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STANDERWICK v. ZONING BOARD OF APPEALS OF ANDOVER
CHANGING THE LEGAL LANDSCAPE FOR STANDING IN ZONING APPEALS

By Keith Glidden

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INTRODUCTION

Massachusetts has 351 cities and towns that exercise the power bestowed upon them by the legislature to regulate land use within their bounds, to the extent that such regulation is not inconsistent with the laws of the commonwealth. Thus, the use, character, development and aesthetics of the Massachusetts physical landscape is governed by a checkerboard of locally implemented ordinances, by-laws and other regulations enacted under this constitutional authority in conjunction with Massachusetts’ zoning and regional planning statutes.

Local administration of land use through zoning is not unfettered, for the legislature also provided for judicial review of local board decisions. By statute, the only persons empowered to appeal a local zoning board decision are those who constitute a “person aggrieved” by the local board decision and who therefore have standing. Without a person aggrieved, the court lacks jurisdiction over the appeal.

Since passage of the Zoning Enabling Act revisions in 1933 setting forth the right to appeal local board decisions, Massachusetts courts have defined the types of harms a person must suffer to be aggrieved and therefore have standing to challenge a zoning decision. Standing rests on defining a type of cognizable harm. The procedure to prove or challenge standing couples a rebuttable presumption with a specialized evidentiary burden that further complicates this jurisdictional element of a zoning appeal. When a defendant challenges a plaintiff’s standing with a motion for summary judgment, the standard of review under rule 56 of the Massachusetts Rules of Civil Procedure imposes additional considerations that challenge even the most experienced lawyer.

One would think that, over the years, the courts would have worked all the kinks out of the standing issue. To the contrary, Massachusetts courts are repeatedly asked to resolve legal and factual nuances in determining whether persons are aggrieved and have standing to challenge a local zoning board decision. Thus, in 2006, the Supreme Judicial Court (“SJC”), in its much anticipated decision in Standerwick v. Zoning Board of Appeals of Andover, made some significant pronouncements in the law of standing that have affected lawyers’ approaches to zoning appeals.

The SJC in Standerwick addressed the two major aspects of standing: (1) defining the legally cognizable harms that confer “person aggrieved” status on a plaintiff — the substantive grounds for standing; and (2) the presumptions and burdens placed on the plaintiff and defendant on the issue of standing — the procedure for asserting or challenging standing. Standerwick retooled the way both a plaintiff’s and a defendant’s lawyer should approach a standing dispute and provided a strategy that adds muscle to a defendant’s challenge to standing. Then, in Jepson v. Zoning Board of Appeals of Ipswich, the SJC considered additional facets of the same two issues and provided guidelines for plaintiffs to prove their claim to standing against a defendant’s attack. Left in the wake of these two decisions are the creative attorneys who test and explore the legal nuances of standing and the trial courts who must resolve the often fact-intensive standing disputes.

3. St. 1933, c.269, § 1. In 1920, the Massachusetts legislature passed the first act allowing cities and towns in the commonwealth to enact zoning regulations, St. 1920, c.601, §§ 1-9, codified at Mass. Gen. Laws ch. 40, §§ 25-30A (Ter. Ed.). No avenue for judicial review was provided as this act only permitted appeals by “[a]ny person who is aggrieved by the refusal of a permit” to the local municipal authority. See St. 1920, c.601, §5, codified at Mass. Gen. Laws ch. 40, § 27 (Ter. Ed.). After passage of the Home Rule Amendment in 1966, see infra notes 13 and 14 and corresponding text, the Zoning Enabling Act was substantially revised in 1975, St. 1975, c.808, § 1. Durand v. IDC Bellingham, LLC, 440 Mass. 45, 50 (2003) (“Prior to [the Home Rule Amendment], the zoning power belonged exclusively to the State, and could be exercised by municipalities only to the extent that State law permitted them to do so.”)
5. This article refers to the party who is challenging the zoning relief granted as the plaintiff and to the successful applicant for the relief at the local level as the defendant.
7. Id. at 28.
9. Id. at 92-98.

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Part I of this article outlines the judicial process for reviewing Massachusetts zoning decisions and the principles of standing. Part II provides a brief factual background for *Standerwick* and its procedural history. Part III analyzes the *S.C.*'s pronouncements on the harms recognized as affording standing under sections 20 through 23 of General Laws chapter 40B. It also addresses decisions involving both chapters 40A, commonly called the “Zoning Act,” or the “Zoning Enabling Act,” and 40B of the General Laws subsequent to *Standerwick* that have focused on defining the harms cognizable for purposes of standing. Part IV discusses *Standerwick*’s impact on a plaintiff’s presumption of standing in the context of summary judgment and analyzes the procedure for proving or challenging standing through the prism of civil procedure.

I. ZONING AND STANDING

A. The Statutory Foundation for Zoning in Massachusetts

The Home Rule Amendment to the Massachusetts constitution is the starting point for the regulatory scheme affecting land-use activities. Under the Home Rule Amendment, cities and towns may enact local ordinances or by-laws to exercise any power conferred upon them by the legislature in subject areas that have not been occupied by or reserved for state control and in a manner not inconsistent with the Massachusetts constitution and laws.

Statutorily, the starting place for zoning in Massachusetts is chapter 40A. Chapter 40A’s seventeen sections set forth a zoning scheme guiding cities and towns (i) in the enactment of ordinances and by-laws; (ii) through the standard regulatory permitting tools for the safe and orderly regulation of land and the authority and makeup of local zoning authorities; (iii) for enforcement, notice and public hearing requirements; and (iv) in providing appellate rights to those persons seeking review of a local zoning decision either to the permit granting authority or to court. Whether it be the regulation of certain land uses in districts, the imposition of dimensional requirements for lots and structures, the change of land uses within municipal boundaries, or the relief from zoning by-law requirements due to hardship on an individual property owner, cities and towns have broad police powers to make decisions that best fit the landscape and the public welfare of their citizens. When persons affected by a local zoning board decision believe that the local board has acted beyond the scope of its authority under the local ordinance or by-law, they may seek de novo review either in a superior court of the county where the land is located or in the land court (or, in Hampden County, in the housing court).

Chapter 40B authorizes cities and towns within a jurisdiction to collaborate for the economic, efficient and orderly promotion of the general welfare of their citizens and the development of land within their jurisdictions. The most notable, controversial and exercised provisions of chapter 40B are sections 20 through 23, which provide for the issuance of comprehensive permits for affordable housing.

The intended, essential purpose of the comprehensive permit is to allow a qualified builder proposing subsidized low- or moderate-income housing to sidestep many restrictive local dimensional and intensity zoning requirements imposed under chapter 40A that adversely affect a project’s economics and to seek approval of such development under one comprehensive permit before the local zoning board of appeals.

B. Standing

Given that land-use regulation is statutory, any review of the law of standing to appeal local zoning decisions should start with the statute. Section 17 of chapter 40A provides for appeal as follows:

> Any person aggrieved by a decision of the board of appeals or any special permit granting authority or by the failure of the board of appeals to take final action concerning any appeal, application or petition within the required time or by the failure of any special permit granting authority to take final action concerning any application for a special permit within the required time, whether or not previously a party to the proceeding, or any municipal officer or board may appeal to the land court department, [or] the superior court


17. Id. §§ 6, 9, 9A, 9B, 9C, 10, 12-14.

18. Id. §§ 7, 8, 11, 15-17.


21. Id. § 21.

22. See id. §§ 21-23. The regulatory scheme for comprehensive permits is not clear upon first reading the statute since most of the substantive provisions appear in lengthy statutory definitions and in regulations promulgated by the Department of Housing and Community Development.

There are, of course, other land use laws that are not pertinent to this article. Chapter 40R of the General Laws, was enacted to “encourage smart growth and increased housing production in Massachusetts,” Mass. Gen. Laws ch. 40R, § 1 (2008), and allows a city or town to incorporate in its zoning a smart growth overlay district. Id. § 2. The subdivision control law, Mass. Gen. Laws ch. 41, §§ 81K-81GG (2008), provides for the orderly subdivision of property in Massachusetts usually by a planning board and is often interrelated with zoning decisions. In fact, it is usual for a planning board to endorse or approve a plan for the division of land with a note on the plan that the designation of lots does not mean that the lots are buildable or satisfy zoning requirements. See, e.g., Smallay v. Planning Board, 10 Mass. App. Ct. 599, 604 (1980); Bigelow v. Osnoss, 16 LCR 446, 447 (Mass. Land Ct. 2008). Others include the Historic District Act, Mass. Gen. Laws ch. 40C, §§ 1-17 (2008) and the regulation of wetlands through Mass. Gen. Laws ch. 40, § 8C (2008) and Mass. Gen. Laws ch. 131, § 40 (2008).
department in which the land concerned is situated 
... by bringing an action within twenty days after the 
decision has been filed in the office of the city or town 
clerk.23

Chapter 40B appeals follow section 17 in that “[a]ny person aggrieved by the issuance of a comprehensive permit or approval may appeal to the court as provided in section seventeen of chapter forty A.”24 The difficulty posed for land-use lawyers is that nothing within section 17 details the meaning of “aggrieved,” the linchpin that confers standing on a person to challenge a local board decision. That statutory prerequisite has been treated as jurisdictional.25 The judicial decisions are numerous, and the land-use lawyer is required to pore carefully over profuse amounts of case law rendered since 1933 in order to identify the important hurdles through which a plaintiff must jump before a court may reach the merits of the local zoning decision.26 The SJC’s decision in Standerwick has dramatically affected both the types of harms recognized and the procedural aspects of proving and challenging standing in land use cases.

1. “Person aggrieved” — cognizable harms recognized for standing

“Aggrievement” is the touchstone of standing. This term has developed to encompass the harms recognized by the courts that are sufficient to confer upon a plaintiff “person aggrieved” status under section 17 and the right to challenge a local board decision. Circle Lounge & Grille, Inc. v. Board of Appeal of Boston27 in 1949 was the first case to explain the concept that came to be known as aggrievement.28 In Circle Lounge & Grille, Inc., the SJC was faced with a plaintiff business owner who appealed the local board’s grant of a variance to the defendant developer, who intended to start a competing business across the street from the plaintiff’s parcel.29 The SJC found that a person aggrieved is typically one whose “legal rights have been infringed,”30 and proceeded to define what is meant by legal rights.31 The SJC held that those legal rights, however, do not include a “strictly private right in the enforcement of zoning regulations, unless some statute creates such right.”32 Noting that the governing zoning statute was more than just remedial, the SJC determined that the legislature’s enactment of the statute did not intend to “create in anyone arbitrary rights to interfere with the use of another’s land.”33 In order for a claim of aggrievement to confer standing, the “rights created must bear a rational relation to the situation and use of the plaintiff’s property.”34 To determine these rights, the SJC explored the purpose of the zoning statute.35 The SJC stated that the primary purpose of the regulation of land use through zoning is “the preservation in the public interest of certain neighborhoods against uses which are believed to be deleterious to such neighborhoods.”36 The SJC’s analysis in Circle Lounge & Grille, Inc. is the basic rubric by which later courts have used and continue to use to evaluate a plaintiff’s claimed harms to determine whether that plaintiff has standing.

