MASSACHUSETTS ACADEMY OF TRIAL ATTORNEYS

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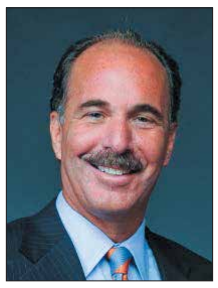
# Establishing liability through the defendant

**By Marc Breakstone**



There is no better way to prove liability in a negligence lawsuit than through the defendant's own admissions. The groundwork starts with your interrogatories, which inquire about the facts surrounding the occurrence.

The best opportunity to obtain admissions comes at the deposition of the defendant or its 30(b)(6) designee. With a corporate defendant, your first deponent should be the person most knowledgeable regarding the safety practices and procedures of the defendant.

**ALL STAR TIPS**

Early in the deposition ask: "Is safety is your highest priority?" If the answer is "yes," great. If the answer is "no," even better (find out what is!).

Human nature is such that every defendant will present themselves as extremely safety conscious. You should hand them enough rope to tie themselves as highly up the safety pole as possible.

Next ask defendant (or its designee), "What are the precautions that should be taken in the context of the occurrence in your case?" Depending on the type of case, ask specifically what it means to drive defensively, to maintain a restaurant floor in a safe condition, to safeguard floor openings at a construction site, to guard pinch points on a machine, or to enter the abdomen with a laparoscopic trocar so as to avoid injury to other structures.

Come into the deposition with your own list of precautions to be followed under the

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## President's Message

# We used to be society's heroes

**By Kathy Jo Cook**

One of the greatest perks of being the president of our state trial lawyers' association is that I am forced to pause from the nonstop work I am doing for my clients and reflect on what it mean to be a plaintiffs' trial lawyer. As plaintiffs' trial lawyers, we make a difference in the lives of not only our clients, but society in general.

Take the Gene Autry cowboy suit.[1] In the 1940s and 1950s, Gene Autry was a popular cowboy star, and thousands of children wore Gene Autry cowboy suits. A lot of them died or suffered horrific burns when their cowboy suits caught fire. Hundreds sued. After the jury returned a plaintiff's verdict in the very first case,[2] those involved in the sale or manufacture of the cowboy suits and their component parts rushed to settle the other cases.

Largely in response to the cowboy suit lawsuits, Congress passed the Flammable Fabrics Act in 1953. This was followed by the Consumer Protection Safety Act in 1972, which established the Consumer Product Safety Commission, an independent regulatory commission designed to protect the public "against unreasonable risks of injury associated with consumer products."[3] By 1977, the American Academy of Pediatrics reported in its journal that the staff of one burn unit "practically danced around the beds of the three children who were admitted in the past year with burns incurred when their pajamas ignited. The reason was that they were wearing garments that had been treated with a flame-retardant chemical.

AP image

**Gene Autry-inspired cowboy costumes resulted in hundreds of suits.**

The burns, therefore, were trivial."[4]

These events were not happenstance. They were the result of hardworking plaintiffs' lawyers saying "No, not on my watch," and using the courts to force product manufacturers and the government into making clothing safer.

Because of plaintiffs' trial lawyers, we have safer cars, safer drugs, safer medicine and a safer environment.

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## EDITOR'S NOTE

# Trying a Chapter 93A/176D case

**By Jonathan A. Karon**

Almost all of us have sent Ch. 93A letters to insurers alleging bad faith settlement practices. Lately, it seems that more of us are actually litigating claims for violation of Ch. 93A and 176D. In the past few years, several MATA members have obtained judgments, including significant attorney's fees awards, against insurers in Ch. 93A cases.

I tried my first bad faith failure to settle case in 2017, and earlier this year the court awarded my firm over $120,000 in attorney's fees. This was particularly noteworthy as the underlying single damages were only $2,439.54 (which the court then trebled).

Part of our responsibility as trial lawyers is to hold insurers accountable when they take advantage of our clients. In the hopes of encouraging others to fight the good fight, I'd like to share some lessons learned about litigating and trying a Ch. 93A/176D case against an insurer.

### An initial caveat

Before filing suit, make sure you really have a strong case. These cases can be a slog, and you should be prepared for an aggressive defense. Don't file any case you'd be reluctant to try, because you'll probably have to. Make sure that you have a real 93A/176D violation and not just a legitimate disagreement over case value.

### Discovery

There are documents and fundamental information you must obtain through paper discovery. In interrogatories, you must ask who was involved in handling your client's claim and what they did. I used these interrogatories:

- Please identify each agent, servant, employee, attorney, or other person acting on behalf of the defendant, [name of insurance company], who has had any responsibility for handling, defense, evaluation and/or resolution of any claims of [your client] arising from injuries [claimant] sustained in a motor vehicle accident on Aug. 24, 2013.
- With regard to each person identified in your answer to the

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# Ruling provides missing piece to 'NIED puzzle'

**By J. Michael Conley**

In *Calderon v. Royal Park, LLC*, 96 Mass. App. Ct. 49 (2019) the Appeals Court ruled that a claim for negligent infliction of emotional distress (NIED) was available to a teenage plaintiff who had been crossing railroad tracks with her best friend when her friend was struck and killed by a train. The Court specifically adopted and applied the "zone of danger" rule, establishing that one who is within the zone of danger created by the defendant's negligence need not satisfy the multi-prong elements required in emotional distress cases on behalf of bystanders. In so ruling, the Court furnished a missing piece to the NIED puzzle, because no Massachusetts appellate court had previously expressly applied the rule.

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Historically, Massachusetts limited recovery for NIED to cases where a defendant's negligence caused a physical impact of some kind to the plaintiff's person. *Spade v. Lynn & Boston R.R.*, 168 Mass. 285 (1897) (no recovery for emotional distress "where there is no injury to the person from without"); see *Conley v. United Drug Co.*, 218 Mass. 238 (1914) (plaintiff bruised after fainting to floor following an explosion).

