

Journal

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President's Message



Prioritizing well-being

By Rhonda Maloney

As I embark on this new year of service to MATA, I am humbled



to have been nominated and voted into this position by the Board of Governors. I am cognizant of the incredible

work done by MATA in these last several years, particularly during the pandemic, in an effort to continue to bring justice to our clients and help the courts navigate unprecedented circumstances, keep at first the virtual doors open and then the actual doors open, and allow the justice system to continue its vital work in the commonwealth.

As the late Chief Justice Gantz so eloquently wrote on March 19, 2020, when asking for guidance from the bar on improvisations to keep the wheels of justice turning, "If we stand strong, resilient and adaptive, and work together as judiciary and bar to find 'duct tape' solutions to immediate problems that otherwise might take years to solve, we will leave this crisis with a better, more resilient system of justice. And perhaps, if we do our jobs well, a future generation may well say of us, 'This was their finest hour.'"

In the last several years, MATA has worked hand in hand with the courts on novel and innovative approaches to our new reality, and out of that new-found creativity came changes including remote hearings, improved e-filing capacity, six-person juries in Superior Court and most

recently providing key guidance on rules changes involving remote depositions.

I am even more cognizant of the incredible work done by MATA during its infancy in 1975, a history recently brought to light by our own John Carroll in his November 2022 Journal article. The founders and early presidents including Paul Sugarman, Jim Reardon, John J.C. Herlihy, Mike Mone, Jim Meehan, Camille Sarrouf and Charlie Barrett forged the way in the Courts and in the legislature on matters important to the rights of the injured and covered such topics as failure to warn, subsequent remedial measures, breaches of express and implied warranties, the discovery rule in medical malpractice cases and c. 93A with regard to insurance bad faith, to name just a few.

It strikes me, too, that their legacy lives on in us. I see it in the generations of firms, in addition to new lawyers and those of us who have been around the block who, together, constitute our great membership. I see it in the courtrooms and the State House, and I see it in the information and support so generously exchanged on the listserv every day. That legacy is one of great passion for the law, steadfast service to our clients in their darkest hour and the foresight to know that what we do today can and often does impact the rights and freedoms of our clients and our communities tomorrow. That living legacy is the very core of MATA, and I am proud to be leading this great organization in that quest this year.

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EDITOR'S NOTE

Fight defense junk science with 'Daubert'

By Jonathan A. Karon

A frustrating stereotype is that plaintiff's attorneys retain hired



gun experts who will say anything and engage in "junk science." It's frustrating because it's exactly

backwards. A good plaintiff's attorney wants an honest expert who will tell them if they don't have a case. When it comes to medical experts, plaintiff attorneys want to work with their client's treating physician, if available. In contrast, defense counsel and insurers frequently retain experts, who, like the queen in "Alice Through the Looking Glass," are willing "to believe [or at least testify to] six impossible things before breakfast".

Lately, this seems to be most common with two kinds of experts: the defense doctor

who testifies based solely on a medical records review; and the accident reconstructionist who testifies long after the crash based on minimal data. Fortunately, there is a way to address both situations, a Daubert/Lannigan motion. For some reason a lot of plaintiff's attorneys think that those motions are only brought by defendants. But I routinely serve these motions when I think the defense expert is engaging in junk science (or more technically, "making it up as they go along").

A brief review of the law. The trial judge serves as a gatekeeper who must exclude any expert testimony which lacks reliability. *Commonwealth v. Lannigan*, 419 Mass. 15, 26 (1994) (adopting standard of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)). The purpose of having a trial judge serve as a

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All-Star Tip: Redirect a ready reserve

By John Carroll

Redirect examination is an underused tool, partly because it is seldom



prepared for in advance; hence, it is overlooked in the moment at trial. Yet, it can often be the pivot point in your case.

Redirect is governed by

The Mass Guide to Evidence, Section 611 (which tracks the Federal Rule of

Evidence, Rule 611). That rule gives wide discretion to the trial judge as to allowing the scope of enquiry. It defines redirect as limited to matters raised in cross examination.

It is easily defined in the rule book; it is harder to delineate in the heat of trial. Very often, cross-examination may elicit facts not raised in direct. That "opens the door" to a new matter of enquiry on redirect. If you are prepared for such an opportunity, and you listen attentively to your opponent's cross, you may be

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'Mounsey' turns 50

By Thomas R. Murphy

Boy, time flies. A half-century ago, Chief Justice Tauro issued a couple



of landmark decisions that blew the doors off status-based classifications in premises liability cases. One was *BHA v. Hemingway*,

whose reasoning discarded the agrarian model used to categorize the landlord-tenant relationship. The other was *Mounsey v. Ellard*, a cardinal case in our precinct of the law and one worth reviewing to better understand a landowner's duty to others.

