Massachusetts Academy of Trial Attorneys Journal
February 2014 | Vol. 7, No. 1

# Look for the MATA logo

**By J. Michael Conley**

I often marvel at the great leap of faith a client makes in hiring an attorney for a major personal injury case. Having someone I scarcely know entrust their family's future well-being to me and my firm is an affecting and humbling experience.

It is hard for us to fully understand clients' challenge in identifying the right attorney. How do they know? How do they decide? How can they be confident? How can they feel safe?

PRESIDENT'S MESSAGE

Some are fortunate to have a trusted friend or family lawyer to guide them to competent counsel. For the rest, there is certainly no shortage of marketing information available in such a highly competitive practice. In fact, the huge volume of information available may hinder as much as a help consumers search for the right lawyer. Where does one begin?

In Massachusetts, I suggest that a helpful and important threshold criterion is a lawyer's membership in the Massachusetts Academy of Trial Attorneys.

In other words, LOOK FOR THE MATA LOGO.

Why is MATA membership relevant? After all, it's open to all lawyers. While membership does not depend upon or signify a lawyer's qualifications, it speaks volumes about the lawyer's commitment and values, such that an injury victim or his/her family might fairly consider the absence of MATA membership to be disqualifying.

MATA members, with their dues and countless volunteer hours, advocate in the legislature to preserve and advance personal injury victims' rights in the civil justice system. Similarly, members under the auspices of the Amicus Committee volunteer their time and resources to file friend-of-the-court briefs on issues that impact victims' rights, including in cases in which the plaintiff's attorney has not joined MATA. That is because such advocacy is at the core of MATA's mission and not just a benefit of membership.

In other words, an injured victim can know that MATA members have been working on his behalf long before the accident made him anyone's potential client. Would it be unduly harsh, especially in view of MATA's modest dues structure, for a consumer to question a non-MATA personal injury attorney as a "free rider?"

MATA members have educational opportunities — basic and advanced — that promote quality legal work. In addition the MATA's Listserve provides members with ready access to assistance and advice from hundreds of fellow Massachusetts plaintiffs' lawyers. Is there any equivalent resource available to non-members?

MATA and its members have demonstrated interest divergent from the cartoon lawyer stereotype that some expect by actively supporting public safety efforts, such as the End Distracted Driving program, in the hopes of eradicating the kind of dangers that give rise to personal injury lawsuits.

Amid the chafe of the legal marketplace, MATA membership is a distinguishing credential. A consumer can sensibly narrow her search for an attorney to the 900 or so who have demonstrably cared about her rights and safety before she needed a lawyer, and who have secured access to first-rate educational and informational resources.

A potential client interviewing a non-member attorney can fairly ask directly the question I will pose rhetorically: Why should anyone retain for a Massachusetts personal injury case, large or small, any lawyer who is not a member of the Massachusetts Academy of Trial Attorneys?

# Law only gets you so far

**By Jonathan A. Karon**

My first MATA seminar was in 1989 and featured the late Abner Sisson on closing arguments.

He was 82 at the time, still practicing — a legend of the trial bar since before I was born. I still refer to his handout before every trial, but one piece of wisdom stands out. According to Mr. Sisson (I'm just not comfortable calling him Abner), an effective advocate needs to know "something of the difference between pain and ease, riches and poverty, the lonely and the beaten, the haughty and the proud" and of human frailty and vice. That lawyer can talk to 12 jurors and be understood.

So much of what we do in this crazy profession has nothing to do with the law. If we're lucky, over the years, by our own trial and error, by the kindness of colleagues and mentors, we get a handle on how to do this job. I remember one seminar I attended a few years later at which a present-day legend spoke (I won't embarrass him by mentioning his name). This lawyer is famous for securing numerous large plaintiffs' verdicts. The most useful thing I got from hearing him speak was that he also loses cases. And I had thought it was just me.

There are very few law books in my office. The top shelf of my bookcase has medical books. The second shelf has trial practice books by people named Ball and Keenan and Friedman. The rest are a haphazard mix of MCLE materials, industry standards, building codes, regulations, engineering papers — somewhere in there I think there's even a transcript of Clarence Darrow's cross-examination of William Jennings Bryan. But not a lot of law.