The Supreme Judicial Court abandoned the impact rule in *Dziokonski v. Babineau*, 375 Mass. 555 (1978), followed by *Ferriter v. Daniel O'Connell's Sons*, 381 Mass. 507, 518-19 (1980). In *Dziokonski* the Court held that a parent who has suffered emotional distress with resulting physical harm following an event which injured his/her child, possessed a viable claim if the parent either witnessed the accident or soon came on the scene while the child was still there. 375 Mass at 568. "[T]he determination whether there should be liability for the injury sustained depends on a number of factors, such as where, when, and how the injury, to the third person entered into the consciousness of the claimant, and what degree there was of familial or other relationship between the claimant and the third person." *Dziokonski,* 375 Mass. at 568. In *Ferriter* the Court ruled that emotional distress recovery would be permissible for a wife and child who encountered their injured loved one in the hospital. "So long as the shock follows closely on the heels of the accident, the two types of harm are equally foreseeable." *Ferriter v.* 381 Mass. at 517.

It has since become well understood that a plaintiff can support an NIED claim based on injury to a third person by establishing that (1) he/she is closely related to a third person directly injured by a defendant's tortious conduct, (2) sees or comes upon the injured victim-relative soon after the accident, and (3) he/she suffers emotional injuries with physical manifestation as the result of witnessing the accident or coming upon the victim-relative. *Migliori v. Airborne Freight Corp.*, 426 Mass. 629, 632 (1998), citing *Ferriter,* 381 Mass. 507 at 518-19; see *Sullivan v. Boston Gas Co.*, 414 Mass. 129, 137-38, (1993). ("Physical injury" requirement requires only that plaintiffs "corroborate their mental distress claims with enough objective evidence of harm to convince a judge that their claims present a sufficient likelihood of genuineness.")

Cases that courts have found wanting have had clear shortcomings, including lacking the necessary relationship, not personally encountering the loved one and witnessing the injuries, not timely encountering the loved one on the heels of the event, or not suffering emotional distress demonstrably related to the encounter. See, e.g., *Migliori v. Airborne Freight Corp.*, 426 Mass. 629, 638 (1998) (rescuer lacks sufficient close relationship); *Cohen v. McDonnell Douglas Corp.*, 389 Mass. 327, 341-42 (1983) (declining recovery where a plaintiff, more than a thousand miles from the scene of the accident, learned of her son's death by telephone seven hours after the accident occurred and never witnessed the scene of the accident or her son's injuries); *Stockdale v. Bird & Son Inc.*, 399 Mass. 249, 251-52 (1987) (no cause of action for claimant who learned of her son's death four hours after he died and saw his body the next day at the funeral home); *Nancy P. v. D'Amato*, 401 Mass. 516, 520 (1988) (no recovery where mother learned of harm to her child many months after sexual abuse occurred); *Miles v. Edward O. Tabor, M.D., Inc.*, 387 Mass. 783, 788 (1982) (mother's claim against doctor for two-month-old son's death fails because claims were based on doctor's negligence at time of son's birth, two months earlier, and she failed to establish that she sustained any emotional distress from the allegedly negligent act, as distinguished from the grief caused by the death of her child); *Barnes v. Geiger*, 15 Mass. App. Ct. 365, 367 (1983) (plaintiff witnessed injury to unrelated person and mistakenly believed her child had been hurt).

As the contours of these bystander cases have become settled, no decision has directly addressed the viability of emotional distress claims based solely on zone of danger. The *Dziokonski* Court considered and rejected the zone of danger rule without indicating whether it was subsumed within the rule it was adopting. "It is arguably reasonable to impose liability for the physical consequences of emotional distress where the defendant's negligent conduct might have caused physical injury by direct impact but did not. The problem with the zone of danger rule, however, is that it is an inadequate measure of the reasonable foreseeability of the possibility of physical injury resulting from a parent's anxiety arising from harm to his child." *Dziokonski,* 375 Mass. at 564.

> No decision has directly addressed the viability of emotional distress claims based solely on zone of danger.

While the approach adopted in *Dziokonski* was understood to be more expansive than the zone of danger rule, there has been no definitive ruling that a claim could be based on zone of danger without satisfying the bystander claim elements. Courts have discussed but have not adopted or applied the zone of danger rule. *Cimino v. Milford Keg, Inc.*, 385 Mass. 323, 324 (1982), was a dram shop case arising from a fatal auto collision during which a father witnessed the death of his son. Although decided four years after *Dziokonski*, the injuries had predated the SJC's establishment of bystander recovery. In allowing the father's emotional distress claim to proceed, the Court mentioned zone of danger, but decided the case based on the impact rule: "This case involves no extension or retroactive application of *Dziokonski, supra*. The plaintiff here, unlike the plaintiff in *Dziokonski*, was himself indisputably in danger of being hit by Mott's car. There was considerable authority in 1976, when this accident occurred, in favor of permitting a person within the so called "zone of danger" to recover for emotional distress and injuries caused by witnessing injuries negligently inflicted on another. See Annot., 29 A.L.R.3d 1337, 1356-1357 (1970), and cases cited; Restatement (Second) of Torts § 313 (2) (1965). We acknowledged these authorities in *Dziokonski, supra* at 563-564, but there we permitted recovery by one *not* in the zone of danger. See, *id.* at 569-571 (Quirico, J., dissenting). It seems clear, also, that the case law of this Commonwealth had developed by January 19, 1976, to allow recovery for negligent infliction of emotional harm where physical impact or harm was involved as it was in this case. See *Dziokonski, supra* at 559 (cases collected). See also *Freedman v. Eastern Mass. StRy.*, 299 Mass. 246 (1938), which appears to be on all fours with the case at bar. The plaintiff here was properly allowed to recover on this theory." *Cimino v. Milford Keg, Inc.*, 385 Mass. 323, 333-334 (1982).