In January 1967, Officer Mounsey was a Concord police officer who, while serving a summons for parking violations, slipped and fell on ice at the Ellard's home. Apparently, the homeowners had chosen not to repair a defect in their drainage system and as a result water, which turned to ice, accumulated and the officer slipped and fell. The Complaint (actually, in those days it was called a Declaration) had counts for three theories of liability: negligence, gross negligence, and willful, wonton, or reckless conduct. Back then there was no discovery and when the case

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went to trial the judge directed a verdict on all counts after the opening statement. On appeal, the Court affirmed the ruling on the second and third counts — counsel's opening being "devoid of any facts which would have warranted a finding" under either theory. But they drilled down on the negligence count, and with Justices Quirico and Reardon concurring in part and dissenting in part, and Justice Kaplan concurring, they created the standard of care that we enjoy today.

Back then the common law put visitors on others' property in three categories: trespassers, licensees, or invitees which made out a "sliding scale" such that as the visitor's status improved from one to the next the property owner's corresponding duty increased. But in the end, *Sweeny v. Old Colony* (1865) was the standard: a plaintiff had to prove "some obligation or duty" which the defendant had "left undischarged or unfulfilled." Trespassers were totally out of luck: they had no rights because property owners were not "bound to protect or provide safeguards for wrongdoers." And licensees who entered property uninvited or "without any enticement, allurement or inducement" from the owner, did so "at his [or her] own risk and enjoy[ed] the license subject to its concomitant perils." There was no duty owed to those who visit solely "for their own convenience or pleasure, and who are not either expressly invited to enter or induced"

to go onto the property. The gist of the rule was there was liability if a visitor had been "led to believe that" the property was "intended to be used by visitors or passengers" and the owner did more than simply acquiesce in the visit.

These harsh rules grew out of the importance of property rights, which some say was the primary interest the Founders wanted to protect (that and slavery). Property owners' interests were highly favored and their duty to a licensee was "not to inflict willful or wonton injury." The reasoning, going back to English common law, was that a landowner should only be bound to a duty of reasonable care "in those cases where he invited the visit for his own purpose." Not exactly what we'd call neighborly.

One problem with implementing this rule was the exceptions, which eventually ate up the rule. Is a cop an invitee — nobody asked him to come knocking? How about a letter carrier — after all, the property owner didn't mail the letter? And what about a garbage collector? Looking at how other States handled such classifications the Court saw that the licensee classification unduly favored "landowners interests over the individual citizen's interest as to his personal safety." Another problem discussed in *Mounsey* was that in modern society it no longer made sense to predicate a landowner's duty based solely on a visitor's status — that may have worked in rural society (a distinction Chief Justice

Tauro also referred to in *Hemingway*) with sparse land and large estates, but the immunity the licensee rule afforded landowners could not "be justified in an urban industrial society." He concluded that the rule "no longer conforms to public opinion" and, quoting the Supreme Court in an admiralty case, held that "the licensee-invitee distinction in the modern context has 'produced confusion and conflict.'" So they got rid of it.

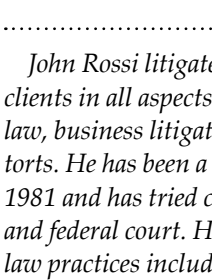
They specifically said: "we no long follow the common law distinction between licensees and invitees and, instead, create a common duty of reasonable care which the occupier owes to all lawful visitors." From there, we get the guts of today's jury instruction in these cases: "A landowner must act as a reasonable [person] in maintaining his [or her] property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" which is a standard that they nicked from a case out of the DC Circuit the year before. And on balance, *Mounsey* is also the source of the common instruction from defendants, who are wont to point out that the holding "does not make landowners and occupiers insurers of their property nor does it impose unreasonable maintenance burdens." So happy 50th, *Mounsey*.

Changes to Superior Court Civil Motion Practice

By John F. Rossi

The most recent changes to the Superior Court Rules regarding civil motions took effect on Sept. 1, 2023. These changes require many changes to the way in which we have been handling several aspects of civil motion practice in the Superior Court. These changes involve amendments to several Superior Court rules, including Rule 9A, 9B, & 9.C, and include a new Rule 9F.

Notice of Filing: Rule 9A(b)(2)(iii) provides clarity to what many refer to as the List of Documents. The List of Documents is now referred to



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as a Notice of Filing. The amended rule states:

"The moving party must give prompt notice of the filing of a Rule 9A Package by serving all parties with a copy of a notice of filing in a separate document that lists the title of each document included in the Rule 9A Package, and by filing the notice with the Rule 9A Package. No other list of documents need be included in the Rule 9A Package."