EDITOR'S NOTE

Sometimes law gets in the way. My first plaintiff's products liability trial was a motorcycle crashworthiness case, and I thought I had a great one. Under breach of warranty of merchantability, the defendant was liable if it could have manufactured the motorcycle without the unnecessarily sharp piece that punctured my client's foot. Nonetheless, the jury did not take long to reach a defense verdict. Trying to think like a normal person (i.e., not a lawyer) I'm quite convinced the jury's reasoning was along the lines of "Hey, your client was in a crash on a motorcycle — what did he think would happen?"

Since then, I've learned that the easiest way to increase winning percentage at trial is to decline bad cases. Like all of us, my screening is not perfect, but I've developed a test. I call it the "What the [ex-

Continued on page 2

# The importance of control

**By Neil Sugarman**

TIPS FROM THE MASTERS

## MATA's voice of experience

Successfully trying jury cases is not a skill with which you are born; rather, it is a lifelong avocation that needs to be continually honed and developed.

At first, in an effort to become a trial lawyer, the classic approach is to watch and listen to others who do it and adopt portions of their skills to fit your own needs and personality. After a break-in time, once you have learned the basics, you start to develop your own unique style and qualities. It is at this point that the "true you" begins.

I have been asked to give a single piece of advice to assist the lawyer at trial — and also for use in depositions — to assist the ongoing process of honing your skills. It assumes, of course, that you know your case fully and have a clear game plan. The purpose is not to teach you how to do it, but rather draw your attention to it based upon my experience.

The advice may sound simple, but it is one of the most difficult qualities to achieve during trial: control. Control of the adverse witness, expert or fact, during cross-examination. That does not mean being overbearing with the witness, but to make certain you're in control of the answers given based upon your questions.

You have to be certain that the witness is restricted in response by the use of clear and tight questions. If a witness wanders too far in answering, you may need the assistance of the judge. Having said that, usually you're on your own, and have to exert your own personality, tactics and skill to bring the witness under control. Done properly, it can often make the difference in convincing the jury of your position.

*Editor's comment: After reading his piece, I asked Neil if he thought it would be helpful to add some examples of his techniques for controlling witnesses. He told me he considered including them but concluded it would be counter-productive. As a younger attorney he learned the hard way that many techniques that worked for others would not work for him. In his view, each lawyer must develop their own witness-control techniques based on their personality, the facts of the case, and the nature of the parties. JAK*

*Neil Sugarman, co-founder and principal of Sugarman in Boston, is a recognized master of the trial bar. Over the course of his nearly 50-year career, he has successfully handled some of the most catastrophic explosion and fire accident cases in Massachusetts and obtained numerous substantial settlements and verdicts in product liability, medical malpractice and complex personal injury cases. He is well known for aggressively representing his clients and for his obsessive attention to details. He is a past MATA president and continues to generously give his time to our organization.*



# Law only gets you so far

**Continued from page 1**

pletive deleted] test." If a regular person would hear the story of what happened and think, "what the [expletive deleted] was the defendant thinking?" then you have a good liability case. If not, you're probably going to lose, no matter what the law says.

What's this got to do with the MATA Journal? Simply this: So much of what we do requires that we know a little about a lot of things. Most of what we do is based on judgment calls, intuition, educated guesses and past experience. Knowing the law is easy. Knowing what to do is hard. So, I'd like the MATA Journal to be a place where we can share what we know about how to be a trial lawyer. We will, of course, have plenty of law, but we'll also have a broader perspective on what we do.

In keeping with that broad perspective, we're starting a new feature, "Tips From the Masters." In each issue, a different recognized master of the Massachusetts plaintiffs' bar will provide one of their most useful trial or litigation tips. We are privileged that Neil Sugarman, a present-day legend of our bar, has kindly agreed to contribute our initial installment.

I am honored to take over editorship of the MATA Journal from President J. Michael Conley and I hope that you will feel free to call or email if there's a feature you'd like to see or if you'd like to contribute. In the meantime, I'm going to resume my ongoing search for that big book I know someone is keeping somewhere that tells you exactly what your client's case is worth. Also, if you have any suggestions about how to preserve your sanity while waiting for the jury to come back …

*Jonathan A. Karon, editor-in-chief of the MATA Journal, is a partner at the Boston firm of Karon & Dalimonte, LLP. He has a national practice representing the catastrophically injured, including cases involving amusement ride accidents, traumatic brain injuries and defective products. He is on MATA's Executive Committee and Board of Governors. He can be reached at (617) 367-3311 or at jakaron@kdlaw.net.*

# MATA Legislative update

**By Timothy C. Kelleher**

MATA is on the forefront of several pieces of legislation that would protect the rights of injured individuals in Massachusetts. Recently, our members have testified in favor of a trial court bill which would, among other things, introduce expanded jury voir dire, allow plaintiffs to request damage amounts and increase a judge's ability to deal with liens.

