Massachusetts Academy of Trial Attorneys Journal
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Diversity key to continued growth

By J. Michael Conley

I am privileged and honored to serve as president of the Massachusetts Academy of Trial Attorneys for 2013-2014. In an otherwise tough and competitive business, MATA represents the things we do together — the things we do for one another, for each other's clients, for the betterment of the practice and for the safety of the community. It is where we are reminded that we are blessed to be working in one of the very few parts of the practice of law that fulfills the idealistic goal most of us carried to law school: to be able to make a positive difference in the lives of everyday people.

PRESIDENT'S MESSAGE

Paraphrasing Rick Freidman, at our best, today's trial lawyers are the insurgent force fighting on behalf of human values in a country occupied by corporate interests. MATA's central role in this endeavor is well illustrated by the following footnote in a recent Supreme Judicial Court decision:

> We acknowledge the amicus briefs submitted on behalf of the defendants by Associated Industries of Massachusetts; the Coalition for Litigation Justice, Inc.; the NFIB Small Business Legal Center; and the American Tort Reform Association; by the Federation of Defense and Corporate Counsel; and by the Massachusetts Defense Lawyers Association and DRI — The Voice of the Defense Bar. We also acknowledge the amicus brief on behalf of the plaintiffs by the Massachusetts Academy of Trial Attorneys.

Klairmont v. Gainsboro Rest., Inc., 465 Mass. 165, 167 (2013).

Members connect at MATA Annual Meeting
See photos from annual meeting.
PAGES 6 - 7

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MATA has done an extraordinary job advancing our values. We have been vigilant in identifying, and forceful in opposing, legislation that is harmful to consumers and injury victims. We have been active in advocating changes to the system, such as lawyer conducted voir dire in civil cases, which will improve ordinary citizens' opportunity to receive a fair trial in a civil case. We have been active in the courts, filing amicus briefs supporting members and

Continued on page 4

Hurt while working for uninsured employers: avenues of recovery

By Brendan G. Carney

Despite state law mandating nearly all employers to carry workers' compensation insurance, many Massachusetts employers fraudulently choose to conduct business without coverage in order to increase profits, while passing the cost of work-related injuries on to injured workers, families and taxpayers.

There are several potential avenues of compensation for an employee who is injured during the course of his employment with an uninsured employer. Injured workers can file a workers' compensation claim for wage loss and medical benefits with the commonwealth's Workers' Compensation Trust Fund.

A claim for workers' compensation benefits should be filed against a general contractor that hired the uninsured employer, if one can be identified. Additionally, an injured worker may also bring civil or third-party claims against his or her employer, a general contractor and/or any other third parties that may have caused or contributed to the employee's injury.

Workers' compensation claim

Workers' compensation claims involving uninsured employers are governed by the Code of Massachusetts Regulations, 452 C.M.R. 3.04. The first step an employee's attorney must undertake is to file an Insurer Request Certification with the Department of Industrial Accidents in order to verify that the employer did not carry workers' comp insurance on the date of the injury.

That form, which can be downloaded at the DIA's website, certifies to the DIA that the employee and employee's attorney have attempted to contact the employer to verify whether the employer in fact had a workers' comp policy in effect on the date of the accident. After the filing, the DIA Trust Fund should contact the employee attorney requesting that the employee complete and sign a Form 170 (Affidavit of Employee in Application for Trust Fund Benefits). Once the Form 170 has been filed, the employee is then allowed to file his or her claim (Form 110) for benefits.

If the uninsured employer was contracted to perform work by a third party, and a general contractor-subcontractor relationship can be established, a claim for workers' comp benefits should be initiated against the general contractor pur-

Continued on page 3

Caselaw supports a plaintiff's right to statement pre-deposition

By David J. Berg

If your client gave a written or recorded statement to the defendant or the insurer, you would naturally like to have a copy as soon as possible, and certainly before your client explains how the accident happened in answers to interrogatories or at deposition.

Massachusetts law makes that easy. G.L.c. 233, §23A requires that, in any personal injury action, no written or oral statement of a party "concerning the facts out of which the cause of action arose, given by such party, or a person in his behalf, to any other party to the action, or to his agent or attorney, or to the insurer of such other party, or to the agent or attorney of such insurer, shall be admissible in evidence in, or referred to at, the trial of such action or in any proceeding connected therewith unless a copy of such statement or verbatim written transcription of such recorded statement is furnished to the party making the same or to his attorney within ten days after written request therefor made by such party or attorney to the adverse party or his attorney, or within such further time as the court may allow on motion and notice."

A close reading of the statute shows that it does not specifically require that the adversary produce the statement; only if he/she wants to use it at trial must it be produced. Thus, a defense attorney could choose to withhold the statement and not use it at trial, but, given that statements are taken in order to be used, such a posture seems unlikely.

