground the use of video depositions to a halt.

There's no reason for this. Not only can Zoom depositions be recorded simply by pressing "record," but an experienced videographer can make a recording from the Zoom feed that complies with all the requirements of Rule 30A. As an alternative, the videographer could set up a remote-controlled camera at the deponent's location.

Since neither of these alternatives is permitted as of right, the SJC has needlessly put the brakes on video depositions.

Service by email

Why wasn't this a thing before COVID?

MATA's virtual coffee hour

Every Friday at 10 a.m., MATA holds a virtual coffee hour on Zoom that begins with a 10-15 minute presentation on a current legal topic followed by a general group discussion. We started doing this shortly after COVID shut things down as a way to keep from being isolated.

Past speakers have included Mike Harris on Zoom depositions; Marc Diller on Zoom focus groups; Andy Abraham and Laura Mangini on DME's post-COVID; Tom Bond and Ian McWilliams on the current status of video depositions; Kevin Powers on the HI-TECH Act; John Rossi on a remote trial; Tom Murphy on moving cases post COVID and an Amicus Committee update; Lee Dawn Daniel and Scott Heidorn on defense attempts to toll pre-judgment interest; Scott Gowen on three-judge panels; Jason Carter on the Landlord/Tenant Issues; current MATA President Brendan Carney joined us for "Meet the President" and Immediate Past President Kathy Jo Cook updated us on how our courts are responding to the pandemic.

I've learned a lot from the speakers, but my favorite part is our open discussion when we can catch up and connect with our colleagues.

The Zoom link and scheduled topic are posted weekly on the listserv. I've had the privilege of moderating the coffee hour, and I'd like to thank not just our speakers but everyone who joined us for keeping us connected. We usually get between 20 to 40 members on the call, and MATA members are cordially invited to attend.

Great losses

Since our last issue, our legal community has been hit with some terrible losses.

SJC Chief Justice Gants died unexpectedly in September. Many MATA members knew him far better than I did, but I will always remember when he spoke to MATA's Board of Governors shortly after the 2016 presidential election. He reminded us that many people were now feeling vulnerable and that, as lawyers, we had a responsibility to let them know that everyone is equal before the law and that the law is here to protect everyone. His keen intellect, down-to-earth manner, and strong sense of empathy will be sorely missed.

Also missed will be former MATA President Ed Wallace. In addition to being a great trial lawyer, Ed was funny and warm. He made a room happier when he entered it, and we are all sadder now that he's gone.

Finally, Justice Ruth Bader Ginsburg. A trailblazer and legal giant. Apart from that, in these polarized times, it's worth remembering that Justice Scalia was one of her best friends. Whatever our political persuasions, that's an example we can all learn from.

So, on that sad but hopeful note, onward to this issue of the MATA Journal.

Jonathan A. Karon, the editor-in-chief of the MATA Journal, is a past president of MATA. He is of counsel at the KJC Law Firm in Boston. In his national practice, he represents the catastrophically injured, including cases involving traumatic brain injuries, amusement ride accidents and defective products. He can be reached at (617) 720-8447 or at jkaron@kjclawfirm.com.

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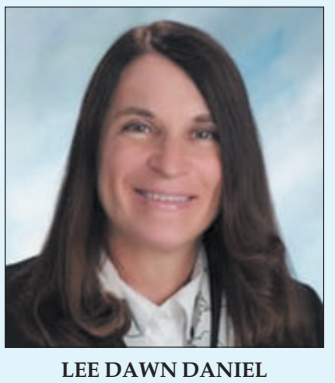

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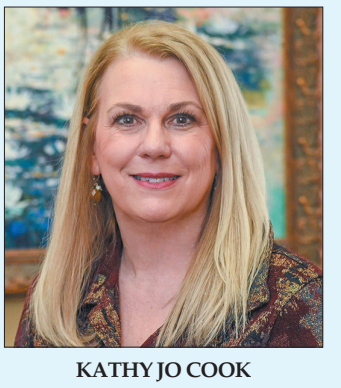

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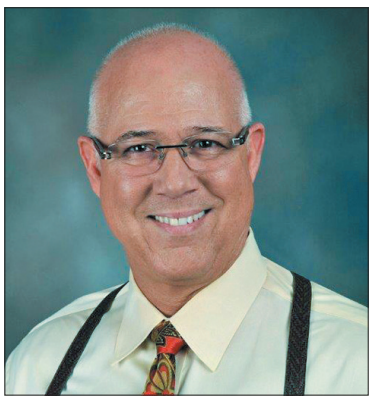
MATA brings in CLE stars from across America