Our members also testified in support of a bill that would allow audiovisual depositions without filing a motion. In addition, we have testified in favor of consumer-friendly improvements in Massachusetts auto insurance.

We continue to monitor the implementation of the 2012 healthcare law, following the practical effects of the changes. Also in the patients' rights area, MATA has continued to advocate for passage of a bill to do away with secret medical peer review in Massachusetts. This will improve transparency in healthcare and increase patients' access to information about their own care. We give many thanks to people like Michael Najjar, Mike Conley, Charlotte Glinka, Steven Schafer, Annette Gonthier-Kiely, Kim Winter, Saba Hashem, Jon Karon, Neil Sugarman, Leo Boyle and Jeffrey Catalano for lending their insight and expertise to these issues.

In the area of workers' compensation, MATA has been fortunate to have great partners like the Massachusetts Coalition for Occupational Safety and Health and the Massachusetts Bar Association. MATA is part of a coalition with MassCOSH and the MBA pushing for an increase in burial benefits for the families of workers killed on the job. Similarly, MATA is fighting to improve compensation for those who are seriously scarred while performing their job duties. MATA Workers Compensation Section Co-chairs Sean Flaherty and Judson Pierce, along with Brendan Carney, have led the way for MATA in this legislative area.

As always, MATA is on the lookout for legislation that could limit injured plaintiffs' rights. Sometimes these bills are filed in good faith to address a different issue without knowledge that the change will have a damaging effect on people. Unfortunately, many other bills are supported by well-funded (often out-of-state) interests and represent a direct attack on plaintiffs' rights. In either case, MATA will continue to work diligently to address problem legislation and promote laws that protect public safety and individual rights.

Keeping up with the State House is a major job. MATA is fortunate to have the guidance of our government relations professionals from Quinn &Morris as we tackle these challenges. We are saddened by the passing of Robert H. Quinn, a great person and leader in the legislative arena. He will be sorely missed by all of us at MATA. I consider it a privilege and an honor to have had the opportunity to work with him.

We thank our lawmakers for their thoughtfulness in our dealings with them and their willingness to address so many important issues. Finally, I would like to thank Mayor Martin Walsh and Eugene O'Flaherty for their outstanding service in the Legislature and offer them our very best wishes as they bring their talents to serve the City of Boston.

*Timothy C. Kelleher III is a partner at Jones Kelleher LLP. He is the immediate past-president of the Massachusetts Academy of Trial Attorneys and serves as chair of the Legislative Committee. His practice focuses on civil litigation including serious personal injury cases, general liability, product liability, construction site litigation, medical malpractice and civil rights litigation. His experience has included the successful trial, arbitration and mediation of a wide variety of cases over the last 20 years.*

# Amicus report

**By Thomas R. Murphy**

The MATA Amicus Committee has been working on a number of projects over the last couple years and into the current term. The following is a quick sketch of where we have been and where we are going in the New Year. Anyone interested in writing for the committee should contact the chair. A labor of love, contributing to a worthy organization such as MATA is very rewarding, to say nothing of the value of weighing in on the evolution of the common law.

Last year, MATA briefed *Klairmont v. Gainsboro*, a fall-down/93A case in which an intoxicated patron fell to his death in a tavern with a portfolio full of building-code violations. After two weeks of evidence in the negligence case the jury returned a "yes-no" verdict, but the court later found for the estate on a 93A claim and rendered a substantial award.

MATA's Jeff Beeler and Tom Murphy ran up against four defense amici, contesting their claim that the jury's answer on causation precluded Judge Fahey's 93A findings. The SJC agreed that the court could make a separate 93A finding, the jury verdict notwithstanding, but vacated the judgment and remanded the case for further findings on damages.