The statute covers any kind of statement, including letters sent by the plaintiff to the defendant. *Spellman v. Metropolitan Transit Authority*, 328 Mass. 446, 104 N.E. 2d 493 (1952). While *Spellman* held that failure to comply with this statute is reversible error, id. at 450, 104 N.E. 2d at 495, the only other appellate decision to address §23A, *Mazzoleni v. Cotton*, 33 Mass. App. Ct. 147, 597 N.E. 2d 59 (1992), did not require strict compliance with the statute. In *Mazzoleni*, the plaintiff's counsel had twice written to defense counsel requesting a copy of the plaintiff's written statement to the insurer, but defense counsel ignored the letters. Id. at 148, 597 N.E. 2d at 59-60. The plaintiff subsequently filed suit and sent document requests, which finally spurred the defendant to produce the statement, but not until the plaintiff had already answered interrogatories. Id. at 149, 597 N.E. 2d at 60.

At trial, the plaintiff moved to exclude the statement for the defendant's failure to comply with the statute and because the plaintiff had been prejudiced because she answered interrogatories before she received the statement. The court denied the motion, ruling that, while the statute should be "vigorously enforced," "the risk of unfair surprise at trial is negligible" because the plaintiff had the statement for "almost two years" before trial. Id.

The Appeals Court affirmed, holding that "the last clause of the statute [the statement shall be furnished "within such further time as the court may allow on motion and notice"] plainly authorizes the trial court to permit the furnishing of a copy of the statement beyond the ten-day period following a written request." Id. at 150, 597 N.E. 2d at 61.

The court also noted that, although the plaintiff claimed that she was prejudiced by having to answer interrogatories before receiving her statement, she did not explain how or why she was prejudiced. Id. at 149 n. 2, 597 N.E. 2d 60 at n. 2. Nevertheless, the court concluded by remarking that it did not condone the insurer's failure to respond to the plaintiff's original requests for her statement, that its "decision today creates no safe harbor for casual, sloppy or arrogant insurers presented with such a request," and that "the trial judge's discretion under G.L.c. 233, §23A, might well have been upheld here had the judge allowed the motion in limine." Id. at 152, 597 N.E. 2d at 62.

The message from *Spellman* and *Mazzoleni* for the state court practitioner is that he/she should request the statement as soon as possible. If the statement has not been produced by the time that the case goes to suit, the attorney should move for a protection order against answering interrogatories until the statement has been produced and offer a solid explanation about how the plaintiff would be prejudiced by having to answer interrogatories before seeing a copy of his/her statement.

But what about the Massachusetts federal court practitioner? What right does a plaintiff in U.S. District Court have to get a copy of his/her statement? The federal equivalent to G.L.c. 233, §23A is Fed. R. Civ. P. 26(b)(3)(C), which gives any witness, including a party, an absolute right to his or her own statement. However, for decades, personal-injury defense attorneys in federal courts apparently followed a practice of withholding any written or recorded statement that the plaintiff might have given until after the plaintiff's deposition, or at least after the defense attorney was finished with his or her questioning of the plaintiff at the deposition.

Plaintiffs' lawyers and district courts, for the most part, acquiesced in this practice. Defense attorneys customarily justified the action by stating that allowing the plaintiff to see his statement before being deposed would permit the plaintiff to tailor his testimony to the statement and would impair the defendant's ability to obtain the plaintiff's unrefreshed testimony. However, the national consensus (as well as the law of this district) has moved in the direction of requiring a party's statement to be immediately disclosed upon request. The better argument is that claims that a defendant wishes to have the plaintiff's unrefreshed testimony or that the defendant wishes to avoid the possibility that the plaintiff may tailor his testimony to fit his prior statement are not (and never were) good cause for withholding the statement under the modern Rule 26(b)(3)(C).

The rule states: "Previous Statement. Any party or other person may, on request

Continued on page 8

Hurt while working for uninsured employers: avenues of recovery

Continued from page 1

suant to G.L.c. 152 §18. Section 18 mandates that the general contractor's workers' compensation insurer shall be responsible for payment of benefits if a general contractor-subcontractor relationship can be established. Inquiries as to the identity of the general contractor's insurer can be made online at the DIA website's Online Insurance Inquiry page.

Since the alleged general contractor's insurer may deny liability by asserting that its insured was not the general contractor, claims for benefits should be asserted against both the general contractor and the DIA Trust Fund, the fallback option in the event the general contractor's defense succeeds. Separate claims should be filed against the DIA Trust Fund and the general contractor.

All subsequent pleadings filed at the DIA should include a caption that identifies the uninsured employer as the "employer," the trust fund as the "employer's insurer", the general contractor as the "Section 18 employer" and the general contractor's insurer as the "Section 18 insurer." Those identifications distinguishing the identity of the parties are important in the event that a defendant general contractor in a third-party civil negligence claim tries to assert that the injured worker was its employee, and thus the injured worker's third-party claims against them are barred by the exclusivity remedy provision of the workers' compensation statute.

If the pleading simply lists the Section 18 employer/general contractor as the "employer," that pleading could be used by the general contractor trying to escape tort liability to further support their assertion that the injured worker was an employee and the exclusive remedy provision applies.