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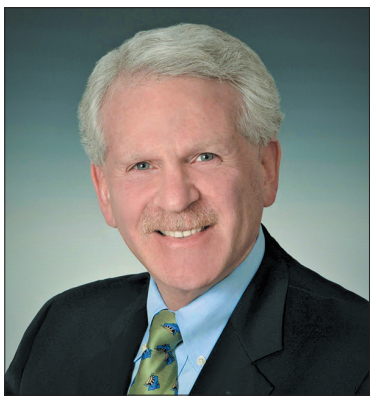

MARK MANDELL

RANDI MCGINN

JOHN GOMEZ

Although the pandemic has put a damper on in-person programs, one bright spot has been the ability to bring a number of national speakers to present to our members 'live' through virtual webinars. Over the past months, MATA members have learned from Keith Mitnik of Florida, Mark Mandell of Rhode Island, Randi McGinn of New Mexico and John Gomez of California.

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Animations in PI cases

Continued from page 1

it is often imperative to begin with your experts. Their data, measurements and calculations need to be employed with great accuracy or you will not survive the inevitable objection. The expert who creates your animation must be in touch with all others regarding the subject of the animation and must adhere to all technical specifications.

In effect, the animation is often a visual summary of lengthy and sometimes unavoidably dull expert testimony. For today's increasingly inattentive jurors, an animation can mean the difference between victory and defeat.

Animations are useful in any case where there is movement or progression of some kind. Many are accustomed to seeing them in motor vehicle cases (see shefflaw.com/animations). But they can also be used in cases where degeneration of a structure occurs over time, leading to catastrophic failure. One example is when the foundation of a building becomes rusted and collapses, or when corrosion eats through a high-pressure pipe, resulting in an explosion

(see shefflaw.com/animations).

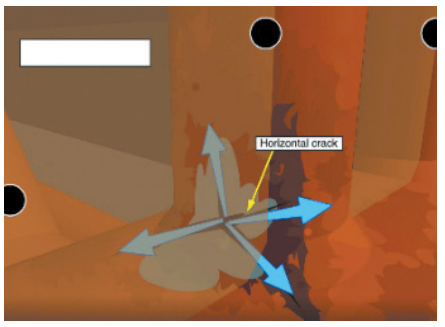
Animations can be helpful in demonstrating how a fire progresses through a building, allowing jurors to understand how inhabitants became trapped.

Animations can also be used in the damages portion of your case. They can demonstrate the gradual progression of brain injury over days, weeks or months, or the visual realization of degeneration following an orthopedic injury, which can take place over years.

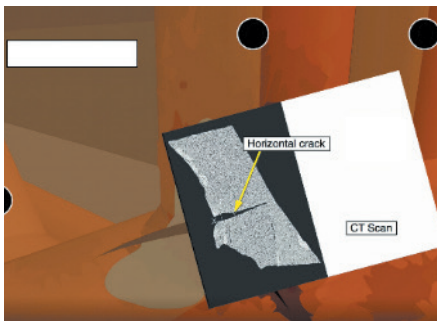
In effect, they can provide a crystal ball, based upon expert opinion, to allow a jury to see how an injury will affect your client many years from now. Again, you must make sure your expert medical witness approves of your animation, and develop direct examination that makes it relevant to his/her testimony.

In addition to review and input from experts, you can make your animations more credible by "grounding" them in real evidence. By this I mean using photographic and other actual evidence within the animation in order to demonstrate to jurors or others that there is indisputable visual confirmation. We usually do this by superimposing real evidence on top of the animated version. The following demonstrates how actual photographs and real evidence can dovetail with your animated presentation in order to properly "ground" it in reality:

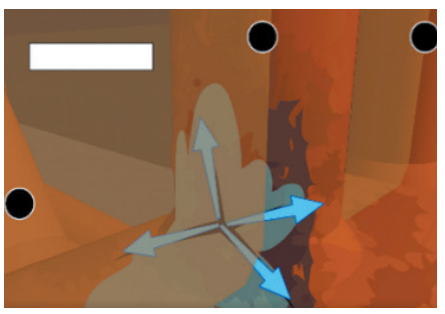
Animation of a structural crack



Crack confirmed and "grounded" by CT scan done after explosion



Animation of alleged source of explosion



Source of explosion "grounded" by photograph of blowout taken after explosion

Today, more than ever, animations can be an important tool at both trial and mediation. They are helpful in any case where movement or progression over time is relevant. It's important to work with experts in order to make sure that your animation is relevant or even admissible. When done correctly, animations can greatly enhance liability or damages in your case.

