

MASSACHUSETTS
PRACTICE SERIES™

Volume 43

Trial Practice
THIRD EDITION

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Chapters 1 to 19



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INTRODUCTION TO THE THIRD EDITION OF TRIAL PRACTICE

The third edition of Massachusetts Trial Practice is a new work. It addresses the significant changes in trial practice since the earlier editions were first published. New developments in court procedures, evidence, rules of court, standing orders, and statutes have had an immense impact on modern trial practice in the courts of the commonwealth. The third edition is intended to be a ready and reliable reference to assist experienced attorneys stay current on all phases of modern Massachusetts trial practice, thereby, enhancing their effectiveness. Novices and law students will find the citations, ideas, suggestions, strategies, tactics and techniques in this work useful for leading their clients safely to justice.

The third edition opens with chapters covering topics having an overarching importance in trial practice, ethics and the courts. The nine rules of ethical advocacy in Massachusetts are explained because unethical advocacy usually results in bar discipline. Missteps such as bringing a case in the wrong court, one without jurisdiction or where venue is improper, can cause a case to flounder at its outset; therefore, the third edition reviews the courts of the commonwealth, their jurisdiction and venue.

The third edition proceeds in the order in which cases come in, are accepted, investigated, discovered, prepared, tried and appealed to final judgment. Beginning with a discussion of preliminary matters, such as whether to take a case, how to get paid for your work, and how to investigate a case, the third edition turns to the legal standards for pleading, commencing the case within the applicable statute of limitations or repose, and moving it through the trial court in accordance with the applicable time standards and tracking orders. Since occasionally a case can get sidetracked by removal from state to federal court, the removal process is explained.

Motions are commonplace in the trial courts of the commonwealth; they arise in almost every case and may be used for many purposes. The third edition examines modern motion practice and suggests seven practical rules for effectively presenting motions in court. Pretrial motions for framing the case, narrowing the issues and putting it on a suitable trial footing are discussed. Knowing how to properly make motions

and effectively present them in court are two skills every trial attorney needs to master. The third edition explains what to do when rapid legal action is required, such as when a client faces irreparable loss, is held in police custody, or threatened with abuse.

The Massachusetts Rules of Civil Procedure and the Massachusetts Rules of Criminal Procedure significantly changed traditional trial practice by, among other things, moving it away from, what was known as trial by ambush. The new frontier in modern discovery is electronically stored information. The third edition examines electronic discovery and explains techniques for informal discovery, admissions, interrogatories, document production, depositions (lay, audio-visual and expert), and entry onto property for inspection or physical examinations. Sanctions for discovery abuse and the proper assertion of applicable privileges are described.

The primary principle of trial practice, pretrial preparation, is examined in the third edition. The extent of pretrial preparation usually depends on the complexity of the case and the experience of counsel in handling similar cases. Although no case suffers from too much pretrial preparation, many falter for lack of it. Proper pretrial preparation includes: planning to object to the opposition's problematic evidence; preparing offers of proof to support your most important evidence; making a first draft of proposed jury instructions; and identifying the correct standard of review applicable to the main issues in your case. Pretrial preparation is the time for taking the necessary steps to make sure every fact you need to prove is admissible and developing a backup plan for any questionable evidence you need to protect your case against the unexpected. An excellent way of doing this is by preparing to prove facts without evidence. Pretrial preparation is the time for finding your theory of the case and crafting a compelling theme to drive it home. It is the time for preparing your client and witnesses for the trial, for preparing and having subpoenas served, for handling any spoliation issues in the case. In civil cases, pretrial preparation is the time to come up with a realistic settlement value, by analyzing the potential for liability and damages. It is also the time for preparing the pretrial memorandum, attending pretrial conferences, and writing the trial brief.

After reviewing the considerations involved in deciding whether a trial should be by judge or jury, the third edition takes up the topic of jury selection. The way citizens are qualified to become jurors is explained. The important information contained in the confidential juror questionnaires is revealed. This basic background information on every juror is used during jury selection for selecting a receptive jury. The

modern voir dire process, including attorney conducted voir dire, information sharing, group and individual questioning are explained. Sample voir dire questions in cases involving auto accidents, childhood sex abuse, lack of criminal responsibility, medical malpractice, prejudicial publicity, product liability and racial prejudice are provided. Challenging a jury, the array, for excluding a distinctive group, underrepresentation and systemic exclusion are explained. After providing some conventional wisdom about challenging prospective jurors, challenges for cause and peremptory challenges, including the number, procedures and propriety of peremptory challenges, are explained.