Pursuant to the Department of Industrial Accidents' Reviewing Board's decision in *Cappello v. DTR Advertising Inc.* (2011), the insurer for the general contractor shall be responsible for paying any Section 28 awards (doubling workers' compensation benefits) arising out of the willful misconduct of an uninsured employer (subcontractor). If the workers' compensation case is resolved via lump sum settlement before any civil claims are resolved, and the lump sum settlement was inclusive of future Section 28 exposure, the employee's attorney should attempt to get the insurer to stipulate to an allocation of Section 28 benefits in order to shield that percentage of the recovery from the insurer's Section 15 lien recovery on the civil claim proceeds. Although every case should be evaluated on its own set of facts, generally an employee's attorney should not file a Section 28 claim against the employer until all third party claims have been resolved. Delaying the filing of the Section 28 claim until after the third party claims are settled prevents the third party defendant from asserting the fact that the employee blamed their own employer's willful conduct for causing their harm in an attempt to attribute the harm caused to the employee to the plaintiff's employer.

Civil/Third Party Claims

If a general contractor or negligent third party with insurance coverage or reachable assets cannot be identified, the injured worker has the right to recover full tort damages directly from his uninsured employer. Once it has been determined that the employer did not have workers' compensation coverage on the date of injury, a plaintiff seeking a tort recovery against an uninsured employer must first establish:

1) the employee-employer relationship,
2) the plaintiff was injured, and
3) the injury arose out of and in the course of employment.

See G.L.c. 152, §25A; G.L.c. 152, §66.

If those three elements can be established, the uninsured status of the employer gives rise to a civil action and the uninsured employer cannot successfully assert the defenses of comparative negligence, assumption or risk, negligence of a co-employee or that the employee's injury did not result from the negligence or other fault of the employer. See G.L.c. 152 §66. Essentially, as long as the plaintiff can establish that the injury arose out of and in the course of his or her employment with the employer, and that the employer did not carry workers' compensation insurance on the date of the injury, then the plaintiff has a strict liability claim for damages. Recovery is not limited to what the plaintiff would have recovered in workers' compensation benefits had the employer been insured.

The plaintiff may recover full tort damages. *O'Dea v. J.A.L., Inc.*, 30 Mass. App. Ct. 449 (1991); *LaClair v. Silberline Manufacturing Co.*, 379 Mass. 21, 26 (1979). It should be noted that very few such civil claims are worth pursuing, for the simple reason that most employers who failed to carry workers' compensation coverage have reachable assets to satisfy a judgment.

Since most uninsured employers do not have any reachable assets, most civil recoveries are achieved via third party negligence claims against a general contractor (typically in the construction site accident setting) or another party who may have caused or contributed to the injuries (such as the negligent operator of a motor vehicle or manufacturer of a defective product). If a general contractor or other negligent third party can be identified, the injured worker may assert third party negligence claims against those entities. It is important to note that the Massachusetts Supreme Judicial Court has recently held that receipt of workers' compensation benefits from a third party general contractor (pursuant to G.L.c. 152 §18) does not allow the general contractor to claim immunity from third party liability claims by asserting the exclusive remedy provision of the workers' compensation statute. *Wentworth v. Becker Custon Building Ltd.*, 459 Mass. 768 (2011).

As with all workplace injury claims where workers' compensation benefits have been paid, the entity that has paid benefits has subrogation rights against any monetary recoveries received as a result of any civil claims. See G.L.c. 152 Section 15.

Brendan G. Carney is a principle at the Carney Law Firm and focuses his practice on the representation of those who have been injured at work. He is a member of MATA's Board of Governors and is also a member of the Massachusetts Bar Association's Workplace Safety Task Force.

The ins and outs of structured attorney fees

By Howard T. Saperston

Structured attorney fees can constitute a viable option for any attorney who wants to create a supplemental retirement fund, manage the cash flow of the firm or protect him or herself from being bumped into a higher tax bracket.

In *Childs, et al. v Commissioner of Internal Revenue,* 103 T.C. No. 36 Docket No. 15639-92, the 11th U.S. Circuit Court of Appeals affirmed that attorneys who elect to structure their fees will not have to pay taxes on those payments until the year the income is received. The ruling allows attorneys to spread out their income, rather than getting hit with a large tax bill in one year.

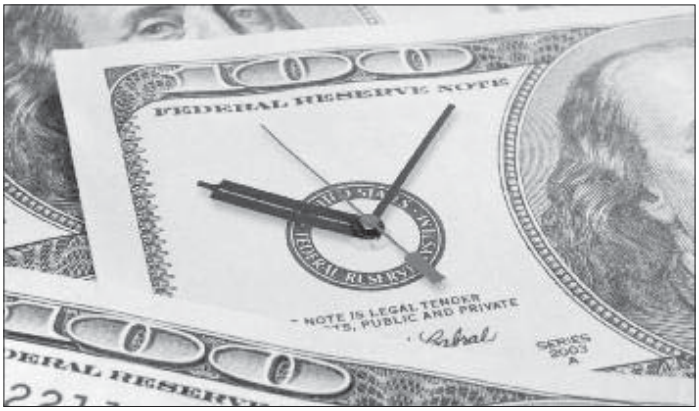
There are a number of factors to take into account when deciding whether or not to do an attorney fee structure:

- Age
- Health
- Present financial needs and goals
- Future needs and goals (college, retirement, etc.)
- Tax bracket
- Risk tolerance

Can I elect to do a fee structure if my client takes a cash settlement?