Although the approach of Circle Lounge & Grille, Inc. has been essentially unchanged in the years subsequent, the courts’ implementation of this approach has created the large body of case law that is critical to understand because it further defines, and also sometimes creates confusion about, the typical harms that present a “plausible claim of a definite violation of a property right, property

25. Linking “person aggrieved” to jurisdiction was first articulated in Marotta v. Bd. of Appeals, 336 Mass. 199 (1957). Marotta stated that “[i]n the Superior Court had no jurisdiction to consider the case unless an appeal (if not by a municipal officer or board) was taken by an aggrieved person. It is immaterial that the point was not raised in the answers or before the Superior Court.” Id. at 202-03 (citations omitted). The authority cited by Marotta for this concept of jurisdiction derived from probate cases wherein only a person aggrieved could appeal a probate decree in equity. See id. at 202 (citing Pattee v. Stetsen, 170 Mass. 93, 94 (1898)).
26. Depending on the circumstances of a case, the de novo review of a local zoning decision may lead to a dual-stage structure of a zoning case. See, e.g., Raskind v. Town of Lexington Bd. of Appeals, 13 LCR 229 (Mass. Land Ct. 2005) (trial decision on merits of zoning decision), rev’d 68 Mass. App. Ct. 1115 (2007) and Raskind v. Town of Lexington Bd. of Appeals, 10 LCR 166 (Mass. Land Ct. 2002) (trial decision on standing). One stage will revolve around the plaintiff’s standing, the other around the merits of granting the special permit, variance or other zoning relief. This structure usually does not create a problem with presenting the two issues during a trial. However, often overlaps or is inextricably intertwined with proof of the merits. Where the zoning appeal is set for trial on both issues, disputes may arise about the timing of the presentation to the court of evidence relating to the two issues depending on the evidentiary overlap of the grounds for standing and the subject matter of the zoning relief. At trial, a defendant naturally desires to have the plaintiff’s standing addressed first through the plaintiff’s presentation of his or her case in order to leave the defendant the opportunity to end the case with a directed verdict or involuntary dismissal before presenting his or her prima facie case for granting the zoning relief at issue. Notwithstanding a defendant’s preference, the issue of standing in a zoning case may not be completely developed for the court without a full presentation of the project at issue, which is better done in the context of the defendant’s affirmative evidence. The resolution of these disputes is likely to vary depending on the project at issue, which is more protected in the context of the defendant’s affirmative evidence. The resolution of these disputes is likely to vary.
28. The SJC in Circle Lounge & Grille, Inc. did not use the term “aggrievement” to refer to a plaintiff’s harms that are cognizable to confer standing. The Appeals Court in Prudential Ins. Co. v. Bd. of Appeals, 18 Mass. App. Ct. 632 (1984), is the first reported appellate case using this term. Id. at 633. The SJC has also referred to a plaintiff’s harms as aggrievement. See Jepson v. Zoning Bd. of Appeals, 450 Mass. 81, 88-89 (2007); Marashlian v. Zoning Bd. of Appeals, 421 Mass. 721, 729 (1996).
30. Id. at 430.
31. Id.
32. Id. at 431.
33. Id. The statute at issue was St. 1924, c. 488 as amended by St. 1941, c. 373, which governed zoning in Boston. However, the SJC noted that its discussion of “any person aggrieved” applied as well to the same language in the statute governing zoning in the rest of the commonwealth (i.e., the predecessor to chapter 40A). Circle Lounge & Grille, Inc., 324 Mass. at 432.
34. Id. at 431.
35. Id.
36. Id. at 429-30.
increases. In the congestion, safety and parking problems associated with such increased pedestrian or vehicular traffic from development and overcrowding of land; [and] to avoid undue concentration of population.”

Although “aggrievement is a ‘matter of degree,’ and ‘the variety of circumstances which may arise seems to call for the exercise of discretion rather than the imposition of an inflexible rule,’” Massachusetts courts have recognized some aggrievements as typically within the “scope of interests protected by the Zoning Act.” Such as increased noise, increased or decreased light, diminished property values, decreased privacy due to increased density, the potential for litter, and drainage, erosion and flooding.

Very commonly recognized claims of aggrievement are due to increased pedestrian or vehicular traffic from development and the congestion, safety and parking problems associated with such increases. In Bedford v. Trustees of Boston University, the Appeals Court upheld the trial judge’s determination that the plaintiff had standing to challenge the Boston Board of Appeal’s decision, ruling that the plaintiff had provided sufficient evidence of a reasonable likelihood that he would be harmed by an increase in pedestrian and vehicular congestion and that such harms were of the types which zoning was intended to prevent or mitigate. The Appeals Court also upheld the trial judge’s determination that the plaintiff’s standing was unaffected by the defendant’s assertion that the plaintiff had an improper motive in appealing. The defendant claimed that the plaintiff was using the appeal to leverage a higher price for his property in a potential sale to the defendant rather than being motivated by the harm to his property interests. Under the factual circumstances, the Appeals Court found “nothing offensive in the plaintiff’s negotiations and simultaneous attempts to protect an interest recognized by the zoning law.”

Other types of claims of aggrievement are not “typical,” however, and have not been as well received by the courts. Primary among these claims are aesthetic concerns. When a plaintiff’s only claims are negative visual impacts from a potential development, the plaintiff is not likely to survive a challenge to standing. Specifically, the Appeals Court in Barvenik v. Board of Aldermen, stated that “[s]ubjective and unspecified fears about the possible impairment of interest, or legal interest sufficient to bring [a plaintiff] within the zone of standing.” An ultimate question, of course, is whether plaintiff has in fact suffered the injury claimed, together with the related issues of who has the burden of proof and what is the nature of the evidence that the aggrieved person must produce. These issues are addressed in Part IB (2) infra.

Although “aggrievement is a ‘matter of degree,’ and ‘the variety of circumstances which may arise seems to call for the exercise of discretion rather than the imposition of an inflexible rule,’” Massachusetts courts have recognized some aggrievements as typically within the “scope of interests protected by the Zoning Act,” such as increased noise, increased or decreased light, diminished property values, decreased privacy due to increased density, the potential for litter, and drainage, erosion and flooding.


38. An ultimate question, of course, is whether plaintiff has in fact suffered the injury claimed, together with the related issues of who has the burden of proof and what is the nature of the evidence that the aggrieved person must produce. These issues are addressed in Part IB (2) infra.


48. Id. at 378. The Appeals Court noted that § 2 of the Boston Enabling Act states that “[a] zoning regulation shall be designed among other purposes to protect against, (2) whether the plaintiff claims an injury to his or her private legal interest, or legal interest sufficient to bring [a] plaintiff within the ‘scope of interests protected by the Zoning Act,’” Massachusetts courts have recognized some aggrievements as typically within the “scope of interests protected by the Zoning Act,” such as increased noise, increased or decreased light, diminished property values, decreased privacy due to increased density, the potential for litter, and drainage, erosion and flooding.


50. Id.

51. Id. at 378. Courts are wary of a party using the appeal process for personal gain unrelated to the purposes that zoning is intended to protect. See Hogan v. Hayes, 19 Mass. App. Ct. 399, 404 (1985). However, a plaintiff’s appeal of a local board decision is considered to be petitioning activity and protected by the Massachusetts Anti-SLAPP statute, Mass. Gen. Laws ch. 231, § 59H (2008), from a defendant’s retaliatory actions such as those for abuse of process or intentional infliction of emotional distress. A defendant may be successful in prosecuting such claims related to zoning challenges in the face of a special motion to dismiss pursuant to the Anti-SLAPP statute by either showing an independent basis for such claims, i.e., other than the petitioning activity, or showing that the zoning appeal is devoid of any reasonable factual support or any arguable basis in law. See Ayasli v. Armstrong, 56 Mass. App. Ct. 740, 748 (2002) (finding that even though defendants’ persistent challenges to plaintiffs’ development of their property played role in plaintiffs’ decision to file action claiming violations of Massachusetts civil rights act, Mass. Gen. Laws ch. 12, §§ 11H, 11I (2008), there was independent basis for complaint, namely defendants’ interference with plaintiffs’ right to use and enjoy their property); Vittands v. Sudduth, 49 Mass. App. Ct. 401, 413-15 (2000) (finding that superior court properly denied plaintiff’s Anti-SLAPP statute special motion to dismiss defendant’s claims of abuse of process and intentional infliction of emotional distress because plaintiff’s declaratory judgment action challenging permits granted to defendant was devoid of reasonable factual and legal support); see also Garabedian v. Westland, 59 Mass. App. Ct. 427, 431-34 (2003) (special motion to dismiss should not have been granted because plaintiff’s declaratory judgment action, which sought judgment that development of his property was permissible, was in part based on non-petitioning activity, it would not expose defendants to legal expense or damages, and defendants did not show that complaint was devoid of factual or legal support).

The SJC has professed that motive is irrelevant in the determination of whether there is petitioning activity under the Anti-SLAPP statute and that the focus is “on the conduct complained of” only. Office One, Inc. v. Lopez, 437 Mass. 113, 122 (2002). Likewise, no reported Massachusetts case has included the motive behind a zoning appeal as an element in the determination of a plaintiff’s standing. The focus is only on whether the plaintiff’s aggrievement is a harm cognizable for purposes of standing under the applicable zoning scheme. Certainly evidence that a plaintiff has motives other than legitimate land use issues might be used by a defendant to challenge the credibility of the plaintiff’s evidence.