Exhibits: Rule 9A(b)(2)(iv) appears to address the expanding availability of e-Filing as it relates to the use of exhibits. Exhibit stickers or notations on the page of the exhibit are no longer permissible. In their place are tab dividers or, in the case of electronically filed exhibits, page markers. Consecutive page numbering is a new requirement. The amended rule provides:

"Exhibits, attached to a motion, memorandum or affidavit, or contained in a separate appendix, must be separated from one another by off-set tab dividers, or page markers if filed electronically, and the pages of the exhibits must be consecutively numbered. If more than one exhibit is included, a Table of Contents or Exhibit Index shall precede the exhibits."

Summary Judgment – Response to Moving Party's Statement of Facts: Rule

9A(b)(5)(iii)(A) provides additional guidance to this item. If a party's obligation to send the moving party's statement of facts in electronic form has been excused, the response thereto may be in a separate document. Also, if not properly controverted, each uncontroverted fact set forth in the statement of facts is deemed to have been admitted. The rule's additional language states:

"Where the obligation to send the Moving Party's Statement of Facts in electronic form has been excused, the response thereto may be in a separate document. For purposes of summary judgment, each fact set forth in the moving party's statement of facts is deemed to have been admitted unless properly controverted in the manner provided in this Paragraph (b)(5)(iii)(A)."

With regard to the Joint Appendix for motions for summary judgment, Rule 9A(b)(5)(v)(A) now requires consecutive page numbering, the exhibit markings changes discussed above, and other issues: It now reads:

"All exhibits referred to in the memoranda supporting or opposing a motion or cross-motion for summary judgment, or in the Consolidated Statement of Facts, must be filed as a single joint appendix, which must include an index of the exhibits ("Joint

Appendix"). The initial moving party, with the cooperation of each opposing party, is responsible for assembling the Joint Appendix and index. All pages of the Joint Appendix must be consecutively numbered by page, and each exhibit must be separated by an off-set tab divider, or page marker if filed electronically. The exhibits served by the moving party with its Motion Papers must include either the consecutive numbering and offset tabs. Where an opposing party relies upon any evidence included in the moving party's exhibits, the opposing party must cite to that evidence using the form of designation of the moving party. If the opposing party designates new exhibits in accordance with Paragraph (b)(5)(iii)(D), it must serve those new exhibits, together with an index of the new exhibits, on the moving party with the Opposition, and it must serve the index on the moving party in electronic form (unless electronic service is excused). Those new exhibits must begin with the next consecutive designation following the last designation by the initial moving party (consecutive page numbering and off-set tab dividers). The opposing party must serve the original and one copy of those new exhibits with its Opposition. If the summary judgment package is e-filed, the moving party is

responsible for delivering a courtesy copy of the Joint Appendix to the Session Clerk, if the clerk or hearing judge requests.”

A motion for appointment of a special process server is now excused from compliance with Paragraph (b) of Rule 9A, Ex Parte motions must be served within 3 days of a ruling on the motion. A party filing an emergency motion shall certify in the motion that it has made a good faith effort to contact and confer with all parties regarding the subject of the motion, and shall set forth in the motion whether any party assents to or opposes the emergency motion. The nature of the emergency must be clearly specified in the motion.” The applicable Rule 9A(d)(1) now provides:

“A party filing an ex parte motion, emergency motion, or motion for appointment of a special process server is excused from compliance with Paragraph (b) of this rule. Ex parte motions must be served within 3 days of a ruling on the motion. Emergency motions, other than ex parte motions, must be served on all parties forthwith upon filing; provided, however, that a party filing an emergency motion shall certify in the motion that it has made a good faith effort to contact and confer with all parties regarding the subject of the motion, and shall set forth in the motion whether any party assents to or opposes the emergency motion. The nature of the emergency must be clearly specified in the motion.”

Motions Involving Incarcerated Parties pursuant to Rule 9A(d)(2) Motions Involving Incarcerated Parties are now subject to the following:

“Administrative Directive No. 92-1, which governs civil actions filed by a plaintiff who is

incarcerated, exempts that part of subdivision (b)(4)(i) of this Rule that requires the filing of the Rule 9A package. Such exemption also applies to motions in civil actions where a defendant is incarcerated and self-represented, but all parties, incarcerated or not, must serve copies upon all other parties in the case. Upon release, a previously incarcerated party shall promptly file and serve notice of change of address. All provisions of Rule 9A shall take effect (a) for the previously incarcerated party, the day of release; and (b) for

the non-incarcerated party, the day of notification of the other party’s release.”