In most cases, you may structure your fees regardless of what your client decides to do.

Howard T. Saperston is a founder of Milestone Consulting LLC, a comprehensive settlement planning and management firm. Milestone is proud to be a Diamond Club Partner with MATA. Saperston can be contacted at hsaperston@milestoneseventh.com. Also visit www.milestoneseventh.com.



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At what point do I need to decide?

You must elect to structure your fees prior to settlement; it must be included in the settlement agreement. You can't have constructive receipt of the money to be structured. It should be paid to the life insurance company via an assignment company.

Is an attorney fee structure flexible?

Yes. You should choose a plan that best fits your individual needs. For example, you can establish a defined period of time to be followed by a lump-sum payment, or if it works better for you, you could take a series of lump-sum payments.

What if I worked on the case with another attorney? Am I still eligible?

Yes, you can still structure your fees, even if you weren't the sole plaintiffs' attorney on the case. The stream of payments can be split among more than one attorney. Should more than one decide to structure, each gets his or her own payment schedule. It is not necessary for all to decide to structure; each can decide for him/herself.

How is the structure funded?

The attorney has a few different options for funding, each with its own potential risks and rewards. The structure can be funded with an annuity from a highly-rated life insurance company, providing the attorney with fixed payments. Certain firms also offer a product that uses a Single Premium Immediate Annuity (SPIA) to purchase a whole-life insurance policy, which may offer a greater return than a traditional annuity.

How are payments made?

Payments can be made either to you or to your firm, and can be affected by a number of factors, including the type of incorporation the firm has (e.g. LLC, PC, etc.), dissolution plans of the firm, tax advantage, etc.

Do I have to pay taxes on the money invested in an attorney fee structure?

Pre-tax funds are placed in the attorney fee structure. Taxes are payable when payments are received. The benefit is that by spreading out your payments over time, you can avoid being bumped into a higher tax bracket.

With proper planning, structured attorney fees can be a useful tool for wealth preservation and income stability.

Disclaimer: Milestone Consulting LLC does not provide legal or tax advice. Please consult an attorney and/or estate planning expert if you have questions regarding the legal or tax implications of your structured attorney fees.

President's Message: Diversity key to continued growth

Continued from page 1

non-members when appellate issues may positively or negatively impact injury victims and consumers. We have worked to provide our members educational opportunities ranging from essential competency skills to cutting-edge, sophisticated trial techniques. We have every reason to be proud of the values, work and accomplishments of MATA, its leadership, its members, and its staff in supporting the fight on behalf of ordinary Americans.

However, I am concerned that while we continue to fight hard for MATA's constituency, we may find ourselves fighting with one hand tied behind our backs. The bar as a whole is catching up to society and becoming increasingly diverse. There are undoubtedly more than a few African-American, Hispanic and Asian trial lawyers representing consumers and injury victims in Massachusetts courts. Unfortunately, on the whole, they have not found MATA, so we need to find them. There also are surely many more women representing these clients than we have drawn to membership; we need to recruit them.

I suggest that this is not simply a matter of social conscience, but rather an organizational imperative. MATA needs to capture the full demographic breadth of those who do what we do, who are in the fray on the side of human values. When we speak on issues of importance, our audience — the Legislature, the courts, and the public — must be confident that we speak for the entire plaintiffs' trial bar and in representation of the entire community.

In addition, increased diversity necessarily will better inform and empower MATA by bringing an infusion of new voices and life experiences into our community frame of reference. Hubert Humphrey said, "We are, I think, much more mature and wise today. Just as we welcome a world of diversity, so we glory in an America of diversity — an America all the richer for the many different and distinctive strands of which it is woven."

In an undertaking in which Executive Director Paul D. Dullea's leadership and experience has been invaluable, we look forward to working with, supporting and asking for help in our effort from affinity bar associations: the Massachusetts Black Lawyers Association, Massachusetts Association of Hispanic Attorneys, Asian-American Lawyers Association of Massachusetts, South Asian Bar Association of Massachusetts, Massachusetts Black Women Attorneys, Massachusetts LGBTQ Bar Association, the Women's Bar Association and others.

Scripture teaches that a cord of many strands is not easily broken. More apropos to our challenge of resisting the occupation of corporate values may be Benjamin Franklin's observation: "We must all hang together or most assuredly we will all hang separately."

Student Corner: MATA leaders answer law students' questions

Q: What advice do you have for a graduating law student interested in becoming a trial attorney in such a highly competitive city such as Boston?

— Melissa L. Greenberg

MEYER

A: While you're still in school, take advantage of every opportunity to participate in mock trial competitions. Enroll in practical skills and trial practice courses. Market yourself to trial attorneys. Many firms hire law students on a part-time basis. That's not only a great opportunity to gain experience, but also a way to get your foot in the door ahead of the competition. Attend networking events sponsored by your school or the local bar associations, and reach out to alumni of your undergraduate and law schools who are working in the field. Trial attorneys generally look for outgoing, confident and eager personalities, so take advantage of any opportunity to meet practicing attorneys and to make a lasting impression. These are not just abstract suggestions — many of the attorneys in my firm have launched successful careers by following this same strategy. Best of luck.