aesthetics or neighborhood appearance, incompatible architectural styles, the diminishment of close neighborhood feeling, or the loss of open or natural space are all considered insufficient bases for aggrievement under Massachusetts law.\textsuperscript{53} Such claims of aggrievement usually express instead matters of general public concern that are appropriately addressed in the local administrative process.\textsuperscript{54} Aesthetics are a valid concern of a zoning board but may not confer standing.\textsuperscript{55} Nevertheless, aesthetic concerns may confer standing where the local by-law or ordinance expressly imparts protection for such an interest.\textsuperscript{56} For example, the local by-law in Monks v. Zoning Board of Appeals of Plymouth,\textsuperscript{57} provided that a special permit can be granted only on the finding that “the proposed structure will not in any way detract from the visual character or quality of the neighborhood.”\textsuperscript{58} The Monks court determined that the “town of Plymouth created and defined a protected interest”\textsuperscript{59} by enacting this local by-law provision. Specifically, the plaintiffs in Monks claimed a visual impact from a proposed 190-foot cellular tower, and the court found in the record sufficient evidence from which it could reasonably infer that the tower would be visible from the plaintiffs’ home.\textsuperscript{60} Similarly in Martin v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints,\textsuperscript{61} the plaintiffs challenged the local board’s issuance of a special permit for the 139-foot steeple located 300 feet from the plaintiffs’ home.\textsuperscript{62} Although the SJC was not persuaded that the trial judge’s finding that the visual impacts on the plaintiffs’ home were “‘extreme and unique’ … [and] caused by ‘presence of such an enormous structure looming over [the plaintiffs’] property,’”\textsuperscript{63} the SJC found that the plaintiffs had standing to challenge the local board’s issuance of the special permit because the local by-law provided that the board should take “visual consequences” into consideration for any proposed structure and that “[v]iews from public ways and developed properties should be considerately treated in the site arrangement and building design.”\textsuperscript{64} Not only do plaintiffs often complain of the visual aesthetics of new development, but they also complain of the loss of view from their own property caused by new development. Courts have consistently ruled, however, that a plaintiff’s bare assertion that development will block the plaintiff’s view does not confer standing.\textsuperscript{65} However, obstruction of a view may translate into loss of property value, and where that harm stems from a derogation from the local zoning provisions, standing can be conferred.\textsuperscript{66} Another area that can be problematic for a plaintiff attempting to establish aggrievement is a plaintiff’s interest in the integrity of the neighborhood. Massachusetts courts have recognized standing to appeal a local zoning board’s decision where the plaintiff has a “legitimate interest in preserving the integrity of his district.”\textsuperscript{67} The Appeals Court, however, has not interpreted that interest broadly.\textsuperscript{68} In Cohen v. Zoning Board of Appeals of Plymouth,\textsuperscript{69} the Appeals Court noted that its ruling on standing was limited to recognizing the “legitimate interest [of owners of property in a single family district] in preserving the integrity of the district from the intrusion of multi-family housing.”\textsuperscript{70} Therefore, it is unlikely that plaintiffs will establish standing by claiming that they have an interest in preserving dimensional requirements, i.e., setbacks, in the neighborhood.\textsuperscript{71} Even where the interest is one of uses, the SJC noted in Circle Lounge & Grille, Inc. that the zoning statute did not confer aggrieved status on a “proprietor in a less restricted zone … by the introduction into a more restricted zone of any use permitted in the zone in which the proprietor’s property is located.”\textsuperscript{72} Massachusetts courts have scrutinized the claims of plaintiffs whose aggrievement is associated with a business property.\textsuperscript{73} As early as Circle Lounge & Grille, Inc., the SJC found that protection from injury due to business competition was not a purpose of zoning

58. Id. at 688.
59. Id.
60. Id.
62. Id. at 144.
63. Id. at 146.
64. Id. (quoting § 7.4.2 of the Belmont zoning by-laws). Notwithstanding the general judicial view that standing based on aesthetics requires a basis in the local zoning by-law or regulation, the Appeals Court found in McGee v. Bd. of Appeals of Boston, 62 Mass. App. Ct. 930, 931 (2004), that the impact of proposed construction abutting plaintiffs’ property conferred standing because the plaintiffs’ properties were less attractive places to live.
66. See Tsagonis v. Bd. of Appeals, 415 Mass. 329, 330 (1993) (finding variance required for house to be constructed on adjacent non-conforming lot, and loss in value accompanied by and attributable to zoning relief challenged). By logical analogy, the granting of a variance from the height requirement for a building on an abutting property that causes a plaintiff to lose a view could be directly related to the purposes of the zoning provision so that a claim of an obstructed view could confer standing for a plaintiff to appeal.
72. Circle Lounge & Grille, Inc. v. Board of Appeals, 324 Mass. 427, 432 (1949); see also Sherrill House, Inc. v. Bd. of Appeals, 19 Mass. App. Ct. 274, 276 (1985). Although it may seem plausible at first blush for a defendant to argue that a plaintiff is estopped from asserting aggrievement where the plaintiff has his own zoning problem or non-conformity, no appellate case has deemed a plaintiff’s zoning status as relevant to standing. See Vainas v. Bd. of Appeals, 337 Mass. 591, 594 (1958) (finding defendant’s contention that plaintiff did not have standing without merit and stating such contention was “none the less so because the plaintiff’s property is likewise nonconforming.”); Reynolds v. Bd. of Appeals, 335 Mass. 464, 470 (1957) (plaintiffs entitled to assert their interest in maintaining integrity of zoning district notwithstanding nonconforming use in their property). Certainly, if such an argument were deemed relevant, the scope of issues in the zoning appeal would unnecessarily expand and thereby divert attention from the merits of the permit at issue. Cf. Bellardo v. Nantucket Planning Bd., Misc. Case Nos. 128711 and 129198, slip op. at 19 (Mass. Land Ct. Dec. 14, 1990). That is not to say, however, that one who suffers from the same defect complained of may not be able to prove a legitimate interest in preserving the neighborhood from the same non-conformity.
73. See Waltham Motor Inn v. LaCava, 3 Mass. App. Ct. 210, 216 (1975) (“The only visible interest of any of those plaintiffs in contesting either or both of the decisions is the protection of existing motel facilities from the anticipated effects of business competition.”).
regulations. The SJC stated that “injury from business competition has generally been considered damnum absque injuria”—a loss or damage without injury. The SJC noted that it is more likely that zoning increases competition by limiting the physical areas where certain businesses can be conducted within a town or city.

Even though common sense dictates that any development would increase congestion, traffic and parking problems, and create drainage issues, artificial light and noise, a plaintiff must substantiate claims of aggrievement or have his or her standing successfully challenged. The Appeals Court in Butler v. City of Waltham stated that the plaintiff’s injury flowing from the board’s decision must be “special and different from the injury the action will cause the community at large.” This requirement that the injury be particularized to the specific plaintiff recognizes that the public administrative process and review at the local level is designed to address the general concerns of the community, and thus a plaintiff should only have the right to appeal when the plaintiff suffers specific harms that may not have been adequately addressed by the zoning board. For example, in Denneny v. Zoning Board of Appeals of Seekonk, the Appeals Court ruled that the plaintiff did not establish standing because claims of danger to neighborhood children and to the health of the community from a 135-foot communication tower were not sufficiently specific to the plaintiff. Plaintiffs will also not be allowed to address the merits of a local zoning board decision where they only proffer “a general civic interest in the enforcement of the zoning ordinance.”

Although a defendant may be largely successful in challenging many of the plaintiff’s various harms, all that is needed to proceed to a full judicial review of the merits of a board decision is one aggrieved plaintiff who has sufficiently supported one recognized harm. Additionally, courts treat a plaintiff’s claim of standing entirely separate from the adjudication of the merits of the appeal and do not limit the substantive scope of the review even where a plaintiff’s standing provides no support to or evidence of the ultimate merits of the plaintiff’s complaint. In other words, once a plaintiff has standing, the law permits him or her to challenge any zoning violation or aspect of zoning relief, including a violation or relief which has no effect on the plaintiff and which would not alone be a basis for aggrievement—a penny of standing opens the door to a pound of relief.

2. Rebuttable presumption and plaintiff’s burden of proving “aggrievement”

The actual harm claimed by the plaintiff and its connection to the alleged zoning violation is the substantive aspect of a plaintiff’s aggrievement. Proving the existence of the aggrievement is a process not to take lightly, for a plaintiff who fails to satisfy this jurisdictional prerequisite will not proceed to de novo review on the merits.

In 1957, the SJC in Marotta v. Board of Appeals of Revere was faced with the plaintiffs’ appeal of a variance granted to applicants seeking a use not allowed in the zoning district encompassing the property. The defendant applicants claimed that the plaintiffs failed to show that they were persons aggrieved. The SJC noted that the only relevant fact found by the trial judge in Marotta was that the local board determined that the plaintiffs owned property within the neighborhood affected by the defendants’ variance. Although a plaintiff living within the area affected by the board’s decision does not necessarily denote that plaintiff to be a “person aggrieved,” the SJC found that “it is reasonable to hold that there is a presumption that property owners to whom the board in the performance of its statutory obligation has sent notice as persons ‘deemed by the board to be affected thereby’ have an interest and are persons aggrieved.”

The relevant statutory provision regarding the presumption afforded the plaintiff is section 11 of chapter 40A, wherein “parties in interest” are entitled to notice of the local board’s consideration of local zoning matters. “Parties in interest” are identified as: [A]butters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner as they appear on the most recent applicable tax list … . The assessors maintaining any applicable tax list shall certify to the permit granting authority or special permit granting authority the names and addresses of parties in interest and such certification shall be conclusive for all purposes.

In Marotta, the SJC pronounced that the jurisdictional requirement, “person aggrieved,” is “not to be narrowly construed.” The SJC reasoned that even though there is a likelihood that landowners not “aggrieved” by the board decision for purposes of zoning would be included in the statutory notice, the board’s good-faith determination carries significant weight and should be held to its implications where the board is the necessary defendant in the appeal. The SJC found that the plaintiffs’ presumption in Marotta was sufficient to satisfy the jurisdictional requirement as there was no “direct evidence” to contest the issue.

The SJC recognized at the same time that the plaintiff’s presumption is rebuttable. The SJC stated that if the defendant challenges a plaintiff’s presumption of aggrievement with “additional

75. Id. at 429.
77. Circle Lounge & Grille, Inc., 324 Mass. at 430.
79. Id. at 440.
81. Id. at 212-13.
85. No appellate case has analyzed whether a plaintiff with standing may be limited in the extent to which he may challenge a zoning approval. This aspect of standing presents an area where a land use lawyer may be able to narrow the relief available to a person with standing in particular factual circumstances of an appeal and appropriate legal rationale.
87. Id. at 200.
88. Id. at 202.
89. Id. at 203.
90. Id. at 204. The statutory obligation referred to by the SJC in Marotta was found in § 17 as it appeared in chapter 40A in 1957. See St. 1954, c. 368, §2.
92. Id.
93. Marotta, 336 Mass. at 204.
94. Id. at 204-05.
95. A presumption under the law is an “assumption that a fact exists based

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evidence,” the “point of jurisdiction will be determined on all the evidence with no benefit to the plaintiffs from the presumption as such.”106 Just as the SJC established in Circle Lounge & Grille, Inc. that the framework for determining whether a plaintiff’s harm is sufficient to show aggrievement to challenge a local zoning decision, it established in Marotta the procedure for plaintiffs and defendants to assert and challenge the court’s jurisdiction to hear the merits of the local zoning board decision.107

Related to this presumption is the burden of proof in civil cases.108 The burden of proof involves two distinct concepts. First, the burden of production, also referred to as the burden of going forward, is the burden placed on a party to produce sufficient evidence so that a jury can find in favor of the proposition supported by such evidence.109 Second, the burden of persuasion is the burden placed on a party to produce the degree of proof dictated by the law that is needed to persuade the jury to a favorable verdict.110 A rebuttable presumption applies to the burden of production and encompasses a “burden-shifting procedure” between the parties to an action during the proceedings prior to the factfinder’s deliberations.111 The presumptive standing afforded a party shifts the burden of production to the other party to produce evidence on the issue on which the party with the presumption still carries the burden of persuasion.112 The party with the burden of production must introduce sufficient proof to rebut the presumption in order to invoke the burden of persuasion.