In January 2013, Mike Conley wrote for the committee in *Dos Santos v. Coleta*. Mr. Dos Santos got hurt when he tried to flip from a trampoline into a pool on property he rented from the defendant. He claimed that the landowner was negligent in putting the trampoline next to the pool and in failing to warn him of the danger of jumping from one into the other. The jury found for the defendant, the Appeals Court affirmed, but in line with MATA's position, the SJC reversed. It held that a landowner had a duty to remedy an open and obvious danger where he had created and maintained that danger mindful that others would, as here, choose to encounter the condition despite the obvious risk of doing so. Take away: Open and obvious is DOA.

With edits from Tom Murphy and Alex Philipson, MATA signed on to AAJ's brief in *Aleo v. Toys R Us*, a products case in which a jury awarded $2 million in compensatory and $18 million in punitive damages. The cardinal issue was whether under Supreme Court precedent, punitive damages based on gross negligence should be evaluated differently than those based on willful, wanton and reckless conduct. Acknowledging that the compensatory/punitive ratio was close to the limits of due process, the SJC upheld the award in light of the severity of the gross negligence and concluded by saying that it is a "jury's function to make the difficult and uniquely human judgments that defy codification" and lend "discretion, equity, and flexibility" to the legal system.

In July 2013, MATA stalwarts Tom Bond and Sara Tresize briefed *Sanchez v. U.S.* in the 1st U.S. Circuit Court of Appeals. Sanchez's wife had died in child birth after receiving substandard care from a community health clinic, which, little did he know, employed doctors who had been deemed federal employees. Thinking that he would be held to the three-year statute of limitation and not the Federal Tort Claims Act's shorter period, Sanchez sued the doctors in state court. The U.S. attorney swooped in, removed the case, and got it dismissed based on the FTCA. Judge Gordon acknowledged that Sanchez was ensnared in a "statute of limitations trap" but allowed the motion in accordance with 1st Cicruit law. The appeal seeks to apply the notion of equitable tolling to vacate the dismissal and remand the case for trial. Paul Kenney argued the case in October and it is still under advisement. Circuits are spit on equitable tolling so the case could go on to Washington.

In January 2013, the committee wrote to the SJC in support of plaintiff's request for further appellate review of *Gavin v. Tewksbury State Hospital*. The Appeals Court had held that a presentment of a wrongful death claim to a State hospital under G.L.c. 258, otherwise proper, was fatally defective because it had not been made by the duly appointed representative of the estate. The SJC agreed to take the case, solicited input from the bar, and in September 2013, Liz Mulvey filed a top-shelf brief with edits from Tom Murphy and Mike Conley.

The essence of the argument was that the Appeals Court put form over substance and that the appointment should "relate back" and to the presentment. The SJC heard arguments in January of this year.

Also in September 2014, Mike Conley and Jeff Petrucelly filed in support of the plaintiff in *Sheehan v. Weaver*, another case in which the SJC had sought input. At issue was whether dictum in a footnote from a 1999 case should be reconsidered in light of changes to G.L. c. 143, §51. The case turns on whether §51's protection is limited to one fleeing from fire in a building, on the very meaning of the word "building" in the statute, and on whether §51 applies to a mixed-use residential-commercial building. The parties argued the case in December 2013 and the decision will have enormous consequences for future premises-liability claims.

In *Wilkins v. Haverhill*, Judge Cornetta entered summary judgment for the Ccty in a claim under G.L.c. 21, §17C, the recreational-use statue. The plaintiff, while on her way to her son's parent/teacher conference in a public school, had fallen on a defective walkway as she entered the building. The question is whether her attending the conference was for an "educational purpose" as that term is used in the statute. Committee members Alex Philipson and Ben Zimmerman wrote a cogent and compelling brief for MATA. John Finbury argued the case in late January.