— Andrew C. Meyer Jr., Lubin & Meyer, Boston

Q: I'm on a journal, I'm in the top 25 percent of my class, I have both part-time internship and work experience. What else do I need to do to make my resume stand out to employers?

— Shirin Afsous

SHEEHAN

A: As a frequent Northeastern co-op employer and experienced hirer of first-year associates, I observe there are often nonlawyering aspects to a resume that can make a candidate stand out.

Hiring committees see many resumes that are similar in stellar academic qualifications or legal experience, so when a candidate's resume reflects some interesting "full-person" aspect, it often results in an edge — and that critical initial interview call.

Examples I can give from past candidates: synchronized swimmer, fluent in sign language, stand-up comic, licensed scuba diver, competitive poetry slam contestant, or even a student whose resume listed selling hot dogs at Fenway Park in high school and college.

Such interesting non-lawyer qualifications should be limited to no more than one or two, be interesting and memorable, but not political or controversial — and placed at the end of a resume to reflect proper priority. As employers are often thinking about how the potential candidate may appeal to their particular clients, modification of the "full-person" aspect could be appropriately individualized among resumes you're sending to different firms.

Finally, as in any other part of your resume, do not exaggerate your "interesting" aspect, as those points often fill the critical small talk that goes on in every interview.

— Maura L. Sheehan, Law Office of Maura L. Sheehan, Lexington

Q: If my goal is to be a trial lawyer, what do you recommend as the best career path upon graduation?

— Kathleen Berney

GOLDBERG

A: I recommend that the first thing you do is observe as many court hearings as you can, even before graduation. See different types of cases, both criminal and civil, and if you are not sure which area of civil law you would like to practice, go to different courts; many of them are very different, such as the Probate & Family Court, Bankruptcy Court, the Department of Industrial Accidents, different judges in the Superior Courts, etc.

Also, ask lawyers if they would be willing to meet with you for information only, not as a hiring interview, and talk about their litigation practices. I am certain that many MATA members would welcome you to accompany them to court and to share their experiences with you.

— Scott D. Goldberg, The Law Firm of Scott D. Goldberg, Boston

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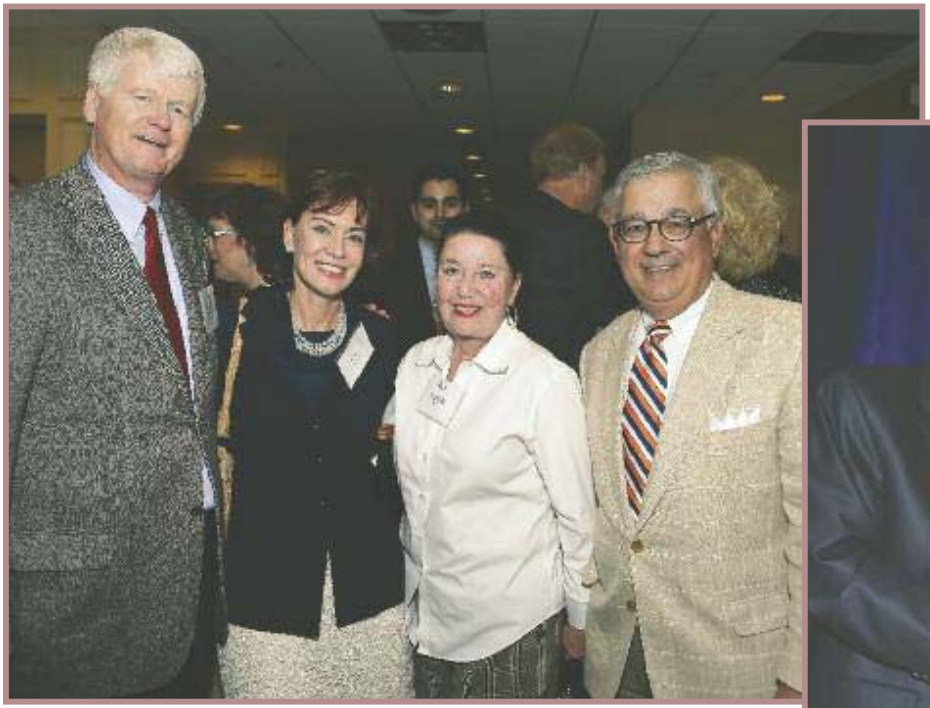
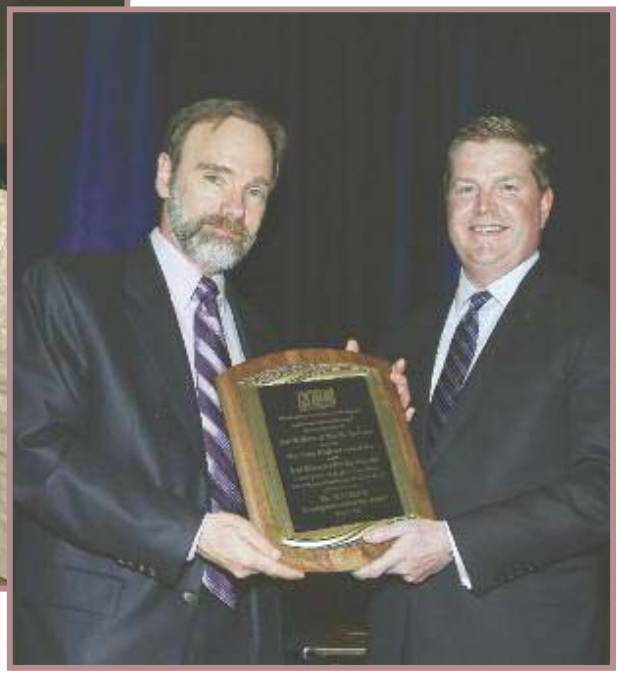
Members connect at MATA Annual Meeting