Doug Sheff is the only attorney in Massachusetts to have served as president of the Massachusetts Bar Association, president of the Massachusetts Academy of Trial Attorneys, governor of the American Association for Justice, and trustee of the National College of Advocacy. Sheff Law is a leader in wrongful death and personal injury cases, including fire and explosion, construction site, trucking and traumatic brain injury cases. The firm has handled some of the most significant cases of the decade, including the Aaron Hernandez wrongful death case, Columbia Gas explosion cases and the Back Bay fire case. Doug has received numerous honors and awards and was named one of Massachusetts Lawyers Weekly's Lawyers of the Year for 2019.

Update on HITECH medical records requests

Continued from page 4

DHHS on standard of review applicable to information blocking. DHHS is clearly fed up with the gamesmanship of medical records contractors; little else could explain its decision to "emphasize that an actor's practice of charging an individual, their personal representative, or another person or entity designated by the individual for electronic access to the individual's EHI would be inherently suspect under an information blocking review." 21st Century Cures Act Regulations, 85 Fed. Reg. 25,792 (2020).

"Patients have already effectively paid for their health information, either directly or through their employers, health plans, and other entities that negotiate and purchase health care items and services on their behalf." *Id.* at 25,886.

All of this suggests that challenging information blocking by medical records contractors can be a fruitful exercise for those attorneys and clients/patients willing to undertake the effort.

DHHS on delay tactics by medical records contractors. DHHS alludes to "commenters" urging delay in implementation of the new regulations well beyond the current Nov. 2, 2020, enforcement date: "commenters recommended that [the Office of the Inspector General (OIG)] not take any enforcement action for a period of 18 months or two years after the effective date of the final rule." 21st Century Cures Act Regulations, 85 Fed. Reg. 25,792 (2020).

Indeed, "[s]ome commenters recommended a period of enforcement discretion of no less than five years during which OIG would require corrective action plans instead of imposing penalties for information blocking. One commenter also recommended that [DHHS] 'grandfather' any economic arrangements that exist two years from the date of the final rule." *Id.*

DHHS did not identify the "commenters" in question, but it is difficult to avoid speculating that those "commenters" were probably some of the same medical records contractors that have spent a decade or longer deftly attempting to avoid compliance with HITECH.

In any event, DHHS did not yield — much: "[t]aking these comments into consideration, we have delayed the compliance date of the information blocking section of this rule (45 CFR part 171). The compliance date for the information blocking section ... will be six months after the publication date of this final rule." *Id.* And so it is: Nov. 2, 2020. 45 C.F.R. §171.101(b) (2020).

One other delay is worth bearing in mind. "Until May 2, 2022, electronic health information for purposes of [information blocking] is limited to the electronic health information identified by the data elements represented in the [United States Core Data for Interoperability (USCDI)] standard adopted in [45 C.F.R.] §170.213." 45 C.F.R. §171.103(b) (2020). The USCDI Version 1 standard is beyond the scope of this article, but is available at https://www.healthit.gov/isa/united-states-core-data-interoperability-uscdi (last accessed Oct. 7, 2020).

But do not expect certified medical records. Refusing to provide certified medical records to counsel is one way that medical records contractors have placed pressure on counsel to submit an additional, non-HITECH request. It is unlikely that medical providers will begin gladly certifying medical records directed to a client/patient. See the March 2020 MATA Journal article for a discussion of this issue.

Best practices after Nov. 2, 2020. Truly cautious counsel, perhaps doubtful that counsel will qualify as "another person or entity designated by the" client/patient, might still do well to draft HITECH letters so as to direct that the provider ship the records directly to the client/patient.

If counsel insists on listing himself or herself as the recipient of the medical records, then counsel should draft HITECH letters to request access to medical records via an internet portal, in order to avoid an active "copying" step through which a medical records contractor might legitimize HITECH-noncompliant fees.