Currently, the Amicus Committee is

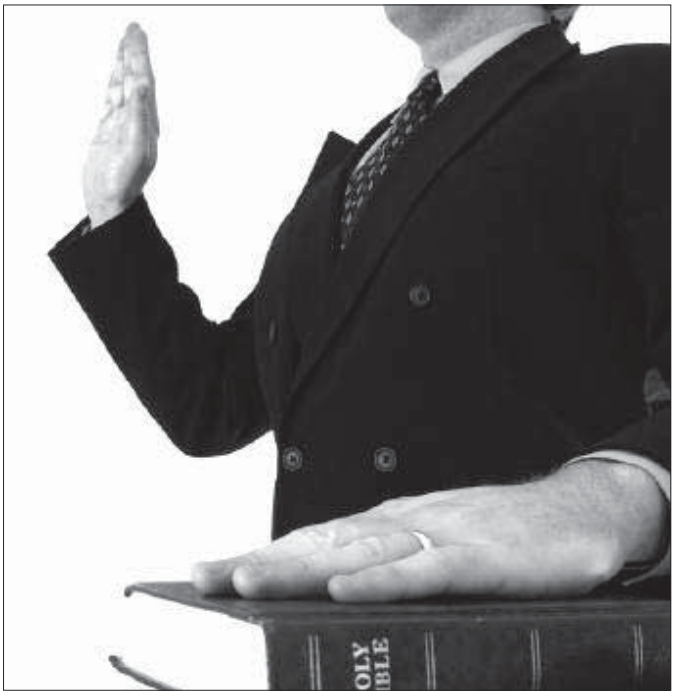
**Continued on page 10**

*Thomas Murphy of the Law Offices of Thomas R. Murphy, LLC, has tried scores of cases to verdict throughout the country. He was trial counsel in* Conte v. Dayton Power & Light Co., *in which the jury returned a $3.5 million verdict, said to be the largest at the time in Montgomery County, Ohio, and successfully argued before the 6th Circuit, which affirmed the judgment. He has been inducted into the American Board of Trial Advocates and is the chair of MATA's Amicus Committee.*

# The benefit of expert witness testimony

**By George Cuchural**

Given the technical and complex nature of modern litigation, expert witness testimony is becoming increasingly important. Experts apply their experience and subject matter expertise to help the trier-of-fact understand industry-specific terms and processes. An expert can be an extremely valuable asset to either a plaintiff or defense attorney. To showcase the value of expert witness testimony, The Expert Institute has compiled a list of recent headline-grabbing cases in which an expert witness made a significant impact on the case outcome.



### 1) Mark Cuban defeats insider trading allegations

When the SEC accused Dallas Mavericks owner Mark Cuban of insider trading, the entrepreneurial businessman was determined to prove his innocence. It took five years, but with the help of a securities expert, Cuban was exonerated of all charges. The expert witness and former SEC executive convinced the jury that Cuban did not break any laws because he traded on information that was immaterial and publicly available at the time of the sale in question.

### 2) Apple scores win in high-profile patent litigation

One highly talented and persuasive CPA convinced a federal jury in a high-profile patent litigation suit that Samsung Electronics Co. infringed on Apple Inc. patents. Testimony provided by Apple's economic damages witness helped resolve a dispute among jurors as to whether $178 million of the more than $230 million of profits that Samsung earned was attributable to Samsung's operating costs as the South Korean-based company claimed. The jury, swayed by expert witness testimony, ultimately awarded a $290 million judgment in Apple's favor.

### 3) Chicago man exonerated, awarded $25 million

16 years after he was wrongly imprisoned for murder, Thaddeus Jimenez was finally exonerated. Hardworking lawyers spent years attempting to prove malicious prosecution and violation of due process. Their case was greatly strengthened by the testimony of a former FBI agent and expert on police investigations.

Jimenez's police-activities expert testified on reasonable practices for police investigations. He exposed the coercive tactics employed by a former Chicago police detective investigating the murder that then 13-year-old Jimenez was jailed for and explained how radically his actions deviated from industry standards. The 7th U.S. Circuit Court of Appeals ruled in favor of Jimenez and awarded him $25 million, one of the most substantial verdicts in Chicago's history.

### 4) Johnson & Johnson pays $8 million for defective hip implant device

Johnson & Johnson was forced to recall 93,000 defective devices used in total hip arthroplasty surgeries following evidence that their DePuy Orthopedics artificial hip implants caused significant health complications. The first trial against the healthcare giant on the issue demonstrated that the DePuy device had multiple design defects. A biomedical engineering expert witness testified on behalf of the plaintiff, explaining that J&J ignored red flags in their internal data that their product deformed 10 times more than industry standards had allowed. Another expert witness explained aspects of the product's design that rendered it inadequate. The jury agreed with the plaintiff's experts and held that J&J must pay $8 million in damages.

### 5) Ethan Couch and the Affluenza Defense

A 16-year-old boy made national headlines when he avoided jail time for a drunk-driving episode that left four people dead. Ethan Couch's defense psychology expert witness described the young boy as suffering from a mental health condition called "affluenza."