*Calderon v. Royal Park, LLC*, 96 Mass. App. Ct. 49 (2019) was a case against a landowner, claiming that poor maintenance of a fence permitted child trespassers access to the adjoining railroad tracks. The defendant property owner opposed the surviving friend's emotional distress claim on the basis that the plaintiff (as merely a "best friend") is not the type of bystander who can recover for her emotional distress. Rejecting this defense, the Court stated: "Labeling the plaintiff a 'bystander' does not make her so. A bystander is one who herself was never in danger from the defendant's negligence, but instead merely observed or later came upon the effects of the defendant's negligence upon another. See *Cohen v. McDonnell Douglas Corp.*, 389 Mass. 327, 340 (1983) (third-person bystander recovery allowed "in some circumstances even though the plaintiff was not within the 'zone of danger' created by the defendant's negligent conduct"); *Dziokonski v. Babineau*, 375 Mass. 555, 563-568 (1978) (bystander recovery doctrine more expansive than zone of danger rule and "reasonable foreseeability" liability). A person who, as alleged here, is herself placed within the zone of danger created by the defendant's negligence

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*J. Michael Conley is past president of MATA and former editor-in-chief of the MATA Journal.*

# Washington update: FAIR Act passes in House

**By Linda A. Lipsen**

I am pleased to report that the U.S. House of Representatives recently passed the Forced Arbitration Injustice Repeal (FAIR) Act to end forced arbitration in all its forms — a watershed moment in the push to end this rigged, anticonsumer practice and restore your clients' Seventh Amendment rights. This legislation is the first time in decades that one house of Congress has voted to restore rights on such a grand scale. We have made great progress in the last ten years, but Senate passage will be AAJ's next big challenge.

Please read our newly released report, *The Truth About Forced Arbitration*, and visit our Faces of Forced Arbitration website to learn more about how this rigged practice devastates Americans.

Some recent highlights of our advocacy:

## The House of Representatives passes the FAIR Act

On Sept. 20, 2019, the House of Representatives voted to pass the FAIR Act, 225 in favor to 186 opposed, to end forced arbitration in all its forms. All Democrats present and two Republicans — Rep. Matt Gaetz (R-FL) and Rep. Chris Smith (R-NJ) — voted to uphold the Seventh Amendment rights of American consumers, workers, and seniors. Seventeen Democrats spoke passionately on the House floor in favor, including Rep. Jerry Nadler (D-NY), Rep. David Cicilline (D-RI), Rep. Hank Johnson (D-GA), Rep. Jamie Raskin (D-MD), Rep. Matt Cartwright (D-PA), Rep. Diana DeGette (D-CO), Rep. Hakeem Jeffries (D-NY), Rep. Jackie Speier (D-CA) and Rep. Rosa DeLauro (D-CT). Tellingly, only three members of Congress spoke against the bill, showing the inherent weakness in the opposition's anti-civil-justice position.

We now have momentum, but the battle is not yet won. It is up to the Senate to pass the Senate companion bill, S. 610, Forced Arbitration Injustice Repeal (FAIR) Act, before it can go to the president's desk. AAJ is working to increase support for the FAIR Act in the Senate. The message — that forced arbitration is a rigged, anticonsumer practice — is starting to spread across the states, and the aisle.

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## AV/ driverless legislation

Negotiations have started again for legislation that would allow more driverless cars onto public roadways. As with last Congress, AAJ is focusing on ensuring that those harmed by AVs still have access to state courts and are not forced into arbitration. Both the Senate and the House are engaged in negotiations on this issue, but it is unclear if there is a path forward for this kind of bill.

## Rules update

We also keep you updated on federal rule changes, as the same rules often are adopted at the state level.

## Proposed Social Security rulemaking

The Advisory Committee on Civil Rules has engaged in an ongoing discussion of whether uniform national rules should be developed for review of decisions of the Commissioner of Social Security by federal district courts. AAJ filled comments in September 2019, reiterating AAJ's serious concerns about the creation of separate procedural rules for Social Security review cases, and the kind of precedent special rules would create. The Federal Rules of Civil Procedure (FRCP) are meant to be transsubstantive and not vary based on the substantive area of the law.

## Snap removal rule change proposal

AAJ filed a proposal with the Advisory Committee to change Rule 4 of the FRCP to address the tremendous burdens on federal courts associated with the problems and practice of "snap removal." Snap removal comes from an effort by certain defense attorneys to evade state court jurisdiction by contorting the interpretation of the Federal Rules to quickly remove state cases to federal court before service has been effectuated.

## Fighting for you and your clients

AAJ continues to fight all efforts to undermine civil justice. We look forward to keeping you in the loop on important developments. We welcome your input. You can reach me at advocacy@justice.org.

# Trying a Chapter 93A/176D case

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previous interrogatory, please state with particularity what each person has done with respect to the claim of [claimant].

There are two essential types of documents you must request:

• the complete claims file, including claims notes; and

• any claims manuals used in handling these types of claims.

The defendant is likely to fight production, but there is good case law they are discoverable. The claims file is the most essential as it is the record of exactly what was done. In fact, you really can't litigate the case without it. Fortunately, courts recognize this.

As stated by SJC Chief Justice Ralph D. Gants, back when he was sitting in the Superior Court: "Bad-faith actions against an insurer...can only be proved by showing exactly how the company processed the claim, how thoroughly it was considered and why the company took the action it did. The claims file is a unique, contemporaneously prepared history of the company's handling of the claim; in an action such as this the need for the information in the file is not only substantial, but overwhelming...The 'substantial equivalent' of this material cannot be obtained through other means of discovery."[1]

Justice Gants went on to discuss further reasons for disclosure of the complete claims file: "The need for disclosure of the opinion work product in the insurance claims file becomes clear when one considers that the plaintiffs are certainly entitled to depose the claims representative responsible for determining the settlement offer and ask him to explain his reasons for making that offer.... If his opinion work product in the claims file were not discoverable, the plaintiffs would be denied access to any writings he made prior to or contemporaneously with the settlement offer that may contradict or influence his deposition and trial testimony. It would make no sense for the law to allow the plaintiffs to ask the claims representative today what he was thinking in 2004 when the settlement offers were made but deny the plaintiff access to the writings he made in 2004 that reflect what he was thinking at that time. It would also be fundamentally unfair to the plaintiffs because it would permit the claims representative to testify about his state of mind without needing to worry about being impeached with the prior statements he made in the claims file."[2]

> Be prepared for every roadblock and potential dirty trick you can think of.