The third edition's examination of opening statements begins by explaining the differing approaches to opening statements in bench and jury trials. Juror expectations about opening statements in a modern trial are discussed. The third edition retains the universal truths and timeless features at the core of the earlier editions including the principles of ethos, pathos, and logos; additionally, the six maxims of persuasion are explained. After providing an overview of opening statements, the law of opening statements is explained. The characteristics controlling the content of a proper opening are described including the prohibitions on arguing, non-evidential information, personal opinions and legal lecturing. The court's discretionary enforcement of the propriety of opening statements is considered along with the nature and purpose of opening statements. The methods for preparing an opening statement along with illustrative checklists and outlines are provided. Contemporary and traditional opening statements are described. The three main parts of opening statements are separately discussed. The importance of establishing a theme, the manner of opening and using exhibits in the opening statement are all explained along with the basics of sequestering witnesses. The most common pitfalls in opening statements are identified. Sample opening statements in civil and criminal cases are provided. Problems such as referring to experts during the opening statement, missing evidence and the burden of proof are discussed.

One of the most effective and efficient ways to try a case is proving facts without evidence. The third edition explains the four main methods for proving facts without evidence: agreed statement of facts and trial stipulations; judicial notice; the burden of proof including prima facie evidence, inferences, and presumptions; and views. During pretrial preparation, each method should be examined, every fact susceptible of such proof identified, and arrangements made, or the proof put into a suitable form, for use at trial. An experienced trial attorney once likened proof without evidence going into the record to getting

hit by an ICBM.

A competent direct examination seems simple to the lay observer but its seeming simplicity is deceptive; realistically, direct examination is a very difficult trial skill to master. After discussing the nature and purpose of direct examination and explaining how to make witnesses appear in court, the third edition explains the seven steps for preparing an adroit direct examination. The law of direct examination is explained. The art of direct examination is explored. The many practical features of direct examination are discussed; such as having a simple plan, logical order, pacing the direct by using small details to make a big point, eliciting description and action, minimizing or ignoring weakness and asking clear questions. The main methods for eliciting testimony, adverse examination, open-ended questions, specific questions and the secret art of direct examination are described. The form of questions on direct examination are discussed including questions which are: argumentative; assume facts not in evidence; call for a narrative answer; comments; compound; confusing; harassing; leading; misleading; and speculative. The sometimes-troublesome issue of laying a foundation is explored. Special attention is paid to foundations for establishing testimonial competence of a child or expert witness. Focus is also put on authenticating or identifying evidence including: self-authentication; testimonial authentication and identification; ancient documents; comparisons; distinguishing characteristics; e-mail communications; methods provided by statute or rule; nonexpert opinion on handwriting; public records or reports; pictures or other products of a reliable process or system; phone calls; personal knowledge and the opinion rule. The third edition explains how to offer and use trial exhibits, make an offer of proof, and the foundations needed for demonstrations, experiments and tests. The methods for handling witness memory problems including memory revived, recorded memory and repressed memory recovered are discussed. The use of character and reputation evidence is explained including exceptions used by the accused, exceptions used by the prosecution and witness exceptions.

Following a description of the principles and purposes of cross-examination is an explanation of the uses of cross-examination to: develop or elicit favorable facts; discredit the witness; test the knowledge, testimonial competence, and truthfulness of the witness; show the bias, prejudice, interest or motive of the witness; determine the opportunity the witness had to learn about their testimony; and weakening the direct testimony. After describing the law and scope of cross-examination, preparing for cross-examination is examined.