The term, coined by mental health therapist Jessie O'Neill in her 1997 book, "The Golden Ghetto: The Psychology of Affluence," describes an inability to appreciate the consequences of one's actions. The judge, swayed by the expert witness's testimony, chose to sentence Couch to 10 years of probation rather than the 20-year sentence sought by prosecutors.

*George Cuchural is vice president of client relations for The Expert Institute.*

# Members connect at the MATA Holiday Ball

# MARCH MATA-NESS

## Membership Drive
## March 4, 2014

Calling locations

-Boston-

-Braintree-

-Burlington-

VOLUNTEER: KALEIGH@MASSACADEMY.COM

# Members connect at the MATA Holiday Ball

# STUDENT CORNER

## MATA leaders answer law students' questions

### Q: What is the best way for a law student to get to know attorneys in a particular field of interest?

— Christopher Barnett 3L

**A:** I was successful networking with other attorneys when I found a comfortable way to do it. The most successful encounters happened when a friend knew an attorney and I could introduce myself as a friend of so and so. Once the attorney knows that you have a mutual acquaintance she is often more agreeable to speaking with you and meeting for an informational interview. This often leads to learning names of her colleagues who practice in areas of law that are closer to your interests. I met with those colleagues and they were happy to meet with me because I had an introduction. Each attorney I met with gave me valuable details leading me down paths towards my goal of working in the area of law in which I now practice, estate planning and some family law matters. A few of these informational sessions led to me joining MATA and finding out about volunteer programs, such as the Lawyer for the Day Program — both useful resources for attorneys and law students. For a law student (who can join for free), MATA membership gives an opportunity to see how lawyers in your field of interest are answering questions, which can be helpful to understanding the field and whether you truly will enjoy working in that area of law. Through these connections I found valuable mentors and met other volunteer lawyers who became important colleagues, resources and friends. In sum, the best way to get to know attorneys in a particular field is to find a comfortable way to network through familiar acquaintances, friends and family and then branch out one person at a time.

Kelly P. Doucette
KPDLAW, Amesbury

### Q: What are the things that you enjoy most and the least about being a trial lawyer?

— Kathleen Berney 2L

**A:** I enjoy being part of a group of attorneys who are dedicated to protecting the rights of victims and making a difference in their lives. It is rewarding to know that people's lives are made easier by the work we do after they suffer a tragic setback. On the other hand, I hate losing (even more than I enjoy winning). When my clients are denied justice, it stays with them and me, forever. There is no such thing as a short-term memory when you lose a trial, nor should there be.

Jeffrey N. Catalano
Todd & Weld, Boston

JEFFREY N. CATALANO

KELLY P. DOUCETTE



# IN MEMORIAM

## The Honorable Robert H. Quinn

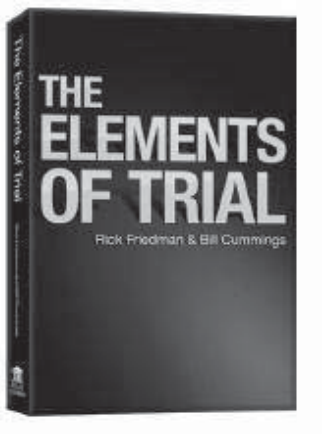
Robert H. Quinn, a partner at Quinn & Morris in Boston, was a unique and fascinating individual. He served as speaker of the House and later as attorney general.

He was a public citizen in the truest sense of the word. MATA has been privileged to work with Quinn & Morris on legislative matters. Robert Quinn remembered and knew more about Massachusetts politics and legislative issues than most, and he used that knowledge to work for the people of the commonwealth long after his tenure as speaker.

His wit and rapier humor was legend, as was his kindness and generosity of spirit. Quinn has left a legacy of dignity, honor, loyalty and trust. He was a man of his word — always. We offer our deepest sympathies to Quinn's family, friends, as well as Jim and the rest of the dedicated team at Quinn & Morris.

J. Michael Conley, President
Massachusetts Academy of Trial Attorneys

# 'The Elements of Trial'
## by Rick Friedman and Bill Cummings




**By J. Michael Conley**

BOOK REVIEW

Imagine how comforting it would be (or would have been) as a new trial lawyer to have a sage companion by your side throughout the trial process to explain each of the trial components, its purposes, what needs to be accomplished and how to approach it. Such a resource is now available in the recently published "The Elements of Trial" by Rick Friedman and Bill Cummings (Trial Guides 2013).