Similarly, claims manuals, which show how the insurer believes claims should be handled, are also important evidence and are thus discoverable. In *Rhodes v. AIG Domestic Claims*, then-Superior Court Justice Gants held that the refusal of the defendant insurers to produce written claims handling materials, such as claims manuals, in a case alleging bad faith claims handling in a personal injury case was "plainly wrong because the plaintiffs are entitled to investigate whether AIG and National Union complied with their own written policies in handling this claim in determining whether they acted in good faith."[3]

Similarly, Superior Court Justice Douglas Wilkins, in a case involving the refusal of one of Liberty Mutual's affiliated companies to produce its claims manuals, ordered them produced, explaining the multiple reasons why they were discoverable: "First, evidence of the defendant's policies and practices is reasonably calculated to lead to evidence probative on the question of whether the defendant followed those practices. Such evidence may itself warrant an inference that Liberty personnel acted in accordance with a policy in a particular instance. Second, such evidence may either corroborate or impeach testimony regarding what particular witnesses claim to have done. Third, failure to follow policies and practices (and on collaboration with others) may be probative of questions of intent bearing on elements of the misrepresentation claim. For instance it may tend to show a plan, scheme or modus opperandi."[4]

Once you have the claims file (including claims notes) and the manuals, you need to notice the deposition of everyone who handled the claim. In addition, I suggest noticing the Rule 30(b)(6) deposition of the insurer's designee on the handling of your client's claim and the insurer's rules and policies for handling such claims. This allows you to establish the insurer's position on what took place and eliminates any argument that what occurred was just the actions of a rogue adjustor. It also allows you to establish defendant's claims handling "rules."

## Trial

By statute, Chapter 93A cases are tried to a judge, not a jury. This means that prior to trial, you will have to prepare detailed findings of fact. Although this was very time intensive, it was incredibly helpful, because once it was done it served as a roadmap to trying the case. Everything I needed to prove and how I was going to prove it were already laid out. It forced me to make sure I had all my ducks in a row for trial and served as a checklist to help me remember to put in necessary evidence and testimony.

Another issue you'll face is whether to retain an expert in claims handling. Initially, because the actual damages were so small (my client's case involved an underinsurance claim where only loss of the use of the money damages were available) I planned on forgoing an expert. Instead I was going to simply use the "rules" I had established at deposition as evidence of the standard of care. But, since a key issue in bad faith failure to settle is when liability becomes "reasonably clear" I decided that I should present expert testimony on that issue. I suspect whether expert testimony is absolutely necessary depends on the facts of your case and to some extent on which judge is hearing the evidence. But I think if you're willing to go through the discovery fights and other "unique issues" (discussed in the next section) you might as well plan on retaining an expert and maximizing your client's chance of a judgment.

## Finally: a strange defense and don't forget to duck

In my case, I encountered what I call the "if we'd looked, we would have had a reasonable basis for denying your claim" defense. Basically, the insurer will attempt to re-open discovery on your client's claim and hope that it finds something helpful that it didn't have at the time. If it does it will then argue that your client has no damages because if the insurer had conducted a reasonable investigation it would have uncovered the information, and had a reasonable basis for denying the claim. If this explanation is confusing, I apologize. The best advice I can give you is to read *Van Dyke v. St. Paul Fire and Marine Insurance*[5] and be prepared to argue why it doesn't say that.

Finally, be prepared for every roadblock and potential dirty trick you can think of. A cynical person could think that an insurer might go out of its way to aggressively defend a Ch. 93A claim to discourage other lawyers from pursuing these cases. In any case, perhaps it was coincidence, but in my case the defendant initially objected to virtually all discovery propounded, multiple discovery motions were

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# Missing NIED puzzle piece

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is not a bystander and may "recover for emotional distress and injuries caused by witnessing injuries negligently inflicted on another." *Cimino v. Milford Keg, Inc.*, 385 Mass. 323, 333 (1982). Such a person is better understood as a "primary victim of the alleged negligence, and not one who merely experiences 'distress at witnessing some peril or harm to another'" (citation omitted), *Kelly v. Brigham & Women's Hosp.*, 51 Mass. App. Ct. 297 (2001), and her emotional distress, therefore, is "a separate cause of action which arose at the time of the defendant's negligence," *Miles v. Edward O. Tabor, M.D., Inc.*, 387 Mass. 783, 789 n.8, (1982).

The Court further noted that bystander emotional distress elements — familial relationship and substantial physical injury — are not required of a plaintiff who was herself within the zone threatened by the defendant's negligence. *Calderon v. Royal Park, LLC*, 96 Mass. App. Ct. 49, 57-59 (2019). Instead, "[w]hen a plaintiff has been subjected to the risk of serious bodily harm from an automobile or other object directed toward his person by the negligent conduct of a defendant, emotional damage may be expected to result, and the requirement of some additional element of satisfactory proof of [emotional distress] has been met." *Calderon* at 59, quoting *Payton v. Abbott Labs*, 386 Mass. 540, 554 (1982).

The Court posited that Massachusetts law is consistent with Restatement 3d of Torts § 47 which provides, "An actor whose negligent conduct causes serious emotional harm to another is subject to liability to the other if the conduct … places the other in danger of immediate bodily harm and the emotional harm results from the danger." It seems clear though that in hybrid cases in which a plaintiff who suffered an impact or was within the zone of danger suffers emotional distress due to seeing harm to another, compensable damages are not strictly confined to those resulting from the danger, but also include damages caused by witnessing the harm to the third person. *Cimino v. Milford Keg, Inc.*, 385 Mass. 323, 333 (1982), citing Restatement (Second) of Torts § 313 (2); see *Calderon* at 59. ("Although it is true that the plaintiff seeks to recover damages for witnessing the death of her best friend, she does so as someone who herself was placed in the zone of danger by the defendant's conduct. Accordingly, she is not subject to the multifactor standard governing bystander recovery, and we need not decide whether being a "best friend" satisfies it.")

# Trying a Chapter 93A/176D case

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brought by both parties, and the defendant moved for summary judgment and brought a motion for sanctions against me (it was denied).

My favorite "interesting litigation strategy," however, was a defendant's attempt to depose me and call me as a witness at trial. This is, in fact, a common defense tactic in Ch. 93A cases. Personally, although I was tempted, I have seen "Inherit the Wind" and concluded it would be a bad idea. Fortunately, the law was on my side. "The practice of attempting to call opposing counsel as a witness during the course of trial to establish some fact that can readily be proved in a different manner should be discouraged."[6]

As long as there's no material dispute between you and the adjuster about what was communicated, there's no basis for having you testify. In my case I was willing to accept the adjuster's version as contained in her testimony and claim notes, so the defendant was not allowed to call me as a witness. Be warned, though, if your testimony is necessary to prove a Ch. 93A violation, you'll have to refer the case to someone else.