A small body of appellate case law that developed in the four decades after the SJC’s decisions in Circle Lounge & Grille, Inc. and Marotta addresses the burden of proof associated with a plaintiff’s aggrievement. The case law is consistent in applying the rebuttable presumption to plaintiffs who are “parties in interest” under chapter 40A and in holding that, if a defendant’s challenge to the plaintiff’s standing is supported by sufficient evidence, the plaintiff’s presumption disappears, leaving the issue of aggrievement to be determined on all the evidence and the plaintiff with the burden to prove that he or she is one of the limited number of individuals entitled to challenge the local board’s decision.113 That case law, however, did not explain the quantum or the nature of the defendant’s “additional evidence” that is needed to rebut the plaintiff’s presumption.114 In 1995, the SJC in Watros v. Greater Lynn Mental Health & Retardation Association115 affirmatively stated that the amount of evidence needed for the plaintiffs’ presumption to recede is “evidence warranting a finding contrary to the presumed fact.”116 The facts in Watros, however, did not permit a meaningful understanding of the SJC’s standard, because the defendants in Watros produced no evidence to challenge the plaintiffs’ presumption, thus rendering the statement obiter dictum.117

Another area regarding the burden of proof on the issue of aggrievement that escaped clarification in the earlier legal history of standing is the type and quality of evidence a plaintiff needs to meet the burden. Although a plaintiff challenging a local zoning decision who is a party in interest under chapter 40A enjoys a presumption of aggrievement as noted above, it is rebuttable, and if properly challenged, it is the plaintiff’s burden to persuade the factfinder that he or she is a person aggrieved. A plaintiff who is not a party in interest has no presumption and carries the burden of persuasion from the beginning of an appeal.

The SJC in 1996 significantly clarified the law concerning a plaintiff’s burden of proof on standing in Marashlian v. Zoning Board of Appeals of Newburyport.108 In Marashlian, the plaintiffs claimed harm from minimally increased traffic and decreased parking availability from a proposed hotel development.109 After an evidentiary hearing, the trial judge found sufficient support for the plaintiffs’ assertion.110 The trial judge further found that one plaintiff’s harm from increased traffic and decreased parking availability was within the zoning’s scope of concern and that the other plaintiff had a legitimate interest in protecting his tenants, clients and employees from increased traffic and congestion.111 The trial judge therefore ruled that the plaintiffs had standing to challenge the special permit and two variances granted by the local board of appeals to the defendant.112 The Appeals Court, however, reversed and denied the plaintiffs’ standing based on their failure to carry their burden of proof.113 The SJC disagreed with the Appeals Court and upheld the trial court’s decision, pronouncing that plaintiffs have the burden to “put forth credible evidence to substantiate claims of injury to their legal rights.”114 The SJC further stated that “[a] review of standing based on ‘all the evidence’ does not require that the factfinder ultimately find a plaintiff’s allegations meritorious, because [c]ho [o] do so would be to deny standing, after the fact, to any unsuccessful plaintiff.”115 However, at the point where a plaintiff’s burden arises and a court is reviewing a plaintiff’s standing based on all the evidence,
“[standing] is essentially a question of fact for the trial judge.”

Even the Marashlian trial judge’s finding that the variance allowing fewer parking spaces than zoning required still provided adequate parking did not defeat the plaintiffs’ standing. The SJC ruled that the finding did not dispose of the plaintiffs’ standing but rather went to the plaintiffs’ ultimate success on the merits of the court’s consideration of the local board of appeal’s exercise of discretion. If the plaintiff produces specific factual evidence that credibly shows the existence of a harm cognizable under the zoning by-law, it does not matter that the harm was minimal for the purposes of standing. As to the degree of harm, the SJC rejected previous appellate decisions that suggested that to acquire standing a plaintiff must show a substantial likelihood of harm greater than that which could result from an as-of-right use of the property.

Notwithstanding the SJC’s Marashlian decision, it is fair to say that a practical meaning of “credible evidence” is not easily gleaned from Massachusetts case law. The Appeals Court in 2005 took further steps to articulate an understanding of credible evidence in Butler v. City of Waltham. In Butler, the court tried the question of whether the anticipated traffic consequences claimed by the plaintiffs were sufficient to confer standing to challenge the grant of a special permit to increase the size of a nonconforming structure and tiffs were sufficient to confer standing to challenge the grant of a special permit to increase the size of a nonconforming structure and

whether the anticipated traffic consequences claimed by the plain-

119. Justice Francis O’Connor dissented in Marashlian and would have found that plaintiffs were without standing to challenge the local zoning board of appeals’ decision. See id at 728. (O’Connor, J., dissenting). The dissenting opinion points out that the trial judge’s determination that the plaintiffs had standing (and thus the SJC’s majority opinion affirming same) is at odds with the trial judge’s factual finding that the mitigating factors proposed for the project and the corresponding minimal impacts that could be caused by the project ultimately were not going to cause plaintiffs harm. See id at 729-30. The variation in legal analysis between the majority and dissenting opinion is the same issue at play nine years later in Butler v. City of Waltham, 63 Mass. App. Ct. 435 (2005). For a full discussion of the Marashlian decision see Mark Bobrowski, The Zoning Act’s “Person Aggrieved” Standard: From Barvenik to Marashlian, 18 W. New Eng. L. Rev. 385 (1996) and Edward S. Hershfield, Standing in Zoning Cases: Marashlian v. Zoning Board of Appeals of Newburyport, 41 B.B.J. 14 (1997).

120. See Marashlian, 421 Mass. at 724. The SJC did find that it is proper to consider the magnitude of harm that could be caused by an as-of-right use of the property. See id.

121. Id. at 723.

122. Id. at 438-39. The issue of standing was first presented to the trial judge on summary judgment. Id. at 435-36. The only issue on standing that survived summary judgment was an issue of fact on traffic impact. Id. at 436.

123. Id. at 441.

124. Id. (internal citations omitted).


127. Id. at 440 n.12.


129. See Black’s Law Dictionary, supra note 76, at 1220.

130. Butler, 63 Mass. App. Ct. at 441-42. The difference between the Marashlian majority and dissenting opinions and Butler’s resurrection of the issue demonstrates that even after the substantial case law development on plaintiff’s standing to challenge a local zoning decision reasonable minds can differ under a given set of facts as to whether a plaintiff has carried his or her burden to show “credible evidence” based on consideration of “all the evidence.”


132. Id. at 21.


135. Id. at 23.

136. Plaintiffs Eileen Standerwick, Kristin Clarke, Dean Shu, Susan Powers, Judi Desuisseau, Madeline St. Amand and Michael Marcoux appealed as direct abutters and abutters to abutters within 300 feet to the locus. Plaintiffs Jane Bowman and Timothy Carter appealed as neighbors of the locus, but not as abutters under MASS. GEN. LAWS ch. 40A (2006) as they lived over 1,000 feet from locus. See Standerwick v. Andover Zoning Bd. of Appeals, No. 2002-1094, slip op. at 3 (Mass. Super. Ct. July 23, 2003) (order granting defendant’s motion for summary judgment and dismissing complaint), aff’d, 447 Mass. 20 (2006). Judi Desuisseau did not own the property at which she lived, but expected to own it someday because it was owned by her parents. Id. at 3, 8. A tenth plaintiff, William Davidson, was named in the original complaint but was removed by the amended complaint. See Amended Complaint, Standerwick, Superior Court Docket No. 2002-1094 (filed June 24, 2002) (hereinafter “Amended Complaint”).
permit to superior court. 137

The plaintiffs claimed that the Andover ZBA exceeded its authority by issuing the comprehensive permit because (i) the project’s locus is in a rural setting without public transportation and other services, (ii) the locus is inappropriate for a multi-family residential structure, (iii) the Andover ZBA did not adequately protect the future project residents or the residents of the town, (iv) there remained unresolved issues of sanitary sewage affecting the public health, and (v) the comprehensive permit was not consistent with relevant laws and regulations and the “regional need for low and moderate income housing is … outweighed by valid planning objections.” 138

On July 28, 2003, the trial judge allowed Avalon’s motion for summary judgment, holding that the plaintiffs lacked standing to challenge the comprehensive permit. 139 Specifically, the trial judge ruled that one plaintiff did not have standing because she had no property interest in the property abutting the locus, 140 and the two plaintiffs without the presumption of standing failed to present facts to show that the project would affect them “distinct from the manner in which all townspeople are affected.” 141 With regard to the six plaintiffs presumed to have standing, the trial judge concluded that Avalon properly rebutted the presumption. 142 The trial judge found these six plaintiffs’ claims of aggrievement from diminution in property values “is not a concern recognized by [chapter] 40B, in light of the compelling justification of the need for affordable housing,” and their claimed aggrievement from light and noise had no grounding in the policies of chapter 40B because they were purely aesthetic concerns. 143 The trial judge ruled that Avalon’s expert affidavits contradicting the plaintiffs’ concerns of traffic and drainage were sufficient to rebut the presumption and that the plaintiffs had no reasonable likelihood of showing any harms because they amounted to pure conjecture, hypothesis and speculation. 144 The trial judge also ruled that the plaintiffs had no reasonable expectation of being able to prove their claimed aggrievement from vandalism and crime because they did not assert during discovery that they were intending to produce admissible evidence to support their claims. 145

Six plaintiffs appealed the trial judge’s decision to the Appeals Court. 146 The Appeals Court reversed the finding that the plaintiffs lacked standing. 147 The Appeals Court disagreed with Avalon’s argument that aggrievement under chapter 40B is different than chapter 40A, stating that “[i]n order to interpret the term ‘person aggrieved’ as used in [chapter 40B], § 21, we look to the interpretation given the identical term in [chapter 40A], § 17.” 148 Thus the Appeals Court determined that the proper interests to consider in evaluating a plaintiff’s aggrievement under chapter 40B are those types of interests intended to be protected under chapter 40A, the Zoning Enabling Act, which includes a diminution in property value. 149 The Appeals Court also found that at least some of the harms that the plaintiffs claimed were legally cognizable for standing and that the plaintiffs’ presumption of standing was not sufficiently challenged by Avalon. 150

B. The SJC Decision

The SJC granted further appellate review and affirmed the superior court decision, 151 thereby ending the plaintiffs’ challenge to the comprehensive permit. First, the SJC removed any question whether a plaintiff has standing to challenge a comprehensive permit under chapter 40B based on a claim of diminution in property values. 152 Second, the SJC held that Avalon successfully rebutted the plaintiffs’ presumption of standing on summary judgment because Avalon’s discovery of the plaintiffs’ claims of aggrievement showed that the plaintiffs had “no reasonable expectation of proving a legally cognizable injury.” 153 Standerwick, therefore, is an important milestone in the long line of cases that interpret one of the most fundamental aspects of a zoning appeal and provides a guide to lawyers on both the substantive and procedural components of standing.