Special focus is put on preparation for opposing witnesses, knowing the case, analysis of witnesses and possible testimony, organizing and framing the examination, preparation of direct witnesses for cross examination and silent cross-examination. A number of practical guidelines for effective cross-examination are suggested. They include being prepared, listening to the direct testimony, controlling the witness, listening and observing, starting and stopping strong, cross-examining for the factfinder, appearing sincere, keeping calm, carrying on, and patience pays. The topic of impeachment is discussed. Its focus is on the decision to impeach, impeaching for motive such as bias, interest or prejudice, impeaching by prior inconsistent statements, impeaching by conviction, using bad acts for non-impeachment purposes, and testing testimonial faculties and specific contradiction. Witness control techniques, a vital part of cross-examination, are explained. It involves things like looking the witness in the eye, holding center stage, and wording the question to control the answer. Cross-examination using books, periodicals or treatises is discussed. Cross-examining particular types of witnesses focuses on the complainant in sex crimes, expert witnesses and hostile witnesses. Redirect, re-cross and rebuttal examination are described. Objections, offers of proof and motions to strike are explained.

The third edition deals with the crucial topic of damages in civil litigation. After discussing the general nature and grounds of damages, it separately discusses punitive and multiple damages. The key factors in compensatory damages, causation, certainty, completeness, and avoidability are identified. Compensatory damages in contract cases are generally examined including expectancy damages, reliance damages, restitution damages, costs and interest, and liquidated damages. UCC damages for buyers, sellers, lessees and lessors are reviewed. The elements of eminent domain damages are described including costs, interest, real estate taxes, relocation expenses. The calculation of fair market value in eminent domain cases is explained including issues involving: the highest and best use of the property; valuation by an owner's opinion or assessed value; the three main methods for valuing real estate; damages for total takings, partial takings (severance damages), and no formal taking (special damages). Tort damages for personal and real property are examined. Tort damages for personal injury are explained including hospital and medical expenses, impairment of earning capacity, pain and suffering, and adding costs and interest. The legal limitations on tort damages are reviewed including how comparative negligence reduces damages, the economic loss doctrine, good Samaritan exemptions, no fault insurance law limits on damages, damage

caps for charitable institutions, damage caps in medical malpractice cases, and the tort law damage caps for state and local government. Damages for the loss of consortium generally, filial consortium, parental consortium and spousal consortium are explained. The collateral source rule generally and the statutory rule applied in medical malpractice cases are described. Actual, compensatory, and punitive damages in wrongful death cases including the beneficiaries, limitations and parties are discussed. Contempt sanctions and the procedures for summary criminal contempt, non-summary criminal contempt and civil contempt are explained.

After introducing closing arguments and describing their law and order, the third edition describes nine things to avoid in closing arguments: appealing to prejudice; arguing nonexistent facts; drawing unfair inferences; expressing personal opinions; falsely shifting the burden; misstating the law; sending a message and disparaging the opposition; seeking sympathy; and trading places. How to use exhibits during closing argument is discussed along with objections to a closing argument. The importance of practicing and presenting the closing argument is emphasized. Suggestions for planning and preparing a closing argument, structuring the closing argument, beginning the closing argument in bench trials and jury trials, the body of the closing argument and concluding the closing argument are made. These suggestions are gleaned from leading trial attorneys, authors and academic experts in the field of trial practice, and trial transcripts of closing arguments made by trial attorneys in actual cases.

The third edition discusses general principles relating to jury instructions, the duty of the court to instruct, and model jury instructions. The process for requesting jury instructions and objecting to jury instructions is explained. The different types of jury instructions, preliminary instructions, trial instructions, cautionary instructions, curative instructions, informational instructions, and limiting instructions are described. An overview of final jury instructions is provided. The third edition divides jury instructions into three component parts, the beginning, middle and end. Each component part is separately discussed. The discussion is enhanced by footnotes citing trial transcripts containing the jury instructions actually given by various superior court justices.

The third edition discusses jury deliberations generally. It explains external extraneous influences such as discussions with non-jurors, media reports, third party meddling and unauthorized views. Internal extraneous influences such as bias, excessive experimentation or investigation and juror inattention are explained. Items which may be taken into jury room are

generally identified. The general procedures for selecting, separating and using alternate jurors are discussed. Discharging or dismissing trial jurors for death, illness or inability, keeping away unreasonable delay, maintaining justice and the public interest, and preventing extreme hardship are described. The general process for sequestering the jury and responding to jury questions and requests is described. What happens when the jury deliberations reach deadlock is discussed. General verdicts, general verdicts accompanied by answers to interrogatories, and special verdicts are explained and distinguished from findings by the court.