If you do end up litigating one of these cases, I'm sure you'll have your own unique experiences. You'll be committing to a serious investment of time and some serious aggravation. But if you believe your client has been unfairly treated, you'll be performing an important service, not just for your client, but for all Massachusetts consumers.

Now, if you've gotten this far, welcome to the latest issue of the MATA Journal.

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[1] *Rhodes v. AIG Domestic Claims*, No. 05-1360-BLS2 (Suffolk Superior Court, Jan. 27, 2006, Memorandum and Order by Gants, J. at p. 7-8 citing *Yurick v. Liberty Mutual Ins. Co.*, 201 F.R.D. 465, 473 n. 13 (D. Ariz. 2001).

[2] *Rhodes v. AIG Domestic Claims* at 9.

[3] *Rhodes v. AIG Domestic Claims*, No. 05-1360-BLS2 (Suffolk Superior Court, Jan. 27, 2006, Memorandum and Order by Gants, J. at p. 16 and 18).

[4] *Coultas, et al v. Liberty Mutual Fire Insurance Company*, No. 13-311; (Suffolk Superior Court, June 20, 2014, Order by Wilkins, J. at 6).

[5] 388 Mass. 671 (1983).

[6] *Kendall v. Atkins*, 374 Mass. 320, 324 (1978).

# Seizing the opportunities of e-filing

**By David A.F. Lewis**

The shift by many state and federal appellate courts to e-filing has several consequences for attorneys. The most obvious is that judges, staff attorneys and other court staff will be reading your briefs, petitions, motions and other materials on monitors, iPads and tablets — and not on paper.

As I discussed in my articles, "The Perils for Trial Lawyers of On-Screen Reading" in the November 2018 edition of The MATA Journal and "Easing On-Screen Reading of Appellate Briefs" in the May 2019 issue, the consequences of judges reading briefs and motions on an iPad or tablet have, at least at a basic level, fairly easy solutions. But the shift to reading briefs and motions in an electronic format also presents significant opportunities for attorneys willing to seize them. The opportunities exist because reading on a screen instead of on paper increases the impact of the effective use of visual displays — graphs, photos, charts or diagrams — to not just increase your document's readability, but to make it more persuasive. I will present a few ideas in this article on how best to take advantage of those opportunities.

### What do appellate judges think about attorneys using charts and graphs in their briefs?

It turns out they like the idea. How do I know? Over the course of several years, I sent surveys to all of the federal and state appellate judges in the federal 1st, 2nd, 3rd, 7th and 10th circuits. The courts surveyed comprise 39 appellate courts in 18 states. (New Jersey did not give me approval to survey its judges, which is why the numbers are slightly "off.") I received responses from 192 judges, which works out to a response rate of slightly under 43 percent. This is a relatively high response rate for a survey that was submitted "cold" (i.e., I didn't prepare anyone ahead of time).

The survey contained 86 questions divided into seven sections. The questions in each section sought not only to discover the advocacy preferences of the judges on a particular topic, but also to gauge the strength of their preferences. To accomplish this, the questions in six of the seven sections gave the judges a Likert scale consisting of five answer choices ranging from "strongly agree" (indicated by a 1) to "strongly disagree" (indicated by a 5).

I calculated mean (average) values for each individual court. I also calculated standard deviations in order to have a value that reflected the extent to which a group of judges disagreed with one another.

As part of my survey, I asked the state and federal appellate judges how they liked charts and graphs and this is how they responded.

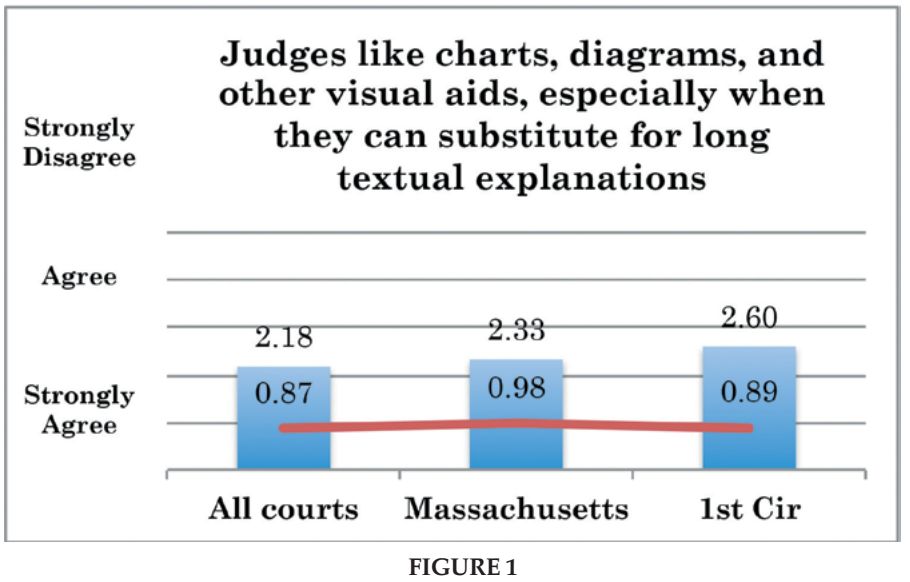


FIGURE 1

If the survey results of almost 200 state and federal appellate judges approving the use of charts and graphs is not enough, how about an example of a photo being used by an appellate judge in an opinion? These pages are taken from a 7th Circuit decision written by Judge Richard Posner. (*Figures 2a and 2b)* See *Gonzalez-Servin v. Ford Motor Co.*, 662 F.3d 931, 934 (7th Cir. 2011).

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the cases that established the precedents. Whatever the reason, such advocacy is unacceptable.

The ostrich is a noble animal, but not a proper model for an appellate advocate. (Not that ostriches *really* bury their heads in the sand when threatened; don't be fooled by the picture below.) The "ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist is as unprofessional as it is pointless." *Mannheim Video, Inc. v. County of Cook*, 884 F.2d 1043, 1047 (7th Cir. 1989), quoting *Hill v. Norfolk & Western Ry.*, 814 F.2d 1192, 1198 (7th Cir. 1987).