III. SUBSTANTIVE GROUNDS FOR STANDING — FOCUSING ON THE INTERESTS THAT THE STATUTORY SCHEME PROTECTS

The main portion of Standerwick focuses on the substantive grounds for standing, that is, the harms cognizable for standing. The SJC followed the rubric established in Circle Lounge & Grille, Inc. of looking first at the interests that fall within the protective umbrella of the pertinent zoning statute, here chapter 40B. 154 It determined that the legislature, in its effort to promote affordable housing in Massachusetts through enactment of chapter 40B, did not intend to protect individual property values. 155 Although Standerwick presents a sea change in the prior practice of standing under chapter 40A, the SJC remained consistent both in its active support of the legislative purpose of chapter 40B 156 and with previous case law that examined the statutory purpose in setting the limits of standing.

139. Id. at 21-22.
141. Id. at 9.
142. Id. at 25.
143. Id. at 10, 12-13. In support of its determination that the plaintiffs’ interests were not recognized under chapter 40B, the trial judge cited the unreported decision in Connor v. Town of Barnstable, Civil Action No. 01-0394 (Mass. Super. Ct. Dec. 1, 2001) (order granting defendant’s motion to dismiss), in which the court determined on a motion to dismiss that aesthetic concerns are not an interest protected by chapter 40B. Id.
145. Id. at 35-37.
149. See id.
150. Id. at 337.
152. Id. at 21.
153. Id. at 35 (quoting Kourovouvalis v. Gen. Motors Corp., 410 Mass. 706, 714 (1991)).
154. Id. at 27; see also Circle Lounge & Grille, Inc. v. Bd. of Appeals, 324 Mass. 427 (1949).
Tsagronis clarified an issue left open in *Bell v. Zoning Board of Appeals of Gloucester*, where the SJC found, without explanation, that “the same standing requirements apply to appeals under [chapter] 40A and [chapter] 40B appeals.” In *Bell*, there was no need for the SJC to differentiate the application of chapter 40A “standing requirements” from chapter 40B. *Standerwick* limited the “substantive standards” of standing under chapter 40B to policies pertinent to chapter 40B so as to exclude diminution of value, a measure of-agreement that was pertinent under chapter 40A. *Standerwick* merely applied the well-established “standing requirements” set forth in *Circle Grille & Lounge, Inc.* that require one to look to the statute to determine whether diminution in value is an interest intended to be protected. Chapter 40B did not protect such an interest.

The SJC’s comments on diminution of property value provide further understanding and clarification of such harm as an interest to be protected under chapter 40A, but not under chapter 40B. *Standerwick* confirms that “[a] claim of diminution of property values must be derivative of or related to cognizable interests protected by the applicable zoning scheme.” In doing so, the SJC gives weight to its relatively cursory decision upholding aggrievement based on diminution of value from the obstructed view in *Tsagronis v. Board of Appeals of Wareham*, the oft-cited case for the proposition that diminution of value is sufficient to establish aggrievement under chapter 40A.

In *Tsagronis*, the SJC tied the plaintiffs’ claim of diminution in property value to their challenge to the increased density caused by the variance from local zoning to build on a non-conforming lot. Since density of development is an interest of zoning, *Tsagronis* did not present a situation where the plaintiffs were solely protecting the economic value of property. The SJC in *Standerwick* was concerned that if standing could be achieved by any diminution in value, whether or not linked to a cognizable interest protected by zoning, abutters could attain standing merely by claiming that any change on adjacent property would cause a diminution in value. The SJC cautioned that claims of diminution in value could be used inappropriately as an end run around failed attempts to show aggrievement from the traditional harms recognized for standing. The SJC, however, appeared to recognize that in some circumstances, diminution in property value caused by use of land in violation of zoning may be evidence of harm sufficient to earn a plaintiff standing.

The Appeals Court’s recent decision in *Central Street, LLC v. Zoning Board of Appeals of Hudson* directly applied *Standerwick’s* comments on diminution in value as a legitimate claim of aggrievement. In *Central Street, LLC*, the defendant received a variance from the board of appeals to build on a recently divided lot that did not have sufficient frontage under the zoning by-law. Before analyzing the trial judge’s factual analysis of the plaintiff’s evidence supporting its claim of diminution in property value, the Appeals Court applied the *Circle Lounge & Grille, Inc.* rubric and “first consider[ed] whether the alleged injury to the plaintiff’s personal interest … is an injury to a specific interest that the applicable zoning statute, ordinance, or by-law at issue is intended to protect.” The Appeals Court found that frontage specification among zoning provisions is a dimensional requirement that functions to provide access (for vehicles, utilities and municipal services) to parcels, controls density of development and preserves the character of the neighborhood. The Appeals Court then analyzed the proposed improvement to the parcel and found that the 30-foot driveway, parking spaces, shed and large garage designed to facilitate an excavation business directly abutting the plaintiff’s property provided sufficient circumstances that rendered “diminution in real estate values … derivative of or related to cognizable interests protected by the applicable zoning scheme.”

Both *Tsagronis* and *Central Street LLC*, present situations in which the grants of variances from bulk requirements were being appealed — a variance grant being one of the more limited powers of local authorities to derogate from zoning requirements. It is likely that a claim of diminution in value will be more difficult to correlate factually, as contemplated by *Standerwick*, to an interest of zoning when the grant of a special permit is at issue. When a special permit is involved, the zoning relief sought is not prohibited absent hardship as in the case of a variance, but rather is available under

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158. Id. at 553 (emphasis added).
159. *Circle Lounge & Grille, Inc.*, 447 Mass. at 27.
161. Id. at 31-32.
164. *Tsagronis*, 415 Mass. at 335-36. The lot in question was nonconforming in *Tsagronis* because the town increased the frontage and lot size after the preliminary subdivision plan was filed. Id. at 329-30. The variance was required because the lot had lost its exemption under chapter 40A, § 6. Id. at 331. See also *Dwyer v. Gallo*, 73 Mass. App. Ct. 292, 296-97 (2008) (stating that “diminution in value of the property … is not a sine qua non of standing in zoning cases” in response to defendants’ claim that plaintiffs did not have standing because they would suffer no diminution in their property value and finding that plaintiffs gave sufficient proof to confer standing based on concerns related to overcrowding and increased density, which were recognized private property rights protected by the local by-law).
165. *Standerwick v. Zoning Bd. of Appeals*, 447 Mass. 20, 32 (2006) (citing *Tranfaglia v. Building Comm’n*, 306 Mass. 495, 503-04 (1940)). The dissent in *Tsagronis* would have dismissed the appeal for lack of standing, but the dissent disagreed with the majority’s upholding plaintiffs’ standing based on diminution of value because of a lack of evidence to support their claim where the presumption has receded. See *Tsagronis*, 415 Mass. at 333 (Abrams, J., dissenting).
167. Id.
168. Id.
170. See id. at 488. The defendant received an approval-not-required endorsement from the planning board to divide its parcel into two lots, thereby creating the lot that required a variance to be buildable. Id. at 488.
171. Id. at 492.
172. Id.
173. Id. (quoting *Standerwick v. Zoning Bd. of Appeals*, 447 Mass. 20, 31-32 (2006)). The Appeals Court held that the trial judge erred in applying the evidentiary standard to the determination of standing and reversed the trial judge’s ruling that dismissed the plaintiff’s action for lack of standing. Id. at 493-94.
174. See also *Russell v. Zoning Bd. of Appeals*, 14 LCR 460 (Mass. Land Ct. 2006) (involving claim by abuter of diminution of property value due to construction of single-family home on undersized lot requiring variance from several local ordinance provisions). The superior court’s decision in *Contarrese v. Mount Washington Bank*, No. SUCV 2003-6080, 2006 WL 4326671, at *13 (Mass. Super. Ct. Dec. 12, 2006), however, demonstrates a situation where a plaintiff, challenging the grant of a variance by claiming, among other harms, that she would suffer a diminution in value to her residential property by the construction of a drive-up teller window at a bank, did not show that the diminution in value was derivative of or related to cognizable interests protected by the applicable zoning scheme. Id. The plaintiff’s only claim of diminution in value was that the commercial nature of the proposed structure would affect the
more careful, discretionary control by the local authority of the nature of the land-use.175 Nevertheless, the land-use lawyer should be attentive in his or her review of the “considerations” reflected in the special permit provisions in the local by-law or ordinance and whether diminution of property value can be and is correlated to the interest intended to be protected.176

Recently, in *Sweenie v. Planning Board of Groton*,177 the Appeals Court applied the reasoning in *Monks v. Zoning Board of Appeals of Plymouth*, which can be characterized as dealing with aesthetic interests, to allow local by-law provisions that required consideration of water contamination by gasoline station tanks to provide grounds for standing.178 The by-law provided for a water resource overlay district and a special permit process that required the special permit granting authority to “give consideration” to the “degree of threat to water quality that would result if the control measures failed.”179 The Appeals Court had reversed the superior court’s dismissal of the zoning appeal and found that “consideration” would necessarily permit the parties exposed to the ‘threat of water quality’ to present their evidence and argument to the local special permit granting authority and then, if necessary, to the reviewing court under Chapter 40A, § 17.180 The SJC granted further appellate review and, disagreeing with the Appeals Court’s determination, affirmed the superior court’s dismissal.181 The SJC reasoned that even if the zoning by-law created a protected interest, as was the case in *Monks*, that “alone is not a sufficient basis on which to confer standing.”182 The SJC rejected the Appeals Court’s determination that the abutters’ unsubstantiated “fears” could confer standing because the plaintiffs failed to carry the burden to substantiate factually their claims to bring themselves within the legal scope of an interest protected by the by-law.183 The plaintiffs’ claim of standing lacked the evidentiary component of their aggrievement, that is, they failed to “plausibly demonstrate a cognizable interest.”184 Notwithstanding that the failure to establish evidence of the harm left plaintiffs’ standing wanting, the SJC and Appeals Court decisions in *Sweenie* stress the need for careful review by the land-use lawyer (and careful drafting by the municipality) of the local by-law or ordinance since a valid claim of aggrievement may be lurking within the local administration of chapter 40A.