Friedman, a renowned trial lawyer and lecturer (in the mode of Mauet's teacher/leader/helper/guide) has previously written important and well received trial-related books —"Rules of the Road" (with Pat Malone),"Polarizing the Case," "On Becoming a Trial Lawyer"— focusing on specific trial techniques and the morality and philosophy of trying cases. Cummings is an accomplished lawyer and Friedman's law partner.

In "The Elements of Trial," Friedman and Cummings have presented a valuable overview of the trial process and each of its components: pre-trial investigation and preparation, jury selection, openings, interaction with the judge, direct and cross examination, introducing exhibits and closings. They present in clear and relatable terms a definition of each trial component and its purpose, the basic law, what needs to be accomplished and some suggestions as to how to get it done throughout the process.

A typical chapter addresses one element (e.g. opening statement) and includes subheadings of purpose, advocacy goals, applicable law, implementation, questions to ask and suggested reading. The authors include information on practical topics — where to sit, limiting water consumption to avoid the need for bathroom breaks — as well as on trial mechanics: how to frame questions, make objections, lay foundations for exhibits and what is impermissible or inadvisable to say in openings and closings.

While the target audience of the book has been described as newer and mid-career lawyers preparing for trial, it will provide more experienced practitioners with a quick and useful refresher and an opportunity for re-evaluation. For Massachusetts lawyers encountering differing and evolving voir dire opportunities, the chapter on jury selection could be very useful. Moreover, there are valuable organizational suggestions that may appeal to all.

When I was about two-thirds of the way through the book and reflecting on the authors' achievement in so concisely and accessibly conveying in a small paperback book a basic template of what we need to know and do at trial, I belatedly recognized the title, "The Elements of Trial," as a reference to another succinct and invaluable tract, Strunk & White's "Elements of Style." Friedman and Cumming's book (although thankfully less dogmatic) deserves a place in the libraries of trial lawyers, as well as teachers and students of trial, akin to that which Strunk & White holds among writers and students of writing.

Dorothy Parker wrote, "If you have any young friends who aspire to become writers, the second greatest favor you can do them is to present them with copies of 'The Elements of Style.' The first greatest, of course, is to shoot them now while they're happy."

Significantly, the authors recognize, as Friedman has emphasized in other work, that we do not have to be unhappy; a lawyer's personal well-being, fulfillment and emotional balance make up an important component of sustained success at trial. The book's final chapter is entitled "You," and concludes, "In the end, being an emotionally healthy and effective trial lawyer requires embracing the paradox of caring, believing and detachment."

I am not aware of any comparable trial manual. I wish it had been available 30 years ago.

*MATA President J. Michael Conley of is one of the founders of Kenney & Conley in Braintree, where he concentrates his practice on representing injured victims of negligence and other misconduct. Conley has dedicated his professional career to advancing the rights of injured individuals and their families. He is a frequent writer and lecturer for a number of organizations, including the Massachusetts Bar Association, Massachusetts Continuing Legal Education Inc. and MATA. Conley was the longtime chair of the MATA Amicus Curiae Committee and the MATA Journal.*

## MATA to honor Film and Law Productions with 2014 Media Award

The Massachusetts Academy of Trial Attorneys will present Film and Law Productions with its 2014 Media Award at the MATA Annual Dinner on May 13.

Film and Law Productions "is dedicated to stories as vibrant structures that may change the way victims of violence are seen in society and treated by law."

The group, led by Suffolk Law School Professors Kate Nace Day and Russell G. Murphy, produced the documentary "A Civil Remedy," which chronicles efforts to pursue civil actions against perpetrators of human trafficking.

# Amicus report

**Continued from page 4**

working on a few cases. *Auto Flat v. Hanover* is a G.L.c. 93A, § 1 case. Responding to the SJC'S solicitation on the committee's behalf, Hans Hailey and Danielle Spang are briefing whether an insured is entitled to recover damages where, after it litigates a claim for wrongful denial of coverage but before trial, its insurer fully reimburses the insured for its losses, with interest and fees, such that (or so it claims) there are no "actual damages."

The answer, one would think, is yes, because of the breach; if so, the next question is the measure of those damages. Argument is expected to be in March or later.