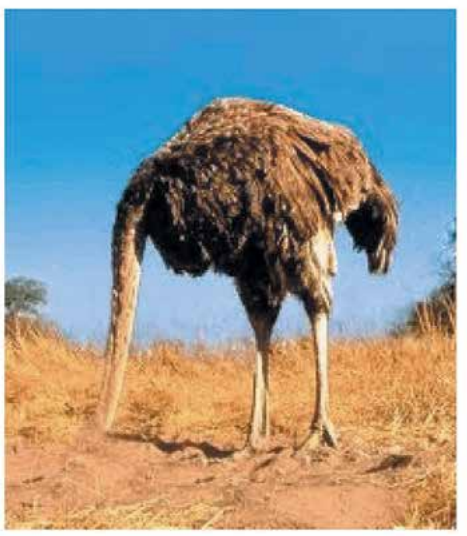


FIGURE 2A

6 Nos. 11-1665, 08-2792

The attorney in the vehicular accident case, David S. "Mac" McKeand, is especially culpable, because he filed his opening brief as well as his reply brief after the *Abad* decision yet mentioned it in neither brief despite the heavy reliance that opposing counsel placed on it in their response brief. In contrast, counsel in the blood-products appeal could not have referred to either *Abad* or *Chang* in their opening brief, did try to distinguish *Abad* (if unpersuasively) in their reply brief, and may have thought that *Chang* added nothing to *Abad*. Their advocacy left much to be desired, but McKeand's left more.

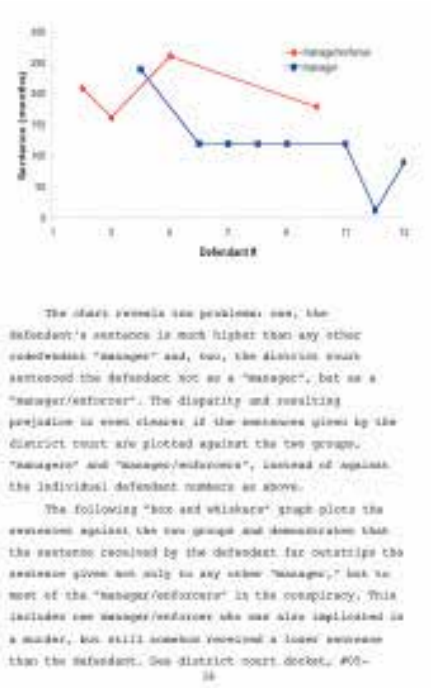
AFFIRMED.

11-23-11

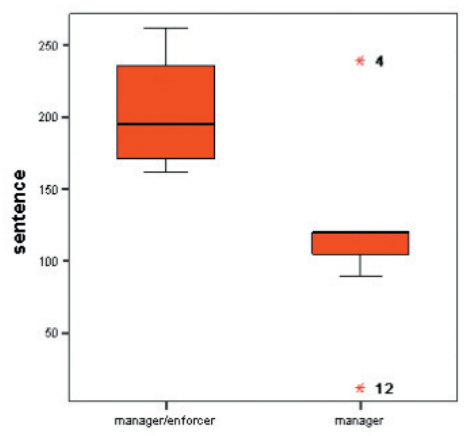
FIGURE 2B

# Examples of charts, graphs to use in briefs and motions

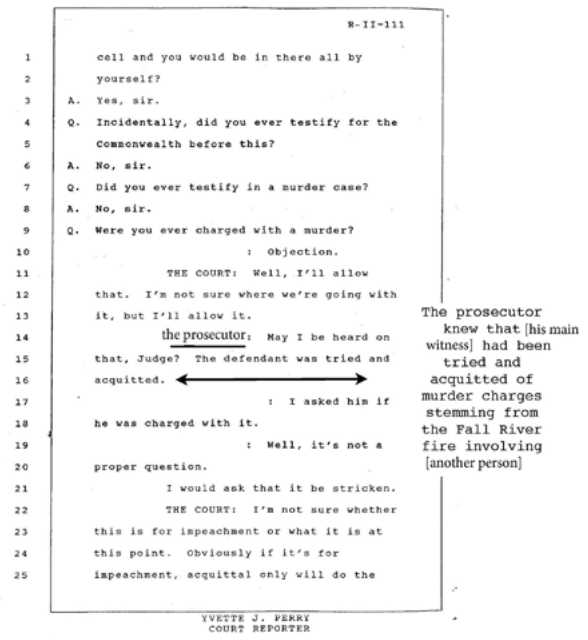
1. Charts are great at showing the relationship among different values (in this instance, sentence length in a criminal case).
The chart here is shown as it appeared on the page of the brief.



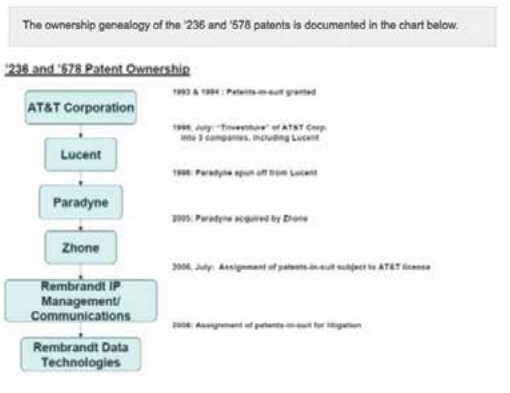
2. A "box-and-whiskers" graph shows the outlier(s) in the data, (in this graph, #4). "Box-and-whiskers" graphs are a bit more sophisticated, but can be extremely persuasive with the right data and when placed in the proper context in the brief.



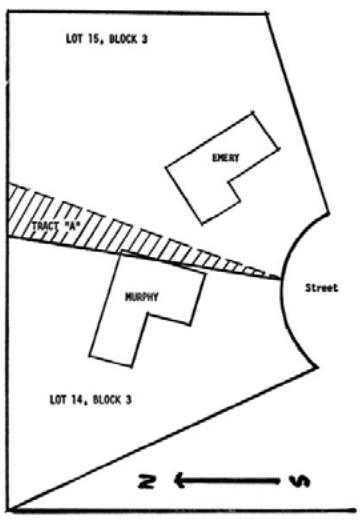

3. Most programs that allow you to work with PDF images, such as Adobe Acrobat, include a text tool that allows you to highlight or call-out portions of transcripts better than a dry reference to a volume, page and line.