As under pre-*Ciox* practice, HITECH letters should bear the client's letterhead and signature. HITECH letters should demand that the provider advise as to any records available only as paper copies, and as to the cost of copying any records, prior to the provider sending such records.

All HITECH letters should invoke the HITECH Act and its regulations, while a HITECH letter requesting that the provider send records directly to counsel should also invoke the regulations implementing the information blocking restrictions of the 21st Century Cures Act.

If the provider and the contractor refuse outright to comply with HITECH, or refuse to adjust an invoice to either the $6.50 flat rate or a fee truly reflective of the actual cost of making a digital copy of digital records, then counsel should file a complaint with the DHHS Office of Civil Rights. Note that the more formal procedure for obtaining review of a HITECH denial is set forth in 45 C.F.R. § 164.524(d)(4).

Above all, prepare for a fight. Years ago, a very large and very profitable medical records contractor industry was built on charging what could easily be described as unreasonable fees. The big medical records contractors will not give up without a fight, and their resistance will take every available form.

Kevin J. Powers 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.

Sources of duty in construction injury cases

Continued from page 3

If the homeowner hires a person to do the work, the homeowner shall act as supervisor. Thus, liability may arise from the homeowner's retained right to control the work. *Corsetti v. Stone Co.*, 396 Mass. 1, 9-11 (1985); Restatement (Second) of Torts §414.

Likewise, owners are answerable for their own negligence in giving orders or direction to their contractors. Restatement (Second) of Torts §410. Homeowners must properly monitor their subcontractors but will not be held to the standard of a construction supervisor. "A homeowner building his own home under an exemption is recognized by the State Building Code as a nonexpert ... who is involved only in periodic supervising of a less complex construction job." *St. Germaine v. Pendergast*, 411 Mass. 615, 617-18 (1992).

However, violation of the Building Code or other regulations or statutes may nonetheless be considered by a jury as evidence of negligence. *Id.* at 620-21.

A landowner who hires a contractor may claim protection from liability for its contractor's negligence only if the contractor is carefully chosen and can lawfully perform the work. Negligence in the selection of a contractor will impose liability on the owner — particularly where the contractor is employed to do work with a risk of physical harm if done improperly or to perform a safety duty that the employer owes to third persons. Restatement (Second) Torts §411.

The insulation from liability enjoyed by an owner who hires an independent contractor is available only to an owner "who has used due care in selecting and agreeing with an independent contractor to do lawful work." *Todd v. Wernick*, 334 Mass. 624, 626 (1956), quoting *Pickett v. Waldorf System, Inc.*, 241 Mass. 569, 570 (year).

Accordingly, an owner who proceeds with an unlicensed contractor may be deemed liable for injuries caused by the contractor's negligence. A contractor's licensure, however, may not end the inquiry; the Restatement also requires an owner to exercise care to employ a "competent and careful contractor" — that is "a contractor who possesses the knowledge, skill, experience, and available equipment which a reasonable man would realize that a contractor must have in order to do the work which he is employed to do without creating unreasonable risk of injury to others, and who also possesses the personal characteristics which are equally necessary." Restatement (Second) Torts §411.

In *Vertentes v. Barletta Co.*, 392 Mass. 165 (1984), the court ruled that Restatement sections imposing vicarious liability on employers for the negligence of independent contractors did not apply to injuries suffered by the negligent contractors' own employees. A sub-contractor's employee was struck by a vehicle while removing orange marker barrels from the highway, where they had been negligently placed by his employer. The worker sought to impose vicarious liability on the general contractor, relying on *Whalen v. Shivek*, 326 Mass. 142, 150 (1950), in which the SJC held that one who hires an independent contractor to perform work that is inherently dangerous is liable for the contractor's negligent failure to take precautions. See Restatement (Second) of Torts §§416 (Work Dangerous in Absence of Special Precautions) and 427 (Negligence as to Danger Inherent in the Work).

Distinguishing cases predicated on the employer's direct negligence, such as *Poirier, supra*, the court ruled that Restatement references to "injury to others" and the holding of *Whalen* did not encompass the harm to the negligent subcontractor's employee.

Significantly, neither the language nor the reasoning of *Vertentes* detracts from the availability of such a vicarious liability claim for an injury to a worker employed by another contractor.