Other matters in the hopper include *Rose v. HECO*. The plaintiff lost his arm in an unguarded grinding machine. After weeks of evidence the trial judge charged the jury that was to decide the negligence and breach of warranty claims that the "unreasonable use" or Correia defense is the "implied warranty version of the contributory negligence defense."

Additionally, the Committee is working on a fascinating duty case: *Does v. Children's Hospital*. In that case the plaintiffs are a group of victims of a pedophile who, before he abused them, had worked for the defendant. Despite the defendant allegedly knowing of his evil ways it neglected to inform his new employer — where he went to work and ultimately abuse the plaintiffs — of his sordid past. Briefing in these cases will be filed in March or April.

Again, anyone interested in helping with a committee project should contact the chair. We provide an extremely valuable service to MATA and, in a larger sense, to the bar. The commitment is well worth the time and will give you a chance to develop your writing which in turn will improve your practice. Doctors have scalpels; accountants have pencils; we have words. They are our only tools and we must use them well. But because writing combines a number of skills it gets complicated; that's why writing is so difficult. Besides, we could use all the help we can get.

Massachusetts Academy of Trial Attorneys

# MEMBERSHIP APPLICATION

Name: _____

Firm/Court/School: _____

Work Address: _____

Work Telephone: _____

Cell: _____

E-mail: _____

Home address: _____ Fax: _____

Home telephone: _____ Website: _____

Telephone: _____

AAJ Member: Y __ N ___ Refferred by: _____

Date of admittance to the Massachusetts bar: _____

**Member category** (please choose one and circle monthly or yearly rate):

| **Rates:** | Monthly Rate | Yearly Rate (June 1 - June 30) |
|---|---|---|
| ____ Admitted to practice less than one year | **$5** | **$50** |
| ____ Admitted to practice 1-5 years | **$10** | **$110** |
| ____ Admitted to practice 6-10 years | **$19** | **$225** |
| ____ Admitted to practice over 10 years | **$40** | **$475** |
| ____ Retired/not primarily practicing | **$19** | **$225** |
| ____ Associate (vendor) | **$14** | **$165** |
| ____ Government Employee/Legal Services | **$6** | **$65** |
| ____ Paralegal | **$4** | **$40** |
| ____ Voluntary sustaining dues | **$49** | **$100** annually |
| ____ Voluntary legislative dues | **$11** | **$125** annually |
| ____ Law Student | Free | |
| **Total authorized charges** | **$**_____ | **$**_____ |

**Payment:**

❒ AMEX ❒ M/C ❒ VISA

Credit Card #: _____ Security Code: _____ Exp. date: _____

**Mail to:**

MATA, 20 Burlington Mall Road, Suite 230, Burlington, MA 01803

(781) 425-5040 (781) 425-5044 – Fax info@massacademy.com

Sign-up Online: massacademy.com

# RAISING THE BAR

## ON PROFESSIONAL LIABILITY INSURANCE

THE HERBERT H. LANDY INSURANCE AGENCY HAS BEEN PROVIDING PROFESSIONAL LIABILITY INSURANCE FOR MORE THAN 60 YEARS. WE WORK WITH THE LEADING INSURANCE COMPANIES TO FIND THE MOST AFFORDABLE AND COMPREHENSIVE LAWYER'S PROFESSIONAL LIABILITY INSURANCE BEST-SUITED TO YOUR FIRM.

### PROFESSIONAL LIABILITY INSURANCE FOR:

NEW AND ESTABLISHED FIRMS | HARD-TO-PLACE FIRMS | ALL AREAS OF PRACTICE
PART-TIME, EMPLOYED AND MOONLIGHTING LAWYERS | NEWLY-ADMITTED ATTORNEYS

***WE ARE PROUD TO BE A PARTNER OF THE MASSACHUSETTS ACADEMY OF TRIAL ATTORNEYS***

TO OBTAIN A PREMIUM INDICATION COMPLETE OUR ONLINE QUESTIONNAIRE: WWW. LANDY.COM/MATA OR CONTACT US BY CALLING 800.336.5422.
VISIT OUR BLOG AT WWW.LANDY.BZ

THE HERBERT H. LANDY INSURANCE AGENCY, INC.
75 SECOND AVENUE · NEEDHAM, MA 02494
800.336.5422 · WWW.LANDY.COM · WWW.LANDY.BZ

LANDY
*"Insurance for Professionals"*