The SJC spoke again on the subject of standing and the interest that chapter 40B intends to protect in *Jepson v. Zoning Board of Appeals of Ipswich*.185 Following its reasoning in *Standerwick*, the SJC held in *Jepson* that the individual landowner had standing to challenge a comprehensive permit because his claim of harm from flooding to his property due to the proposed development constituted “a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest” intended to be protected by chapter 40B.186 The SJC looked to the specific language of the statute, and although wetland issues are not typically within the jurisdiction of a zoning board, the SJC found that the legislature intended to maintain “consideration” by the zoning board of the various recommendations of the local boards in the comprehensive permit process under chapter 40B, section 21, including those of the local conservation commission.187 Thus, in this case, “the interests of the conservation commission, and [Department of Environmental Protection], in the prevention of flooding in, bordering, or affecting an integral and comprehensive wetlands system adjacent to an affordable housing development are interests that the G. L. c. 40B statutory scheme intends to protect.”188

Thus, *Standerwick* and its progeny teach that the land-use lawyer should never take his or her eye off the ball — the zoning statute and the zoning by-law or ordinance at issue — and should always focus initially on whether the claimed injury is of a type that the regulatory scheme at issue was intended to protect. Although the SJC has not moved from its position in *Marotta* that “the words ‘person aggrieved’ in such statute as 40A … are not to be narrowly construed,”189 the court’s recent focus on the intent of the overall regulatory scheme may provide a defendant the means to limit a plaintiff’s ability to challenge a project or a certain aspect of it.

IV. PRESUMPTIONS, BURDENS AND SUMMARY JUDGMENT — STANDING THROUGH THE PRISM OF CIVIL PROCEDURE

The second issue the SJC addressed in *Standerwick* involves the intersection between the evidentiary burdens placed on the parties regarding standing and summary judgment practice under rule 56 of the Massachusetts Rules of Civil Procedure.190 *Standerwick* more

See id. The superior court, relying on *Standerwick*, found that such claim alone only took into consideration the economic value of property and had no necessary relation to an interest protected by the zoning scheme. See id. 175. See Land Use Handbook, supra note 19, § 9.01, at 267.

176. A claim of diminution of property value in an appeal of a grant of a special permit under Mass. Gen. Laws, ch. 40A, § 6 (2008) may invoke cases like Tia- gronis and Central Street LLC because quite often a change to, and in particular an increase in, a pre-existing nonconforming use or structure will involve an increase in or non-permissible perpetuation of non-compliance with, density requirements.


178. Id. at 485.

179. Id. at 484.

180. Id. at 485.


182. Id. at 544-45.

183. Id. at 545.

184. Id.


188. Jepson v. Zoning Bd. of Appeals, 450 Mass. 81, 90 (2007). Section 21 of chapter 40B requires a single application submitted to the zoning board of appeals to build low or moderate income housing in lieu of separate applications to the applicable local permitting boards and for the zoning board of appeals to notify each local board, as applicable, of the filing for their recommendations. The board of appeals must, “in making its decision on said application, [] take into consideration the recommendations of the local boards … .” Mass. Gen. Laws ch. 40B, § 21 (2008). The SJC found that the local conservation commission’s and the Massachusetts Department of Environmental Protection’s jurisdiction over flooding and wetlands did not preclude an abutter’s concerns for flooding on his property from being a legally cognizable interest for purposes of standing under chapter 40B. See *Jepson*, 450 Mass. at 90.


190. It is important to note that *Standerwick* does not limit to appeals under chapter 40B its discussion of the operation of the presumption of aggrievement afforded some plaintiffs to an appeal of a local zoning decision. Unlike with the substantive grounds for aggrievement, the SJC in *Standerwick* did not rely on the purpose and policies behind chapter 40B in addressing the procedural
clearly confirms the SJC’s dicta in Bell v. Board of Appeals of Gloucester that a plaintiff’s presumption will be rebutted if a defendant shows on summary judgment that a plaintiff has no likelihood of proving aggrievement. Standerwick’s confirmation stresses the need for the plaintiff and defendant to focus on aggrievement through the prism of civil procedure in order to effectively challenge or support standing.

The analogy in the Standerwick superior court decision provides a clear understanding of the lesson to be taken away from the case: “The defendants have ‘called the plaintiffs’ hand’ during discovery, and the plaintiffs have been unable to produce any cards.”191 It is every plaintiff’s goal to stay in the game to challenge the merits of the zoning decision and every defendant’s goal to end the appeal as soon as possible. Standerwick uncovered nuances in the well-established burden-switching procedure of a plaintiff’s presumption of standing that have been further tested by lawyers and addressed in subsequent case law. The rules of civil procedure provide many opportunities for each side of a zoning appeal to succeed or fail in developing a case on standing.

A. Asserting a Case of Aggrievement

The first question for both a defendant and a plaintiff is at what point is the plaintiff obligated to articulate his or her claims of aggrievement? If the obligation arises, then how much detail is required in order to put the defendant on notice of the claimed aggrievement sufficient to mount a challenge to a plaintiff’s presumption of standing? Moreover, must a defendant file an answer raising at least a general or affirmative defense in order to put the plaintiff on notice of a challenge to standing?

1. Pleading standing

In Standerwick, the issue of whether the plaintiffs sufficiently articulated their aggrievement was not addressed by the SJC because the plaintiffs did so during discovery. The Appeals Court in Standerwick, however, stated as part of its declaration on standing that “first, of course, the plaintiff must articulate a basis for standing that is legally cognizable.”192 The Appeals Court cited no statutory basis or case law requiring such articulation. Although not directly an issue in Standerwick, the statement sets an important stage and is a source of friction between a plaintiff and defendant in a zoning appeal.

The natural starting point in answering these questions and for understanding what is required to sustain or challenge a plaintiff’s “person aggrieved” status is the plaintiff’s burden of pleading under rule 8 of the Massachusetts Rules of Civil Procedure. Rule 8(a) requires that a pleading include “(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled.”193 The court’s jurisdiction is not required to be pleaded under rule 8(a).194 Nor is jurisdiction a special matter that must be pleaded under rule 9 of the Massachusetts Rules of Civil Procedure. Since only those persons who are aggrieved by a local zoning decision are entitled to challenge it, a safe application of rule 8(a) to zoning appeals urges a plaintiff to specify that he or she has standing, as a person aggrieved195 or is an abutter with the presumption of standing.

Section 17 of chapter 40A does not provide much guidance and only states that “the complaint shall allege that the decision exceeds the authority of the board or authority, and any facts pertinent to the issue, and shall contain a prayer that the decision be annulled.” No appellate case has dictated that rule 8(a) or section 17 requires a more specific articulation of aggrievement.

Notwithstanding the lack of legal authority that a plaintiff’s aggrievement should be pleaded with specificity, it is sensible that a defendant be afforded the opportunity to produce only that evidence which correlates to an aggrievement actually claimed by the plaintiff. The SJC stated in Standerwick that the defendant “may rebut the presumption of standing by seeking to discover from [the plaintiffs] the actual basis of their claims of aggrievement.”196 It is difficult to extract from that statement any specific pleading requirement for a plaintiff who is presumed to have standing. Rather, the SJC’s language seems to suggest a mere claim that a plaintiff has standing, i.e., is a “person aggrieved” or is an abutter, would be sufficient and that the “articulation” of such aggrievement would await discovery.197

Although Massachusetts courts have opined that standing cannot be waived and may be raised by the trial court sua sponte,198 as
a practical matter, a land-use lawyer should be diligent in asserting a challenge to the plaintiff’s standing, first by raising it as a defense in the answer.199 Defendants who are anxious to break ground with a development may seek early dismissal for lack of standing by attacking the complaint through a motion to dismiss pursuant to rule 12(b)(1) or (6) of the Massachusetts Rules of Civil Procedure or a motion for judgment on the pleadings pursuant to rule 12(c).200 Given that the standard of review for rule 12(b)(1) and 12(b)(6) motions only looks to the statements in the pleadings and determines whether the complaint states a claim upon which relief can be granted,201 a plaintiff who employs a simplistic statement of standing as discussed above would likely survive a defendant’s early efforts to end the appeal. Even if a plaintiff does not make a statement of aggrievement in the complaint, often a plaintiff (or at least one plaintiff) is an abutter to the proposed project. As noted, standard pleading practice usually identifies the parties and their addresses, and thus, a plaintiff whose address abuts the locus will have disclosed facts that support the presumption of standing in the pleading.202

As can be seen from the decision in McDonough v. Zoning Bd. of Appeals of Topsfield,203 however, in some situations even the statement of the abutter’s property location in the complaint may not be enough to establish a claim of aggrievement. In McDonough, the land court dismissed a plaintiff’s appeal of the grant of a special permit for lack of standing where the complaint did not make any claim of aggrievement or allege a presumption of standing.204 Although the plaintiff was in fact a direct abutter to the proposed project, he did not so state in the complaint, and the relative location of the plaintiff to the proposed project could not be determined as the address of the plaintiff’s property was on a different street than that of the proposed project.205 Therefore, from the undisputed facts of the pleadings, the plaintiff could not be identified as an abutter or with standing to appeal. Liberal amendment practice under rule 15 of the Massachusetts Rules of Civil Procedure, however, makes the ultimate success of such aggressive tactics doubtful.206

2. Specifying claims of harm

A plaintiff who benefits from the presumption of standing will likely be reluctant to make any statement about the specific claim of harm in the complaint that will assist a defendant to challenge standing. A plaintiff without benefit of the presumption may plead more than a statement of “aggrievement” and provide some detail of the type of harm (e.g., traffic, drainage or decreased light). Despite a plaintiff’s claim of standing in the complaint, a defendant will likely seek to explore the specific harm on which the plaintiff bases the appeal in order to determine a strategy to challenge standing, that is, first, to determine whether the harm is cognizable for purposes of standing, and second, to determine the type of evidence (i.e., expert opinion, field surveys and studies, engineering calculations and the like) the defendant must mount to rebut the plaintiff’s presumption. Beyond stating the type of harm, a requirement that a plaintiff provide further detail about the extent or the source of harm when asked by the defendant will likely be left to a case-by-case determination.

In accordance with Standerwick, the defendant may further “seek to discover” the “basis” for a plaintiff’s aggrievement. Defendants would rather limit the number of experts and breadth of any opinion, if possible. Therefore, the defendant may seek to isolate the particular traffic problem (e.g., queue, delays or dangerous pedestrian conditions at a specific intersection), drainage problem (e.g., increased runoff from pervious surfaces or increased flooding events) or diminution in property values (e.g., the presence of a house on an undersized lot) claimed by the plaintiff in order to focus the evidence on the specific aggrievement. Depending on the nature, size and scope of a project, and the number of plaintiffs, aggrievement stated in broad terms such as “drainage” or “diminution in value” or “traffic” may or may not be sufficient to afford the defendant an opportunity to mount efficiently evidence (likely expert evidence) to rebut the presumption of standing.

A plaintiff who is evasive in detailing a claim of aggrievement, whether in the complaint or during discovery, may be confronted with more aggressive motion practice to compel further answers to discovery requests.207 Since both parties to land-use litigation are especially sensitive to litigation cost, non-responsive answers to de-serving requests that lead to extensive non-dispositive motion practice are not likely to be well received by the court.