Similarly available, and certainly similarly limited, are like sources of vicarious liability. For example, an owner-employer who entrusts an independent contractor to complete repair or construction work on the premises may be subject to the same liability as though he had retained the work in his own hands. See Restatement (Second) Torts §422; see also *Curtis v. Kiley*, 153 Mass. 123, 126 (1891).

Another example is the employer's vicarious strict liability for injury caused by a contractor's abnormally dangerous activity. See Restatement (Second) Torts §427A; see also *Clark-Aiken Co. v. Cromwell-Wright Co.*, 367 Mass. 70, 89 (1975).

Determining an owner's liability for a contractor's negligence as to dangers inherent in the work can be confounding. As a general rule, the employer remains liable for injuries resulting from dangers that it should contemplate at the time that it enters into the contract, and cannot shift to the contractor the responsibility for such dangers, or for taking precautions against them. See Restatement (Second) Torts §§416 (and comment a.) and 427.

The complement to this rule is "collateral negligence," meaning negligence collateral to the contemplated risk. Restatement (Second) Torts §426. The distinction here is one between negligence that is unusual, abnormal or foreign to the normally contemplated risks of doing that kind of work, as opposed to negligence that is a regularly contemplated risk.

"Thus an employer may hire a contractor to make an excavation, reasonably expecting that the contractor will proceed in the normal and usual manner with bulldozer or with pick and shovel. When the contractor, for his own reasons, decides to use blasting instead, and the blasting is done in a negligent manner, so that it injures the plaintiff, such negligence is 'collateral' to the contemplated risk, and the employer is not liable.

> Determining an owner's liability for a contractor's negligence as to dangers inherent in the work can be confounding.

If, on the other hand, the blasting is provided for or contemplated by the contract, the negligence in the course of the operation is within the risk contemplated, and the employer is responsible for it.

"The employer is required to contemplate, and to be responsible for, the negligence of the contractor with respect to all risks which are inherent in the normal and usual manner of doing the work under the particular circumstances. (See §427.) He is not required to contemplate or anticipate abnormal or unusual kinds of negligence on the part of the contractor, or negligence in the performance of operative details of the work which ordinarily may be expected to be carried out with proper care, unless the circumstances under which the work is done give him warning of some special reason to take precautions, or some special risk of harm to others inherent in the work." Restatement (Second) Torts §426, comments a. and b.

Several cases help to illustrate just how blurry the line is between inherent danger for which the landowner-employer may be responsible and collateral danger for which responsibility rests solely with the negligent independent contractor.

• In *Pye v. Faxon*, 156 Mass. 471, 31 N.E. 640 (1892), a contractor building a wall on private land splashed mortar over the plaintiff's adjoining windows and clothes hanging in her yard. The court held this was not collateral negligence, and the employer was held liable. In comparison, *Strauss v. City of Louisville*, 108 Ky. 155, 55 S.W. 1075 (1900), involved a contractor who splashed mortar from a box on the ground into eye of a man passing on the sidewalk. The court held this was collateral negligence, and thus the employer was not liable.

• In *Pickett v. Waldorf System*, 241 Mass. 569, 136 N.E. 64, 23 A.L.R. 1014 (1922), a contractor employed to wash windows of a lunchroom allowed water to accumulate on the sidewalk and freeze, causing a pedestrian injury. The court found this was collateral negligence for which the employer was not liable. On the other hand, in *Wright v. Tudor City Twelfth Unit*, 276 N.Y. 303, 12 N.E.2d 307, 115 A.L.R. 962 (1938), a contractor employed to wash rubber mats in a building did it on the public sidewalk with the employer's knowledge and approval. The court held that the employer was liable.

• *Davis v. John L. Whiting & Son Co.*, 201 Mass. 91, 87 N.E. 199, 18 A.L.R. 782 (1909), involved a contractor who was to paint shutters on a building. The employer reasonably expected they would be painted in place because this was the usual method. The contractor removed the shutters and dropped one five floors. The court held that this was "collateral negligence," for which employer not liable. The court distinguished the case where the removal was contemplated by the contract and stated the employer would then be liable.

The distinctions may be elusive, but it is nonetheless useful to be alert to the possibility of vicarious owner liability in these circumstances.

Thorough evaluation of a construction site injury case requires consideration of potential owner liability. There is really no downside to including all exposed parties, and on occasion a properly framed claim against the property owner may provide the key that unlocks the way to a successful resolution.

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