4. Flowcharts show — rather than explain — items in a series. *Rembrandt Data Techs., LP v. AOL, LLC*, 641 F.3d 1331, 1333 (Fed. Cir. 2011).[1]




5. A drawing helps someone understand a space — and how something happened inside it — better than an explanation in a page (or multiple pages) of text. *Emery v. Medal Bldg. Corp.*, 436 P.2d 661, 662–63 (Colo. 1968). Diagrams such as this are, obviously, extremely helpful and effective in real estate and personal injury cases.




6. Comparing images side-by-side can be highly effective to show and explain similarities and difference especially in technical or medical devices. *Hawg Tools, LLC v. Newsco Int'l Energy Servs. USA, Inc. et al.*, 2016 COA 176M, ¶27 (Colo. App. 2016).

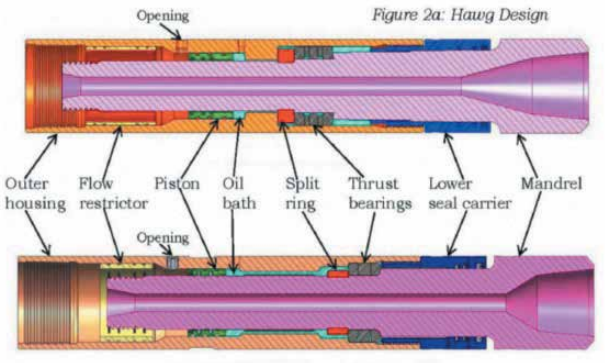


Figure 2: Comparison of Hawg and Newsco Designs

## Conclusion

You would never present a case to a jury without visual displays to help convey the message or theme of your case. Now that judges are reading most pleadings and briefs in electronic format, you should likewise consider never submitting written material without some sort of visual display — a graph, a photo, chart, or diagram — to not just increase your document's readability, but to make it more persuasive as well.

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Thanks to Michael Blaisie for examples 4, 5 and 6. See https://cbaclelegalconnection.com/author/michael-blasie/ (Jan. 9, 2018).

*David A.F. Lewis has been litigating appeals in state and federal court for over 20 years. He is licensed to practice law in Massachusetts and Colorado and has chaired, co-chaired and presented at over 26 appellate practice seminars since January 2007. His practice focuses on appellate litigation as well as consulting with lawyers, businesses and organizations to make their briefs and motions more readable, persuasive and dynamic. He can be reached through www.appellateconsultant.com and at 617-571-3085.*

# MATA MEMBERS CELEBRATE JUSTICE AT ANNUAL CONVENTION AND DINNER

Hundreds of lawyers, judges and lawmakers gathered at the Sheraton Framingham May 16 to network with peers and salute superstars in the legal community and government. MATA members spent the day learning at educational seminars and the night feting some Massachusetts legal luminaries. MATA honored Michael E. Mone with the MATA Lifetime Achievement Award. Carlotta McCarthy Patten received the Court Management Award. Representative Jeffrey N. Roy received MATA Legislator of the Year. In addition, MATA presented the PAIR Project with the MATA Friend of Justice Award for the organization's service to asylum seekers and immigrants.


Representative Jeffrey N. Roy
The MATA 2019
Legislator of the Year Award

# President's Message: We used to be society's heroes

Continued from page 1

Together, we have stood up against the corporate and insurance machines that seek only to line their pockets at the expense of people's lives.

But not everyone sees it that way. The very people we champion have been tricked into thinking that most lawsuits are "frivolous," that juries give out "jackpot justice" and that our tort system is essentially a "lottery." The propaganda campaign to demonize trial lawyers and our system of justice has been going on for years. The Manhattan Institute, which touts itself as a "leading voice" in the area of "tort reform"[5] says, "The litigation industry is nothing but Big Business. Given that 19 percent of all tort costs go to plaintiffs' attorneys, we can imagine a corporation called Trial Lawyers, Inc., which rakes in almost $40 billion per year in revenues — 50 percent more than Microsoft or Intel and twice those of Coca-Cola. The lawsuit industry's lack of transparency prevents us from making an accurate profit estimate, but if its margins are as high as we suspect, Trial Lawyers, Inc. might well be the most profitable business in the world. And it is slowly creeping into almost every aspect of American life. The litigation industry's commitment to profits has fostered corruption, cronyism, and bad public policy — all of which negatively affect the American economy by diverting monies that could have been used to hire workers, conduct product research and development, and make charitable donations."[6]

Ironic that big business and the insurance industry, which of course fund the Manhattan Institute, have decided to demonize plaintiffs' trial lawyers by saying that we are Big Business. Outrageous, but there it is in black and white. And much of the public has bought this lie.

How could this happen? How could the public we have fought to protect turn against us and take big business's side? Propaganda.

What can we do about it? Professor Arthur R. Miller reminds us: "After all, you are now the trustees of civil justice and cannot simply blame your predecessors for its warts and bumps and do nothing about them."[7]

Education is the answer. I challenge each one of you to continue the fight and to take every opportunity to remind your clients and the public about the good that we have done over the years and the good we are doing now. We help the injured obtain justice. We are ones who say that it should not be the taxpayer who has to pay for the medical and life care of injured people; it should be the business or person that caused the damage or their insurance company. And through our work, we are making everyone's lives safer. It is because of us that manufacturers make safer products, doctors are more careful and insurance companies act more fairly.

> "Take every opportunity to remind your clients and the public about the good we have done and are doing now.

As Ruth Bader Ginsburg once said, "If you are neutral in situations of injustice, you have chosen to side with the oppressors." We are not neutral in this battle. As plaintiffs' trial lawyers, we have spent our lives fighting the oppressors. Don't side with the campaign against us. Speak out.

*Kathy Jo Cook, the 2019-2020 MATA President, is the managing member of KJC Law Firm, LLC, which represents individuals and businesses in civil and criminal cases, including personal injury, wrongful death, medical and legal malpractice, consumer protection and employment discrimination. She was the 2008-2009 President of the WBA of MA and has served on the boards and committees of a number of bar associations. Kathy Jo is an honors graduate of Suffolk University Law School and the University of Houston.*

[1]See Barbara Young Welke, "Owning Tragedy, A Hazard," 1 UC Irvine L. Rev. 693 (2011).

[2] See *McCormick v. M.A. Henry Co.*, 275 A.D. 758, 88 N.Y.S. 2d 890 (1949)

[3]15 U.S.C. § 2051 (a) (3) (1972).