The third edition's final chapter focuses on the trio of topics arising after a case is fully tried: judgments, post-trial legal maneuvers and appeals. The entry of judgment and its impact on starting, stopping and resetting the appellate clock is explained, the principle of finality is reviewed, and the process for adding costs is examined. The significance of an offer of judgment and default judgments are explained. A general overview of post-trial maneuvers leads to a separate analysis of the available maneuvers. Motions for judgment notwithstanding the verdict and motions to amend or make additional findings are explained. Motions for a new trial are explored. The grounds for them are explained: errors and irregularities in general; misconduct of parties, counsel, or witnesses; rulings and instructions at trial; disqualification or misconduct of or affecting jury; irregularities or defects in verdict or findings; verdicts or findings contrary to law or evidence; the size of the verdict; surprise, accident, inadvertence, or mistake; and newly discovered evidence. Motions for relief from judgment to correct clerical errors are discussed. The substantive grounds for a motion for relief from judgment are explained: excusable neglect, inadvertence, mistake, or surprise; newly discovered evidence; fraud, misrepresentation, or adverse party's misconduct; void judgment; judgment discharged, released, satisfied or inequitable; and residual reasons. The availability of an independent action to obtain relief from judgment is explained. The main post-judgment motions in criminal cases: motions to stay execution of sentence; motions for a required finding of not guilty and to set aside the verdict; motions requesting revision or revocation of the sentence; motions for release from unlawful restraint or correction of an illegal sentence, motions for a new trial; procedural requirements for Rule 30 post-conviction motions; and motions for forensic or scientific analysis are described. The topic of interlocutory review, before and during trial, is explored along with dispositive motions in criminal cases, interlocutory trial orders, preliminary injunctions and removal of unjustified *lis pendens*. The discussion of

interlocutory review, after trial, includes: appeals to superior court; interlocutory review by appellate division of district court; temporary interlocutory relief pending appeal; staying execution in civil cases; staying execution of sentence in criminal cases; and appellate procedures for civil and criminal motions to stay. Another method of interlocutory review involves judicial reports. The discussion on this topic covers: district court reports to appellate division; superior court reservation and report to appeals court; a trial judge's report for determination by the appeals court; the procedure upon report; report by single justice to full bench. The Supreme Judicial Court's power of interlocutory review, the exercise of general superintendence power, and the exercise of its transfer power are explained. The appellate process is reviewed. It includes: the notice of appeal; the record; docketing the appeal; direct appellate review; filing, service, and time; motions, briefs, the appendix and oral argument. The final portion of the third edition covers the topic of collecting and enforcing judgments. This discussion includes: pretrial security; writ of execution; discovery and supplementary process; seizing property; levying on land; selling personalty; selling levied land; redemption of land; completing the levy by return and recording; the duration of execution; actions to reach and apply and enforcing specific acts.

DEDICATION

To Judy

who, sacrificed too much of our precious time together enabling me to produce this work. When the going got rough her encouragement kept the work going. She freely shared her great gift of clarity making unintelligible sentences understandable. If the reader finds any sentence in this work obscure, it is only because I foolishly called upon her gift too sparingly. Her love, patience, and understanding made this work possible.

ACKNOWLEDGMENT

No worthwhile work on trial practice springs spontaneously from the mind of any one attorney. Trial practice is built on foundations laid by the ancient Greeks, particularly Aristotle's explanation of the three means of persuasion. As Cicero said: "To be ignorant of what occurred before you were born is to remain always a child." Each generation of trial attorneys and judges make improvements in trial practice and contribute to the growth and progress of the law. By evolving trial practice remains relevant. Incorporating the best trial practices from the past and the present enables us to move into the future standing on the shoulders of giants.

One of those giants is William C. Flanagan of the Massachusetts bar. As the ground-breaking author of the first two editions of Massachusetts Trial Practice, Bill Flanagan's contribution to the art and science of trial practice in the commonwealth is unforgettable. This third edition of Massachusetts Trial Practice is an entirely new work; however, it retains the core concepts of Bill Flanagan's masterpiece; trial practices perfected over the centuries by the legal giants on whose shoulders we all stand.

I would be remiss not to also acknowledge the many fine contributions made to this work by Frank J. Wozniak, Principal Attorney Editor, Helen M. Roberts, Lead Publishing Coordinator, and their colleagues at Thomson Reuters. Their expertise and consummate professionalism contributed significantly to making this work a reality.

Harry P. Carroll, Esq.
May 24, 2017



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