199. Although the defense that a plaintiff lacks standing to appeal a local board decision does not fall squarely within the realm of an affirmative defense, it may be prudent for the judge to plead such defense as an affirmative defense in accordance with Mass. R. Civ. P. 8(c). See Black’s Law Dictionary, supra note 76, at 451 (defining an affirmative defense as “a defendant’s assertions of facts and arguments that, if true, will defeat the plaintiff’s or prosecution’s claim, even if all the allegations in the complaint are true”); see also Watros v. Greater Lynn Mental Health and Retardation Ass’n, Inc., 37 Mass. App. Ct. 657, 660 (1994) (stating that defendant asserted as affirmative defense that plaintiffs were not persons aggrieved with sufficient standing to give court jurisdiction over complaint); Kline v. Scituate Planning Bd., 9 LCR 64, 65 (Mass. Land Ct. 2001); Rosenthal v. Town of Millbury Zoning Bd. of Appeals, 3 LCR 115, 115 (Mass. Land Ct. 1995). Moreover, the defendant does not carry the burden of proof on the issue of plaintiff’s standing necessitating fair notice of a defense to standing in the defendant’s pleading, see White v. Spence, 5 Mass. App. Ct. 679, 685 (1977), and the issue is a jurisdictional prerequisite to a court’s review of the merits.

200. See Smith v. Massimiano, 414 Mass. 81, 85 (1993) (“A summary judgment motion under rule 56 ‘concedes the validity of the pleading’ and, unlike rule 12 motions, focuses on the merits of the controversy.” (internal citations omitted)).

201. Under a motion to dismiss standard the judge assumes that the facts in the complaint are true in determining whether a claim has been made that entitles the plaintiff to relief. See Iannacchino v. Ford Motor Co., 451 Mass. 623, 635-36 (2008); Eigerman v. Putnam Inv., Inc., 450 Mass 281, 285-86 (2007).
B. Discovery — Building the Foundation to Support or Challenge Standing

Avalon, the developer in Standerwick, artfully used summary judgment to point to the plaintiffs’ lack of evidence of aggrievement after rebutting the plaintiffs’ presumption of standing as abutters. This tactic, however, took more than a motion for summary judgment and legal argument. Rather, the defendant’s challenge to plaintiffs’ standing gained its evidentiary support early in the case. Based on plaintiffs’ aggrievement as articulated in their complaint, Avalon proceeded to inquire, through discovery, into the specific adverse impacts of the proposed development claimed by plaintiffs.

Although chapter 40A provides a presumption of standing to abutters, plaintiffs should be prepared at all stages to defend their standing. This is especially true during the discovery period where defendants can seek the basis of a plaintiff’s aggrievement in order to build the grounds for rebutting and moving for summary judgment on standing.

1. Discovery tools

a. Defendants’ focus for building a rebuttal to the presumption of standing

Rule 56(c) of the Massachusetts Rules of Civil Procedure sets the stage by providing that summary judgment may only be rendered “if the pleadings, depositions, answers to interrogatories, and responses to requests for admission under rule 36, together with affidavits, if any, show no genuine issue as to any material fact ...” For the defendant, careful use of these discovery tools can develop the tactic that was strategically and successfully employed in Standerwick of merely pointing to the plaintiffs’ lack of evidence needed to oppose summary judgment.

First, a defendant should inquire in discovery as to the basis for a plaintiff’s presumption of standing. A plaintiff may be in the vicinity of the project subject to the appeal but not as required by section 11 of chapter 40A, that is, (1) as an “abutter[,]” (2) as an “abuter[] to the abutter[] within three hundred feet [of the defendant’s property boundary],” (3) as one who “[owns] land directly opposite [the defendant’s land] on any public or private street or way,” or (4) listed on the assessors’ certification to the permit granting authority or special permit granting authority of the names and addresses of parties in interest. The circumstance that no plaintiff qualifies as a party in interest with the presumption of standing may not end the appeal, but it relieves the defendant of the burden of production and squarely places the burden of persuasion on the plaintiff to prove standing.

Employing discovery is a defendant’s opportunity to learn of the plaintiff’s aggrievement and to see if the plaintiff is willing to expend the effort, and likely the money, necessary to maintain the appeal. First, the plaintiff should be asked to identify all harms that will be suffered from the proposed project. One of the most important inquiries for a defendant is a request pursuant to rule 26(b)(4)(A)(i) of the Massachusetts Rules of Civil Procedure for the plaintiff to identify each person the plaintiff expects may be called as an expert witness at trial and the subject matter of the testimony. If the plaintiff answers that he or she does not expect at the time of inquiry to call an expert witness to testify as to particular harms, the defendant, as in Standerwick, may have grounds for summary judgment.

As to those of the plaintiff’s claims of aggrievement that the defendant suspects are baseless or unsupportable, the questions propounded to the plaintiff must be drafted so as to elicit a response that shows no likelihood of producing any evidence at trial for consideration by the factfinder. Since a defendant is required to prove a negative under this standard, the discovery techniques must first explore all the plaintiff’s bases of aggrievement, that is, the types of harm the plaintiff claims is affecting his or her private legal interest. Once the plaintiff has articulated these harms, the defendant should determine which harms are cognizable for conferring standing by linking each of plaintiff’s harms to the type of injury that zoning is intended to protect against and inquiring whether the claimed injury is special and different from that suffered by the rest of the community. For those harms claimed by the plaintiff that are within the scope of protection of the zoning scheme and particular to the plaintiff, the defendant should explore all facets of the evidence necessary to prove the plaintiff’s aggrievement in order to show that the plaintiff’s evidence is inadequate because it is comprised of conjecture, hypothesis and speculation or is otherwise not supported by appropriate expert evidence, or (2) no evidence at all will be forthcoming.

Although the tools of discovery may be used in any sequence, the procedure for challenging a presumption of standing and the lessons of Standerwick suggest that the defendant should weigh the time and expense of, and likely results obtained from, each method of discovery against the need, first, to seek the plaintiff’s source of harm and, second, to explore the plaintiff’s evidence of those harms.

b. Plaintiff’s opportunity to evaluate the project subject to appeal

In some cases, the plaintiff has been involved in the public permitting process before the local board that is the subject of the appeal. In other cases, however, a plaintiff’s first participation in the local process is filing the notice of appeal with the town clerk within 20 days after the board decision.

Although discovery is an important opportunity for the plaintiff to gain necessary information to evaluate his or her harms from the defendant’s project, the plaintiff need not wait for formal discovery to commence. Depending on the scope of the proposed project, the defendant has likely prepared and submitted to local boards,
prior to the plaintiff’s appeal, various architectural and engineering plans, calculations, reports and studies that evaluate the project’s impacts, and the local board may have retained specialized professionals to conduct peer reviews of the submission. Such information is part of a public record that can be accessed by a public information request pursuant to the Massachusetts Public Information Law214 and the Freedom of Information Act.215 In addition to identifying possible aggrievement from the project, such information is useful in identifying the evidence that a defendant will proffer and whether expert or other specialized evidence will be necessary to support any claim of harm. A plaintiff who properly evaluates his or her aggrievement and fully articulates that during discovery may dissuade the defendant from challenging the presumption of standing — or at least postpone such a challenge until trial.

2. Discovery disputes in standing cases

Increased disputes regarding inadequacy of the plaintiff’s responses to discovery of the claims of aggrievement are likely to arise from uncertainties about Standerwick. The land court dealt with such a dispute in Reik v. Zoning Board of Appeals of Barnstable.216 In Reik, the defendant moved to compel production of the report of the expert that plaintiffs identified in their response to expert interrogatories.217 The expert’s report purportedly opined on the plaintiffs’ claims of diminution in property value due to the variance granted defendant to build a single-family home.218 The defendant sought production of the report because the plaintiffs’ answers to expert interrogatories stated in general terms that they would suffer a diminution in value but provided no detail of the amount of diminution or the cause.219 The land court disagreed with the plaintiffs’ argument that the answers to interrogatories were sufficient, at least until such time as the defendant was prepared to produce its own expert report.220 Because standing was jurisdictional and proof of diminution in property value required expert testimony, the land court concluded that “it is neither unreasonable nor unfair to require the plaintiffs to demonstrate the basis for their standing at this point in the proceedings.”221

In Reik, the land court noted that judges differ over whether to order discovery of experts beyond interrogatories.222 Since discovery is a significant stage in the burden-switching procedure of challenging a plaintiff’s standing, an individual judge’s exercise of discretion in discovery and scheduling orders for a particular case may have as much of an impact on variations in the application of the law of standing as individual judges’ interpretations of Standerwick.

C. The “Credible Evidence” Sufficient to Support or Challenge Standing

1. The expert determination

Early in any litigation, one question every lawyer should ask is whether his or her client needs an expert to support his or her claims and, in discovery, whether the opposing party will use an expert in defense. De novo zoning appeals in Massachusetts are no different, and Standerwick clearly points out that a plaintiff proceeds precariously by failing to produce an expert to prove claims of harm that are beyond common knowledge. In addition, a defendant’s challenge to standing may be fruitless without an expert to rebut factually the plaintiff’s claims of aggrievement. Determining the need and type of expert under Standerwick should be made in light of the burden of proof standing articulated in Butler.

The first stage is to identify what types of aggrievement require expert testimony in order to present evidence of a “qualitative” nature sufficient to support a plaintiff’s claim of aggrievement. An expert is typically needed where the fact to be determined is beyond the common knowledge of the average lay person.223 The technical nature of land development itself suggests that many of the issues addressed by a local board are beyond the common knowledge of most people and require expert testimony, i.e., traffic, drainage and diminution in property values, to name a few. Understandably, in the wake of Standerwick, trial courts have increased their scrutiny on the need for an expert.

In Standerwick, plaintiffs opposed Avalon’s motion for summary judgment and filed two affidavits.224 An affidavit by one plaintiff, who was a licensed real estate sales person, stated that the proposed development would devalue her property by as much as 20 percent due to close location, traffic density and impact of nonconforming development.225 The technical nature of property value required expert testimony, the land court concluded that “it is neither unreasonable nor unfair to require the plaintiffs to demonstrate the basis for their standing at this point in the proceedings.”226

The SJC determined that these expert affidavits established that the plaintiffs’ concerns regarding traffic and drainage were unfounded, especially where the plaintiffs did not produce any expert evidence to support their burden of proving their claims of aggrievement.227 The SJC also affirmed the trial judge’s determination that the claims of aggrievement due to crime and vandalism required expert

216. 15 LCR 536 (Mass. Land Ct. 2007) (order allowing defendant Lente Festina, LLC’s motion to compel production of plaintiff’s testifying expert’s previously prepared report and the documents upon which that expert relied in reaching his opinions). The land court’s ruling in Reik was made while the SJC’s decision in Standerwick was pending.
217. Id. at 537.
218. Id. at 536.
219. Id. at 537.
220. Id. at 547.
221. Id. at 549.
222. Id. at 546.
225. Id.
226. Id.
227. Id. at 35-36.