[4] Elizabeth McLoughlin, Nicola Clarke, Kent Stahl and John D. Crawford, "One Pediatric Burn Unit's Experience with Sleepwear-Related Injuries," 60 Pediatrics, Issue 4 (October 1977).

[5]https://www.manhattan-institute.org/about last accessed Oct. 13, 2019.

[6] https://www.manhattan-institute.org/triallawyersinc last accessed Oct. 13, 2019.

[7] Arthur R. Miller, "What Are Courts For? Have We Forsaken the Procedural Gold Standard?," 78 Louisiana L. Rev. (2018).

# Establishing liability through the defendant

Continued from page 1

circumstances, so when the defendant runs out of ideas, you can coax additional admissions.

For example, in a car crash case, ask the defendant what it means to drive defensively. Does defensive driving mean paying attention to the roadway at all times, seeing what can be seen, following at a safe distance, anticipating the actions of other, driving at a safe speed under the conditions? Ask the defendant if she follows these rules at all times.

Your objective should be to elicit a list of precautions that a safety-conscious party must follow when performing the function involved in your case. Make sure your list addresses every negligent act or omission by defendant.

Once you have your safety checklist, ask the defendant specifically what she did in this case. Drill down to get as many specific factual admissions as you can. Don't bother asking the defendant to self-judge whether she met her own safety standards. That is for the jury at trial. What you will find is that the defendant's conduct did not measure up to the high safety standards that she proudly admitted adherence to at the start of the deposition.

If properly done, your deposition may relieve you of the need for an expert witness at trial to testify regarding defendant's breach of their safety responsibilities.

*Marc L. Breakstone is a principal of Breakstone, White & Gluck, P.C. in Boston, where he concentrates in representing plaintiffs in serious personal injury and medical malpractice cases.*

## MATA MEMBER BENEFIT SPOTLIGHT

In addition to being a part of a larger community of trial lawyers, MATA members enjoy a number of concrete benefits. Below is a small sampling of just a few popular member benefits:

**E-Mail Listserv:** Probably MATA's most popular benefit, the Listserv brings you into a community of over 700 attorneys who trade insight, experience and advice. Lawyers statewide who access this pooled knowledgebase find that posting a question to the MATA listserv saves hours of time.

**Meeting Space:** Space is available at the MATA office in Concord for members for a client meeting, section meeting, seminar, mediation or deposition.

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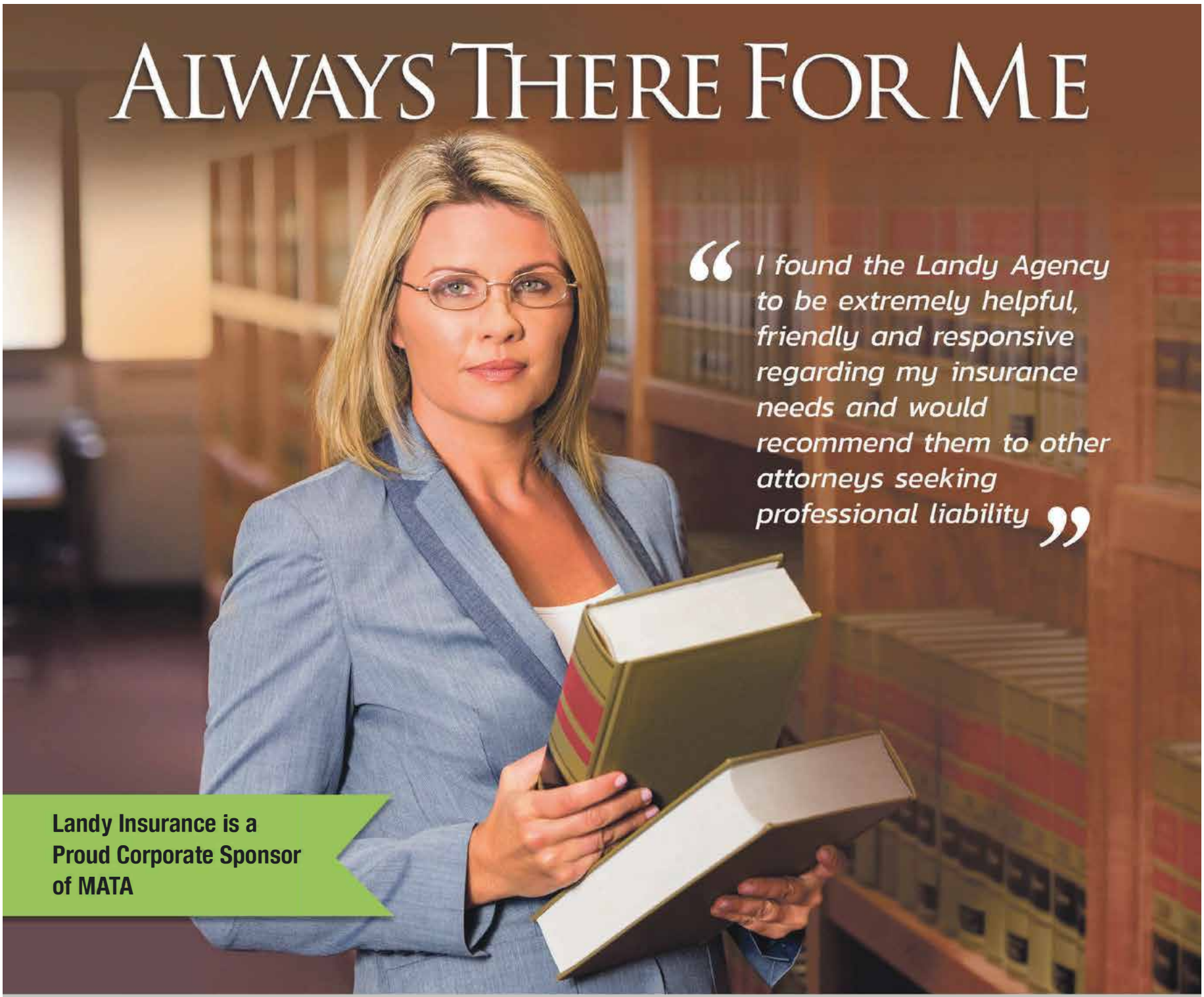


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