Members connect at MATA Annual Meeting

Caselaw supports a plaintiff's right to statement pre-deposition

Continued from page 2

and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses." A plaintiff thus has a right to receive his statement; the only issue is whether he will receive it before or after his deposition. The 1970 Advisory Committee Notes addressed this rule, inter alia, as follows:

"Ordinarily, a party gives a statement without insisting on a copy because he does not yet have a lawyer and does not understand the legal consequences of his actions. Thus, the statement is given at a time when he functions at a disadvantage. Discrepancies between his trial testimony and earlier statement may result from lapse of memory or ordinary inaccuracy; a written statement produced for the first time at trial may give such discrepancies a prominence which they do not deserve. In appropriate cases the court may order a party to be deposed before his statement is produced." See *Smith v. Central Linen Service Co.*, 39 F.R.D. 15 (D. Md. 1966); *McCoy v. General Motors Corp*., 33 F.R.D. 354 (W.D. Pa. 1963).

Smith and *McCoy* accepted the principle that allowing a plaintiff to see his statement before his deposition would give him the opportunity to tailor his testimony to fit the statement, and so ordered that the defendants be allowed to withhold the statement until after the plaintiff's deposition. The federal courts generally followed Smith and McCoy until the late 1990s.

Either the plaintiff or the defendant is entitled to raise the issue of withholding a plaintiff's statement until after his deposition. A plaintiff could raise the issue by filing a motion to compel, while the defendant could file a motion for a protective order. However, under Rule 26, the burden of proof is always on the defendant, the party that is seeking to withhold another party's statement until after the deposition, regardless of which party brings the matter to the Court's attention.

Under Rule 26(c)(1), the defendant must set forth "particular and specific facts" to justify the granting of a protective order. *Prozina Shipping Co., Ltd. v. Thirty-Four Automobiles*, 179 F.R.D. 41, 48 (D. Mass. 1998); *Multi-Core, Inc. v. Southern Water Treatment Company,* 139 F.R.D. 262, 263-264 (D. Mass. 1991). The moving party has a heavy burden to show "extraordinary circumstances" based on "specific facts" that would justify the order. Id.

The leading cases on the new view that a desire to obtain the plaintiff's unrefreshed testimony does not justify withholding the statement until after his deposition are *Rofail v. United States*, 227 F.R.D. 53 (E.D.N.Y. 2005), Vinet v. F&L Marine Management, Inc., 2004 WL 3312007 (E.D. La. 2004), and *Baggs v. Highland Towing, LLC*, 1999 WL 539459 (E.D. La. 1999).

In *Baggs*, the court rejected the defendant's argument that "deposition of the plaintiff before his statement [is produced] is 'customary and routine' in this judicial district and that defendant 'is entitled to depose the plaintiff in order to obtain his unrefreshed testimony before producing his statement." *Baggs*, supra at 3. The court wrote, "These are precisely the kinds of stereotyped and conclusory statements disapproved by the Fifth Circuit in Terra [In re Terra International, 134 F.3d 302, 306 (5th Cir. 1998)]. Defendant is not 'entitled to withhold plaintiff's statement until after his deposition."

Baggs emphasized that immediately disclosing the statement upon request was mandatory, and that the defendant might delay production until after the deposition only in the court's discretion upon a "particularized showing" of good cause. Id. The court finally crushed the defendant's "customary and routine" argument by avowing, "I am aware of no 'customary and routine' practice in this court permitting the withholding of parties' statements until after they are deposed. To whatever extent such a practice may exist in any particular section of this Court, it is — in my opinion — clearly erroneous and contrary to the overall scheme of the Federal Rules of Civil Procedure." Id.

Five years later, the defendant in Vinet claimed that it was entitled to depose Mr. Vinet before producing his statement because: "… there are a number of questions concerning plaintiff's multiple slip and falls, admissions of liability, and bizarre claims of spider bites … while serving aboard the vessel, that justify issuing a protective order producing his statements only after he has given his unrefreshed recollection, in order to maintain the integrity of the statements. This interest is especially strong in this case as plaintiff's accidents were unwitnessed, and the facts and circumstances surrounding his accidents raise questions as to their authenticity, and plaintiff's veracity." Vinet, supra at 2.