Certificates of Service which simply state words to the effect that “the forgoing has been served upon all attorneys of record” are no longer in compliance with Rule 9B. They must now be dated, the manner of service must be specified, the names and addresses of the attorneys served must also be specified as does the identity of each respective party they represent. A new proposed form for the certificate of service is also provided. Rule 9B now provides:

“The last page of every paper served in accordance with Mass. R. Civ. P. 5(a) shall contain a brief statement showing the date and manner of service of the paper; the names and addresses (mailing or email) of all counsel (or parties) served; and the party represented by each counsel served. The statement may be in the following form:

I hereby certify that on [date] a true copy of the above document was served by

[hand/mail/email] upon:

Attorney name [or prose party’s name]

Address [mailing or email]
Attorney for r or prose party]

Dispositive motions have additional requirements which require counsel for each of the parties involved with a:

motion to dismiss: to make a good faith effort to narrow areas of disagreement that may be resolved through amendment of the pleading, curative action in respect to defective service, or other means related to the subject of the motion to dismiss, and in **motions for summary judgment:** to discuss whether the moving party should refrain from making any motion qualifying for decision without a hearing under Superior Court Rule 9A(b)(5)(vi) and make a good faith effort to narrow areas of disagreement that may be resolved through amendment of the pleading, a stipulated dismissal of specified claims or parties, or otherwise.

Rule 9C(b) now provides:

“When conferring about any motion under Mass. R. Civ. P. 12, counsel for each of the parties shall make a good faith effort to narrow areas of disagreement that may be resolved through amendment of the pleading,

curative action in respect to defective service, or other means related to the subject of the motion to dismiss. When conferring about any motion under Mass. R. Civ. P. 56 or 41(b)(2) (second sentence), counsel for each of the parties shall discuss whether the moving party should refrain from making any motion qualifying for decision without a hearing under Superior Court Rule 9A(b)(5)(vi) and make a good faith effort to narrow areas of disagreement that may be resolved through amendment of the pleading, a stipulated dismissal of specified claims or parties, or otherwise.”

Discovery motions must now contain the following:

If arising out of a party’s **responses to interrogatories or a request for admission**, the motion must be accompanied by a brief which shall set forth separately and in the following order:

- the text of the interrogatory or request,
- the opponent’s response and
- an argument.

Alternatively, the text of the interrogatory or request and the opponent’s response may be provided in an appendix to the brief, as long as the brief includes an argument addressed to each interrogatory or request. No argument may be included in the appendix.”

The language of the applicable Rule 9C(c) follows:

“All motions arising out of a party’s response to an interrogatory or a request for admission or arising out of a party’s response to, or asserted failure to comply with, a request for production of documents shall be accompanied by a brief. With respect to each interrogatory or request at issue, the brief shall set forth separately and in the following order (1) the text of the interrogatory or request, (2) the opponent’s response and (3) an argument. Alternatively, the text of the interrogatory or request and the opponent’s response may be provided in an appendix to the brief, as long as the brief includes an argument addressed to each interrogatory or request. No argument may be included in the appendix.”

Requests to Amend Tracking Order to permit additional discovery are governed by a new rule, Rule 9F. Such

motions must identify the following:

- the number of times the Tracking Order has previously been enlarged in the case;

(2) a brief summary of the discovery that has been conducted to date;

(3) the discovery remaining to be conducted;

(4) a brief summary of the nature of the claims in the case; and

(5) any other information deemed relevant by the movant(s).

The new Rule 9F states:

“All motions seeking to amend the Tracking Order to permit additional discovery must identify the following:

(1) the number of times the Tracking Order has previously been enlarged in the case; (2) a brief summary of the discovery that has been conducted to date; (3) the discovery remaining to be conducted; (4) a brief summary of the nature of the claims in the case; and (5) any other information deemed relevant by the movant(s)

Motions to Reconsideration have some material changes which are covered in the amendments to Rule 9D. The permissible length of these motions has been significantly reduced to 10 pages. If based upon a particular and demonstrable error in the original ruling or decision, they must now be filed no later than 21 days after such ruling or decision. This constitutes a dramatic change to the unspecified time limit for filing such a motion.

The grounds for a motion for reconsideration are now expressly limited by rule to:

- newly discovered evidence that could not be discovered through the exercise of due diligence before the original motion was filed;
- a change of relevant law; or
- (3) a particular and demonstrable error in the original ruling or decision.

Furthermore, A Motion for Reconsideration shall otherwise raise no new grounds for relief not raised in the original motion or opposition and shall not reiterate previously advanced arguments.

Rule 9D as amended now states:

“A Motion for Reconsideration shall be based on (1) newly discovered evidence that could not be discovered through the exercise of due diligence before the original motion was filed; (2) a change of relevant law; or (3) a

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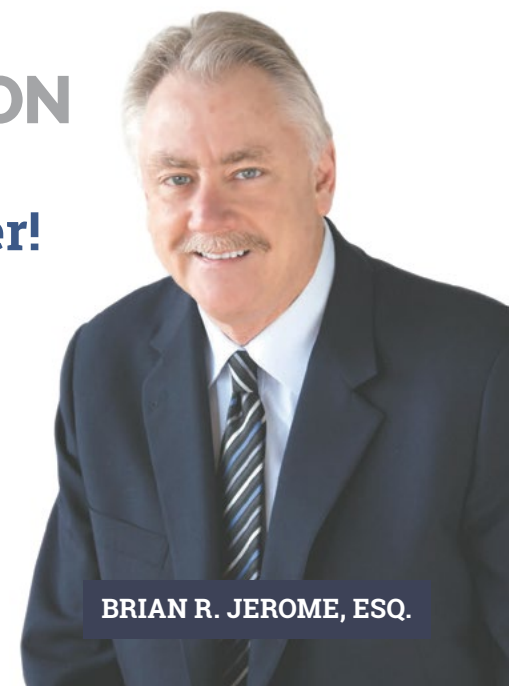
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Changes to Superior Court Civil Motion Practice

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particular and demonstrable error in the original ruling or decision. A Motion for Reconsideration shall otherwise raise no new grounds for relief not raised in the original motion or opposition and shall not reiterate previously advanced arguments.

Motions for Reconsideration shall be served and processed consistent with Rules 9A and 9C. A Motion for Reconsideration shall identify, in the first paragraph, the newly discovered evidence, change of relevant law, or

particular and demonstrable error in the original decision on which the motion is based. A Motion for Reconsideration based on a particular and demonstrable error in the original ruling or decision must be served pursuant to Rule 9A within 21 days of entry of the original ruling or decision.

A Motion for Reconsideration and supporting memorandum shall be contained in a single document and shall not exceed 10 pages in length. The words "MOTION FOR RECONSIDERATION" shall appear

clearly in the title of the motion. Any opposition shall not exceed 10 pages in length. Upon filing, the clerk shall transmit the motion and supporting papers to the Justice who decided the original motion, but if that Justice has retired or is otherwise unavailable, the clerk shall transmit the motion to the Regional Administrative Justice for the region where the case is pending. If, upon reviewing the motion and supporting documents, the Justice desires to hold a hearing on the motion for reconsideration, he or she may schedule a hearing thereon.

Alternatively, he or she may refer the motion for reconsideration to the Regional Administrative Justice for the region where the case is pending.

Motions seeking reconsideration of decisions made pursuant to Mass. R. Civ. P. SO(b), 52(b), 59(b), 59(e) or 60(b) are considered made or served for purposes of those rules on the date of service pursuant to Rule 9A, provided that the moving party shall also simultaneously file and serve a "Notice of Motion for Reconsideration" in the same manner as provided in the final sentence of Rule 9E."

Redirect examination a ready reserve

Continued from page 1

handed a pivotal gem.

In one instance, the author watched a direct examination of the plaintiff. She had been rear-ended by a bus and suffered various soft tissue cervical injuries. As we know, such injuries can easily be painted as sketchy. Juries are skeptical and inclined to agree.

In this case, moreover, defense counsel knew something plaintiff's counsel did not: the plaintiff had suffered a very similar injury in a previous rear-ender some six years before the accident at bar. Cross exam elicited an admission to that effect. It had not been brought out on direct examination.

Such developments, on such facts, tend to be fatal to the plaintiff's case. But plaintiff's counsel realized, even if he did not know of the prior accident, he knew his client had worked consistently for 20 years prior to the accident giving rise to the case before the jury.

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Not only had she worked consistently, but she was also consistently promoted to ascending mid-level management positions at Polaroid. Thinking quickly, he thanked defense counsel for bringing this point up. He had forgotten to mention it on direct. He then turned to the plaintiff and asked her if she missed any work from the prior accident. She emphatically said no. Yet, after this injury, she never worked again, giving up a lucrative job due to the ongoing pain and suffering. The jury awarded her Six hundred fifty thousand dollars (\$650,000.00).

The above incident illustrates why the power of re-direct is often overlooked. It seldom can be prepared for in advance. There is an old adage: "The file ain't the trial". Just because your trial prep was impeccable, there are moments that cannot be prepared for. Those moments may present a chance for a knockout punch on redirect. The key attribute is to listen attentively to your opponent's cross examination.

Listen for signals that invite a response. If your opponent's cross contains questions that require a "yes or no" answer, this can be a strong signal. When such questions are asked, study the witness and the jury. If there is a sense that the witness wants to answer the question more fully, and that the jury wants to hear a more complete answer, consider asking the witness on re-direct what he/she wanted to add but was prevented from doing so.

Juries want completeness. They want to know the whole story. If they sense it is being kept from them, they will look with disfavor on the attorney who does it. (Caveat: be careful, as this is a calculated risk if the witness is not your client, and you do not have a strong sense of what the witness may say. It's a trial lawyer's good judgment).