The court acknowledged that it has "some latitude in determining the time when the statement must be produced," but held that, "to deviate from the production requirement of Rule 26(b)(3) and obtain the protective order it seeks under Rule 26(c), defendant must show good cause (which it defined identically to this court's definition) for its request to withhold Vinet's statements until after his deposition." Id. The court then rejected the defendant's contentions and ordered the defendant to produce the statement immediately, ruling that "these are merely conclusory allegations, unsupported by any particular and specific demonstration of fact," and "to conclude that a witness would lie because his accidents were unwitnessed or would testify truthfully only because of the threat that his prior statements might contradict him is simply stereotyping, as is the assumption that his post-accident statements are the only 'true' versions of the facts." Id. at 3.

The following year, the Eastern District of New York expanded upon Rule 26's good-cause requirement and its application to the production of witness statements in *Rofail*. In that case, Magistrate Judge Joan Azrack agreed that a party is "entitled as a matter of right" to get his/her statement, and then tackled the main issue: why had some other courts had allowed defendants to withhold the statements until after the plaintiff's deposition? *Rofail*, supra at 55. Azrack acknowledged that the Advisory Committee Notes to Rule 26(b)(3) allow that "in appropriate cases the court may order a party to be deposed before his statement is produced." But, when she closely examined the cases that supported withholding the statement until after the deposition, she found their rationale to be flawed and weak because those decisions were made under an outdated version of Rule 26. Those older rules still required a party seeking any documents to show good cause for getting those documents and had no provision for a party or witness to get his/her own statement. 6 Moore's Federal Practice, §26. App.05, 1970 Amendment to Rule 26, text and Advisory Committee Notes; see *Rofail*, supra at 56 n. 2; *Smith*, supra at 16 ("Rule 34 requires that good cause be shown for the inspection and copying of documents.").

Azrack found that none of the cases cited by the Advisory Committee "discuss what makes it appropriate to withhold statements until after a deposition." *Rofail*, supra at 55-56. She determined that neither the Advisory Committee Notes, nor the cases cited by the Advisory Committee, were helpful in determining when a party has shown good cause for withholding a plaintiff's statement until after the deposition because "the cases cited in the advisory committee notes were decided when the federal rules were different than they are now." Id. at 56 n. 2, 59.

She continued, "In short, delaying production of the statement, according to [the cases allowing the statement to be produced after the deposition], is warranted when the party in possession of the statement asks the court for an order timing disclosure," and concluded that "courts which routinely allow stays of production of party statements until after deposition are ignoring both the Rule 26(c) requirement that a litigant demonstrate good cause for the stay and the general rule that discovery by one party does not interrupt discovery of the other." Id. at 56-57.

She found that no case has ever held that simply stating that "there is a danger that plaintiff may tailor [her] testimony to the statement" is good cause for delaying production of the statement until after the deposition, id. at 57, and quoted *Vinet* for the proposition that, "To conclude that a witness would lie because his accidents were unwitnessed or would testify truthfully only because of the threat that his prior statements might contradict him is simply stereotyping." Id. at 57, quoting *Vinet*, supra. She wrote, "If courts routinely grant stays because parties cite the possibility of tailoring in a request for a stay, making the request creates good cause. This procedure then becomes the norm of litigation. This is a change in the rules to which I will not contribute." Id. at 58. She finally held that "the clear wording of Rule 26(b)(3) . . . entitles a party to its statement without exception." Id. at 59.

Federal courts nationwide have been increasingly accepting the positions of *Rofail, Vinet* and *Baggs* and rejecting *Smith* and *McCoy*. For example, in *Douglas v. Overland Park Jeep, Inc.*, 2012 WL 2285049 (D. Kan. 2012), a plaintiff in a sexual harassment case taped conversations with some of the defendant's employees. The plaintiff moved for a protective order to delay production of the recordings until after the employees' depositions. The plaintiff argued that the purpose for the delay was to "promot[e] truthful testimony" by the defendant's employees, and that this constituted good cause. The court rejected this argument, noting that, "to the contrary, it would appear that Plaintiff's motivation for withholding the tapes is to bait these witnesses into untruthful testimony. Delaying production under these circumstances would be manifestly unfair to the witnesses." Id. at 1.

In *Hill v. Hornbeck Offshore Services, LLC*, 2011 U.S. Dist. LEXIS 68439 (E.D. La. 2011), even the fact that the plaintiff returned to work after an unwitnessed accident and failed to "notify Hornbeck or make any allegations as to negligence … until over two years after the alleged incident" was held to be insufficient cause to delay production of the plaintiff's statement until after his deposition. Id. at 6-9.