Juries also like brevity. If you are to redirect, be brief. In and out. One, two or three quick points to clear up or explain points made on cross. Nothing redundant.

An added bonus of redirect is that testimony elicited in response to a question on cross, otherwise inadmissible, can, in some circumstances, be admissible evidence. This is rooted in the concept that opposing counsel "opened the door", making otherwise inadmissible testimony relevant, fair and complete. (See Mass Handbook on evidence, Section 1.8).

A final advantage of re-direct is the notion of "recency." You get the last word. Since you got the first word, you are benefiting from the effect that the concept of primacy and recency have on our thought process. You get to start with the witness and finish with the witness. If done with brevity, it can have a great impact.

Redirect is like a reserve force. If the opportunity presents itself, the application of force at the right time can be devastating. The only preparation is to be present in the moment to seize such unexpected opportunities that may come your way.

(The author thanks Michael Conley for his contribution regarding the reference to Mass. Handbook on Evidence.)



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5 steps to overcome stigma

By Shawn Healy, PhD

This article is for informational purposes only. It is not intended to be used in place of professional advice, treatment, or care in any way. Lawyers, law students, judges, and other legal professionals in Massachusetts can find more on scheduling a Free & Confidential appointment with a licensed clinician here.

While we continue to work with other organizations to fight against stigma in the legal profession around mental health, addiction, and seeking help in general, you can find steps to overcome the battle as an individual here.

In my line of work as a clinical psychologist, one of the biggest barriers to being able to help lawyers, law students, and judges is the stigma that many feel about needing and accepting help. The role of problem-solver or helper is very comfortable to them, but being the one who needs help? Not so much. The stigma associated with mental health treatment has diminished in recent decades, but it still the number one reason why lawyers resist asking for help for an addiction or mental health concern. Many think that their reputations would be negatively affected if others realized that they needed help. Truth be told, we constantly risk our reputations being challenged whenever anyone finds out about our less than perfect qualities. This is the reason why most people try to get to know new people by finding out all they can about said person while revealing as little as possible about themselves.

Letting people know who you are, what your weaknesses are, and what mistakes you've made in life is a very vulnerable experience. That vulnerability makes us feel uncomfortable. When we feel uncomfortable, we try to

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reduce our discomfort as quickly as possible. Unfortunately, most of us choose to reduce our discomfort with a short-term solution; usually through avoidance. Avoidance helps you feel better quickly, followed by a more intense feeling of discomfort the next time you feel vulnerable. Avoidance often makes things worse.

Fighting stigma is very similar to confronting a fear. Fear grows when you give it space to grow (when you avoid it), and fear shrinks when you approach it. The best way to reduce the uncomfortable feeling of being vulnerable is to practice being vulnerable more often. If a particular stigma makes you want to hide some fact about yourself, choose to tell others about that fact. The more you consciously choose to share your vulnerabilities, the less anxious you will become about someone learning about your vulnerabilities.

Obviously, real life is more complicated than a quick pep talk about embracing your vulnerabilities. While we all know that we are all human and that we are all imperfect in our personal lives, we still try to convince others that we are much closer to perfection in our professional

lives. Or at the very least we try to present ourselves as less-imperfect than others. So, on a practical level, how do you confront stigma in your life while also maintaining your professional reputation? Since each situation is different, here are a few places to start.

1. Start small.

Confide in those you already trust, those who have shown a propensity for understanding, compassion, and support toward you. Reveal more to them about your struggles. This will help to unburden you, it will improve your relationships with people close to you, and it will make it easier to seeking help from others if needed.

2. Build a new community.

Start finding others who understand what you are going through to build community. No matter what your struggle is — substance addiction, stress, depression, anxiety, ADHD, etc. — there are people who have gone through what you are experiencing. Learn from others who understand and from those who accept without judgment. Our organization runs a range of groups to help form community.

3. Own your story.

Get more comfortable with your story — your whole story. The more that you can talk about your real self — your struggles and your triumphs, your weaknesses and your strengths — the more resilient you will become.

4. Make it normal.

Because it is. There are countless stories of people — both famous and not — who have recognized a need, sought help, and became more resilient as a result. The more familiar you are with some of these stories, the more normal that shared experience will feel. This will not only give you more hope for your future, but it will also normalize your struggle — which is what makes us all human.

5. Reinterpret the responses of others.

Despite all your efforts, you will not be able to control how others respond to you having struggles and flaws. It's surprising how some people react when they learn that we are all human, but anyway. While you cannot control how people respond to you, you can control how you interpret their response. Most of the time when someone responds harshly to another's vulnerability, it is a defensive response made in fear of their own vulnerabilities — and hence how they personally might be able to handle someone else responding harshly to their own vulnerability. For example, it is often the case that the person who boasts the loudest feels the most insecure. So, try interpreting a person's judgmental response as a subtle reveal of their own vulnerabilities. Instead of responding harshly to their vulnerability, show them how a resilient person acknowledges their own while not backing away.