Other significant cases over the last decade include *Webb v. Windsor Republic Doors*, 2009 WL 3757714 (W.D. Tenn. 2009) (court rejected plaintiff's motion to delay production of defendant's recorded statement until defendant's deposition so that plaintiff could have the benefit of defendant's unfreshed recollection, citing *Rofail*); *U.S. Pecan Trading Co., Ltd. v. General Insurance Company of America*, 2008 WL 5351847 (W.D. Tex. 2008) (court held that Rule 26(b)(3)(C) requires disclosure of the statement before the deposition); *Fausto v. Credigy Services Corp*., 251 F.R.D. 436, 438 (N.D. Cal. 2008); *Chaney v. Kansas City Southern Railway Company*, 2007 WL 2463311 (E.D. La. 2007) (statement ordered produced prior to deposition based on Rule 26 and rejected state court practice to the contrary); *Jerolimo v. Physicians for Women*, 238 F.R.D. 354, 356 (D. Conn. 2006) ("mere conclusory statement, unsupported by any particular and specific demonstration of fact, that a party might tailor its testimony to conform with previously recorded statements

Continued on page 9

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Caselaw supports a plaintiff's right to statement pre-deposition

Continued from page 8

does not rise to the level of good cause"); *Costa v. Afgo Mechanical Services, Inc.*, 237 F.R.D. 21, 22, 24 (E.D.N.Y. 2006) (court ordered statement to be produced prior to party's deposition, finding that good cause was not shown, rejecting the tailoring the testimony argument, and holding "there is no reason to assume automatically that the party whose statements have been recorded will have a propensity to fabricate evidence or lie during the course of his or her testimony"); *Monceaux v. Bayou Fleet, Inc.*, 2006 WL 1236055 (E.D. La. 2006) (court rejected the defendant's argument that the fact that the accident was unwitnessed is sufficient cause for it to be entitled to depose the plaintiff before producing his statement); and *Flowers v. Pride Offshore, Inc.*, 2004 WL 719197 (E.D. La. 2004) (court ordered production of statement before deposition based on the good-cause standard, holding held that the fact that plaintiff did not report his accident until "much later" did not constitute good cause that would allow for the delay in production of the statement).

There are still some holdouts that have either ignored the logic of *Baggs, Vinet* and *Rofail*, stubbornly held onto the logic of *Smith* and *McCoy*, or both. For example, in Roofers Local 30 Combined *Welfare Fund v. Union Roofing Contractors, Inc.*, 2008 WL 4692373 (E.D. Pa. 2008), the court allowed the plaintiffs in a contract case to withhold the statements of two non-party witnesses until after their depositions, accepting the plaintiffs' standard argument that they had a legitimate interest in receiving the witnesses' unrefreshed testimony. Although the court cited Rofail for the proposition that "no courts have specifically ruled that an interest in obtaining the present unrefreshed recollection of a deponent constitutes 'good cause' for a protective order delaying the production of a previous statement," the court followed *Smith* and *McCoy. Roofers Local 30*, supra at 2-4.

In Maine, a District Court judge recently permitted a plaintiff in employment litigation who had surreptitiously recorded conversations with co-workers to delay production of the recordings until after their depositions. *Manske v. UPS Cartage Services, Inc.*, 789 F. Supp. 2d 213 (D. Me. 2011). The court cited *Wright & Miller's* treatise, *Smith* and numerous other cases, including a decision by Magistrate Judge Judith D. Dein, *Donovan v. AXA Equitable Life Insurance Company*, 252 F.R.D. 82 (D. Mass. 2008), but not *Rofail*, for the proposition that "Rule 26(b)(3)(C) does not entitle parties to immediate discovery of their previous statements." Id. at 216-218. However, it should be noted that *Donovan* was not good authority for that holding, as it involved the disclosure of a video surveillance tape, which did not implicate Rule 26(b)(3)(C).

Most importantly, Rofail appears to be the law in Massachusetts, as at least two judges in the district have accepted *Rofail's* logic since 2005, albeit in unpublished summary orders. In 2010, Magistrate Judge Marianne B. Bowler granted a plaintiff's motion to compel the defendant to produce the plaintiff's statement before her deposition based on the defendant's failure to show good cause to withhold the statement until after the plaintiff's deposition. *Konary v. Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, No. 10-11040-MBB, Order dated Dec. 22, 2010 (unnumbered document).

The plaintiff had based her argument on *Rofail, Vinet* and *Baggs*. *Konary* document No. 15. In 2005, a judge denied a defendant's motion for a protective order to allow it to delay producing the plaintiff's statement and a co-defendant's statement until after their depositions. *McBride v. Woods Hole, Martha's Vineyard and Nantucket Steamship Authority* and *LaFleur Crane Service, Inc.*, No. 05-11664-GAO, Order dated Oct. 24, 2005 (unnumbered document). In that case, the plaintiff and the co-defendant had based their arguments on *Rofail*. *McBride* documents Nos. 13 and 14.

Accordingly, Massachusetts federal court practitioners should consider that the various cases that have allowed defendants to depose a plaintiff before producing his statement represent old law, the old way of thinking about the old rule of civil procedure, the wrong custom and practice, and, most importantly, the failure to properly apply Rule 26's good-cause requirement.

Those cases should not be considered to be good law in this district, as they do not follow Azrack's analysis in *Rofail*. The more powerful and logical line of cases support requiring a party's statement to be produced before the deposition, unless the party seeking to withhold the statement demonstrates extraordinary circumstances that justify such an action.

David J. Berg was a personal injury litigator for 22 years who handled maritime and general personal injury cases, as well as state and Longshore workers' compensation cases throughout New England and nationwide. He now concentrates his legal work on legal research and writing on all areas of pretrial procedure and substantive law. He is a graduate of Lafayette College and the Syracuse University College of Law and is a member of the Massachusetts, Maine, New Hampshire, and New York state and federal bars.

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