Stigma, like other fears, only holds power over us when we allow it to. Lawyers, law students, and judges in Massachusetts can talk with one of Lawyers Concerned for Lawyers' licensed clinicians for help for FREE and CONFIDENTIALLY — contact LCL at email@lclma.org, lclma.org or 617-482-9600.

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MATA Annual Dinner

On May 23, 2023, hundreds of MATA members, supporters and friends came to the Sheraton Framingham to learn, network and celebrate the shared support of justice.

During the day, MATA members gathered for a number of timely

seminars including Michael Conley's always-popular *Personal Injury Year* in Review and the annual verdicts panel.

In the evening, dinner attendees got to salute numerous luminaries, including MATA Champion of Justice honoree Gov. Maura T. Healey

and Hon. Serge Georges, recipient of the MATA Judicial Excellence Award. Cheryl Fiandaca, Chief Investigative Reporter for the WBZ-TV I-Team was presented with the MATA Excellence in Media Award, while Michael Joseph Donovan,

the recently retired civil clerk for Suffolk Superior Court, received the MATA Lifetime Achievement Award. MATA Immediate Past President Peter Ainsworth passed the gavel to incoming President Rhonda Maloney.



Douglas Sheff and Gov. Maura Healey



MATA Immediate Past President Peter Ainsworth; Michael Joseph Donovan (Ret.), Civil Clerk for Suffolk Superior Court; and Leo Boyle



Scott Goldberg receives a MATA President's Award from MATA Immediate Past President Peter Ainsworth.



MATA Past President Lee Dawn Daniel receives a MATA President's Award from MATA Immediate Past President Peter Ainsworth.

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David White, Marc Breakstone, Hon. Serge Georges Jr. and Leo Boyle



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Prioritizing well-being

Continued from page 1

MATA's reach is broad. This year we are continuing to provide meaningful recommended jury instructions and comments on proposed rules changes to the Court, and continue to observe and participate in legislative matters, particularly as they relate to our client's rights, ever vigilant against attempts by corporations and pharmaceutical companies to erode those rights. We will continue to support and educate ourselves with stellar CLE's and always on the listserv, and will continue our community service outreach to underserved members of our community. We hope we continue to grow our membership this year as well, so that it remains the vital, innovative and influential organization it has been for almost 50 years.

This year we have also added a new focus, that of lawyer well-being. Recent studies have shown that while many lawyers in Massachusetts report overall

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satisfaction with life, we also report being burned out in our profession, suffering from bias and discrimination, and physical health problems, as well as mental health and substance abuse challenges in percentages higher than that of the general population. Yet a frighteningly low number of us ask for help. Why? Stigma, too little time, fear of reprisals or loss of employment.

Clearly we are not our best selves, or practicing law to our highest potential, while burying these very difficult challenges.

The good news is that there are resources within the legal community and outside of it that are available to us. MATA's website lists many of them. Lawyers' Weekly did an incredible series on combating stigma. The Mass. Bar Association and ABA both have a Well-Being Toolkit. We at MATA have recently added a Well-Being segment to our Board of Governor's meetings and were thrilled to have Heidi Alexander, Executive Director of the SJC Standing Committee on Lawyer Well-Being, address the Board at our first meeting in September. We've added well-being topics and an amazing speaker, Amanda Rowan, at our Friday morning Coffee Hours, and have begun a monthly Wellness Wednesday listserv post which so far

has covered topics from a supportive work environment to avoiding burnout to stigma to the power of laughter.

And lest you think that it is a new or novel revelation that we as Massachusetts lawyers are struggling, it is not. The issue of lawyer well-being garnered the attention of the SJC back 2018 when it appointed a steering committee to study the issue and address the serious concerns set forth in the ABA's Report from the National Task Force on Lawyer Well-Being. The findings of the ABA report, similar to the ones cited above, led to the formation of a more permanent SJC Standing Committee on Lawyer Well-Being under the late Chief Justice Gants, "created to help all Massachusetts lawyers achieve a healthy, positive, and productive balance of work, personal life, and health."

Of course, Lawyers Concerned for Lawyers (LCL) is and has been at the forefront of well-being efforts for lawyers in Massachusetts since 1978. LCL provides resources, meetings, seminars and confidential consultations at no cost. Stress management, burnout, career and networking, financial hardship, secondary trauma, ethics, law firm management, mental health, diversity,

equity and inclusion and addiction recovery — LCL covers it all. LCL has also provided a wonderful article on overcoming stigma as an individual in this Journal issue. If you need a boost, a new way of looking at things, or a private conversation, LCL is there for us. It's free, and it's confidential.

Talking to a friend, family member or colleague who has faced similar circumstances has also been shown to be one of the most effective tools in getting help when it's needed.

But all of these resources can't do anyone any good without taking that first difficult step: asking for help.

My goal this year at MATA is to keep the conversations going on issues that we all face — and the resources available to deal with them — to hopefully making reaching out for help less hard. In the words of Justice Sandra Day O'Connor, "We don't accomplish anything in this world alone."

And perhaps, if we do reach out, promote well-being practices and work together to achieve a healthy, positive and productive balance of work, personal life and health within our profession, a future generation may well say of us, "This was their finest hour."

Fight defense junk science with 'Daubert'

Continued from page 1

"gatekeeper" for expert testimony is to make certain that an expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co.*, 526 U.S. 137, 152 (1999). Accordingly, where an expert's method for analyzing the underlying data is unreliable, the expert's opinions must be excluded. See *Kumho Tire Co. v. Carmichael*, 526 U.S. at 153-56.

Let's apply these principles to record review doctors. These folks usually are retained to testify either that the client didn't suffer the injury or the effects that you're claiming or that their injury or condition wasn't caused by the incident. Sometimes, they testify to both. (In one case the defense doctor was prepared to testify that my 25-year-old client's lower back problems were due to degenerative changes which only became symptomatic after the collision which totaled both vehicles.) Now if your client's

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medical records consistently diagnose your client with their claimed injuries and relate them to the incident, those medical records cannot be the basis of an opinion that your client had a different injury or that the injury wasn't caused by the incident. In those circumstances, however, your client's medical records can be powerful exhibits for a Daubert/Lannigan motion. In the real world, physicians generally base their opinions on examination of the patient, cf. *Commonwealth v. McDonough*, 400 Mass. 639, 647-48 (affirming trial court's exclusion of expert testimony by psychiatrist who never interviewed defendant) (1987); and do not ignore well documented portions of the medical history.

Sometimes, defense doctors will base their opinion on one or two isolated records that clearly got the history wrong. You can keep these opinions out because entries in medical records are not admissible unless the proponent shows that the sources of the information recorded contained "indicia of reliability." *Doyle v. Dong*, 30 Mass. App. Ct. 743, 747-48 & n. 9 (1991). If the entries were clearly not reliable, then you can keep them out of evidence and the defense doctor cannot base their opinions on them. See *DYS v. A Juvenile*, 398 Mass. 516 (1986).

Most of the time, the defense doctor will not provide a clear

explanation of why the records support their contrary conclusions. If you drill down, you will see that the real basis of their opinion is not their background, training, experience, relevant literature (which they rarely cite) and the medical records, but rather "because I say so". This is, of course, not enough. "That a person qualifies as an expert does not endow his testimony with magic qualities". *Theresa Canavan's Case*, 432 Mass. 304, 313 (2000)(citing *Boston Gas Co. v. Assessors of Boston*, 334 Mass. 549, 579 (1956)). Where no real basis for their conclusions appear you can argue that the expert testimony should be excluded not just as unreliable under Daubert/Lannigan, but also because the defendant has not complied with its obligations under Mass. R. Civ. P. 26(b)(4) and in the Pre-Trial Memo to disclose the basis of the expert's opinion.

The same principles apply to accident reconstruction experts. In cases where they are retained long after the fact and no photographs or measurements were taken at the scene, the basis of their opinions is also frequently "because I say so". Just like doctors, these experts are not endowed with "magic powers". A very helpful case is *Commonwealth v. Franceshi*, 94

Mass. App. Ct. 602, 609-610 (2018) where the Appeals Court held a reconstruction expert should not have been permitted to testify

that a mark on the road was a "scuff mark" left by a shoe where their testimony simply stated this conclusion was based on their training and experience and did not explain the methodology by which the conclusion was reached.

It is frequently helpful to take the accident reconstructionist's deposition, to establish the principles and standards for performing a reconstruction. For example, if they are a former police officer, you can ask them what data and information they used when reconstructing accidents for the police. The odds are that it was quite different from what they claim to be able to rely on now.

Not every case warrants a Daubert/Lannigan motion. If you submit them in every case, regardless of whether there's a valid basis, you risk becoming the boy who cried wolf, diminishing your credibility and possibly everyone else who represents plaintiffs. Even if warranted, you still have to make the strategic decision whether it's better to bring a Daubert motion or just cross examine the expert at trial.

But, if the opinion really has no or a crazy basis, I suggest you serve a Daubert/Lannigan motion. Defense experts who make it up as they go along are infuriating, but you can keep at least some of them off the stand.