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testimony, and therefore the plaintiffs’ claims of standing based on those harms failed because they did not provide expert evidence.228 Thus, the plaintiffs had not shown any likelihood of producing evidence at trial for consideration by the factfinder.229 The plaintiffs’ affidavit evidence on the issue of diminution of property value in support of a claim of aggrievement did not confer standing as a matter of law under chapter 40B.230

In Russell v. Planning Board of Marion,231 the developer was proposing to install a floating dock system tied to an existing stone pier.232 In discovery, the plaintiffs articulated that the basis for their aggrievement was a reduction in the water surface area near their residence, the reduced width of the water access to their residence, and decreased safety due to increased boat traffic. The plaintiffs also claimed aggrievement due to decreased navigability of decrease of value.248 Instead, the salesperson concluded that the plaintiffs had no reasonable expectation of being able to prove their claimed aggrievement.249

Once the need for an expert is identified, the second issue is how much factual detail does an expert need to present in order to constitute evidence of a “quantitative” nature that will be admissible and sufficient to support a plaintiff’s claim of aggrievement. Even where a proper “type” of evidence is presented, i.e., an admissible expert opinion, such evidence may not provide the “specific factual support” necessary to substantiate a plaintiff’s claim of aggrievement. In Contarce v. Mount Washington Bank,240 the abutter/plaintiff produced the appropriate expert (a licensed real estate appraiser) to opine on diminution in value to the plaintiff’s property (residential home) from the proposed development (construction of a drive-up teller window to a bank) adjacent to the plaintiff’s property.241 The expert, however, provided a personal opinion that was not supported by market analysis or comparable sales data as the factual basis necessary for her opinion that plaintiff’s property would suffer a diminution in value. The superior court found that real estate appraiser’s reliance on “common wisdom” and “personal opinion of potential buyers’ ‘perceptions’” was speculation that did not confer standing on the plaintiff, in light of defendant’s expert evidence.242

In Russell v. Zoning Board of Appeals of Peabody,243 however, the land court found credible the evidence supporting the plaintiffs’ claims of diminution in value even though the real estate appraiser’s affidavit was “lacking in some specificity.”244 The Russell plaintiffs challenged the grant of variances from several provisions of the local zoning ordinance to allow the division of a lot with an existing two-family dwelling into two lots for the purpose of building a single-family home on the newly created lot.245 The defendants challenged the plaintiffs’ presumption of standing with excerpts from the plaintiffs’’ own depositions wherein they conceded that their claims of harm were based on personal opinions and concerns.246 The plaintiffs’ evidence in response to the standing challenge was an affidavit of a real estate salesperson as to value. The affidavit provided no exact figures, comparables or an estimate of the percentage of decrease of value.247 Instead, the salesperson concluded that the addition of a single-family home would result in some diminution in the plaintiffs’ property value because of increased density and decreased light and air and because the proposed house was not in keeping with the character of the neighborhood.248 What convinced the land court that the plaintiffs had standing was the fact that the salesperson’s affidavit was “essentially an unchallenged expert opinion,” and the harm claimed by the expert was directly related to an interest protected by zoning, i.e., density.249

Although these decisions seem to leave little room for lay or non-expert testimony on harms constituting aggrievement in a zoning

228. Id.
229. Id.
230. Id. at 37.
232. Id. at 638.
233. Id. at 640.
234. Id.
235. Id. at 641.
237. Id. at 439.
238. Id. at 441.
239. Id.
240. Id. at 442.
241. No. SUCV2003-6080, 2006 WL 4326671 (Mass. Super. Ct. Dec. 12, 2006). The private defendant, a bank, received the variance for an addition of a drive-up window to an existing commercial building, Id. at *1. The bank was in the Neighborhood Shopping District where the proposed drive-up window is prohibited. Id.
242. Id. at *7. The superior court noted that the plaintiff’s expert had 15 years of residential appraisal experience but no commercial appraisal license or experience. Id.
243. Id. One of defendant’s experts had 30 years of residential and commercial appraisal experience, and the other had 28 years of similar experience. Id. at *8. From the superior court’s description of the defendant’s experts’ evidence, it is apparent that the superior court considered these analyses to be factually supported, including a traffic analysis by the defendant’s traffic expert. Id. at *8, *12.
244. 14 LCR 460 (Mass. Land Ct. 2006).
245. Id. at 463.
246. Id. at 460-61.
247. Id. at 462.
248. Id.
249. Id. at 462-63.
250. Id. at 463.
appeal, the following discussion suggests a lawyer should not overlook using a little common sense and knowledge to develop the factual components of a plaintiff’s aggrievement.

2. Common sense and knowledge

Appellate decisions seem to support the position that a plaintiff may in certain circumstances substantiate a claim of aggrievement on technical issues without proffering an expert opinion.\(^{251}\) In Jepson, for example, an appeal of a chapter 40B comprehensive permit, the SJC found that the plaintiff sufficiently demonstrated standing on the issue of flooding by providing personal observation of the flooding problems on his property and by relying on the expertise and findings of the local conservation commission as to flooding affecting the adjacent wetlands.\(^{252}\) Avalon presented two affidavits (one by an engineer and the other by the senior project manager) that the proposed development would have no negative impact on flooding in the wetlands adjacent to the proposed development.\(^{253}\) Avalon contended that the plaintiff had not proven standing because (1) the plaintiff did not present expert evidence in response to its experts and the presumption had receded; and (2) that the zoning board of appeals conditioned the project on alleviating the issue of flooding.\(^{254}\)

The abutting individual landowner provided his own affidavit in which he described recent developments in the wetlands (the construction of beaver dams) and the resulting flooding on his property, including photographs of such flooding.\(^{255}\) He also provided copies of documents from the local conservation commission to the Massachusetts Department of Environmental Protection that post-dated the grant of the comprehensive permit and that discussed the effect of the beaver dams in the wetlands and possible corresponding flooding, specifically addressing the changes to the land within the proposed project site.\(^{256}\) The SJC held in Jepson that the abutting individual landowner “presented sufficient proof on the issue of flooding,” “including his reliance on the expertise and findings of the conservation commission,” to conclude that he has standing to appeal the grant of the comprehensive permit.\(^{257}\)

The most important point to take away from Jepson is that when sufficient facts are presented to prove legal harm cognizable for “person aggrieved” status, standing to challenge a local zoning decision will be supported. The plaintiff in Jepson established that flooding occurs on his property and showed that state and local officials (in this case, experts in their field)\(^{258}\) were concerned about the proposed project’s impact on the flooding.\(^{259}\) The SJC stated that “while expert testimony may sometimes be required in a particular case, we have never held that it is always required.”\(^{260}\)

In Choate v. Zoning Board of Appeals of Mashpee,\(^{261}\) the Appeals Court found that the plaintiffs had substantiated their claim of aggrievement on the issue of traffic in part because of common sense and knowledge.\(^{262}\) In Choate, the plaintiffs challenged the grant of a variance to build two single-family homes on two adjoining undersized lots.\(^{263}\) On cross motions, i.e., the plaintiffs’ motion for summary judgment and the defendants’ motion to dismiss, the superior court allowed the defendants’ motion to dismiss based on the plaintiffs’ lack of standing.\(^{264}\) The plaintiffs’ claims of aggrievement were based on the assertion that the addition of two more homes on an unpaved portion of a circular way would increase traffic volume and traffic problems, hasten the deterioration of the unpaved portion of the road, impair the natural and undeveloped environs and diminish their property values.\(^{265}\) The Appeals Court held that the defendants rebutted the presumption of standing with sufficient evidence, consisting of portions of the plaintiffs’ depositions and a defendant’s affidavit that was submitted with the defendants’ motion to dismiss, together with the materials submitted with the plaintiffs’ motion for summary judgment (the plaintiffs’ affidavits, the defendants’ responses to requests for admissions and answers to interrogatories, and the local board decision, including a memorandum from the town fire marshal).\(^{266}\)

The Appeals Court agreed with the superior court that the claims of aesthetic harms were insufficient as a matter of law and that the plaintiffs’ claims of diminution in property values were pure conjecture and personal opinion insufficient to confer standing.\(^{267}\) The Appeals Court disagreed, however, with the superior court’s determination that the plaintiffs’ concern regarding the traffic on the circular way did not confer standing.\(^{268}\) In rejecting standing, the superior court relied on the defendants’ subjective opinions about traffic and on the local board decision that conditioned the variance on compliance with the fire marshal’s memorandum.\(^{269}\) In contrast, the Appeals Court characterized the fire marshal’s memorandum not as a recommendation but rather as a professional opinion on the inadequacy of the circular way and how it did not meet by-law requirements. Furthermore, the Appeals Court noted that none of the defendants’ evidence addressed the plaintiffs’ concerns about the congestion from two-way traffic and the deterioration of the surface of the circular way.\(^{270}\)

Most instructive in the Choate decision was the Appeals Court’s statement that “it was a matter of common sense rather than expertise

251. As to admissibility of lay opinions, see Massachusetts Evidence, supra note 98, at §§ 7.2.1, 7.2.2.
253. Id.
254. Id.
255. Id. at 91.
256. Id.
257. Id. at 91 n.13.
258. The SJC did not indicate that it considered the documentation between the conservation commission and the Massachusetts Department of Environmental Protection to be plaintiff’s “expert opinion” but rather evidence that took the plaintiff’s evidence “out of the realm of apprehension and speculation.” See id.
259. Id.
260. Id.
262. Id. at 385-86.
263. Id. at 377.
264. Id.
265. Id. at 380.
266. Id. at 382.
267. Id. at 383. A plaintiff should not blindly rely on case law that allows “[a]n owner of real estate … having adequate knowledge of his property [to] express an opinion as to its value.” CBI Partners Ltd. v. P’ship v. Town of Chatham, 41 Mass. App. Ct. 923, 924 (1996) (quoting Southwick v. Mass. Turnpike Auth., 339 Mass. 666, 668 (1959)), to support a claim of diminution of real estate value with his or her own testimony. An opinion of whether real estate has experienced a diminution of value requires more expertise than the familiarity an owner has with the characteristics of the property and the knowledge of its uses, such as the effect of external factors on real estate value and knowledge of the real estate market.
269. Id. at 385.
270. Id.
to know that a house on each of the defendants’ two lots would generate more traffic than one house on the two lots if combined.271 In Choate, the plaintiff testified about the physical characteristics of the circular way, including that it was only twelve feet wide.272 The Appeals Court declared “it a matter of common knowledge that more than twelve feet is needed for two ordinarily sized vehicles to pass in opposite directions.”273 The Appeals Court cited further factual support in one plaintiff’s deposition that described an incident where an ambulance was unable to pass down the circular way to respond to an emergency.274 Relying on this information submitted at the trial court, the Appeals Court determined that the plaintiffs sustained their burden, based on all the evidence, to show standing to challenge the board decision.275

A plaintiff seeking to employ “common sense” should, however, be careful to consider all the rational conclusions that are possible from a practical view of the facts about the neighborhood of the proposed project. As demonstrated in Butler, common sense can equally support the facts asserted by a defendant, and therefore reliance on common sense can fail to establish credible evidence of a claim of aggrievement, especially in comparison to a defendant’s more robust showing.276 Although there is no firm rule on the role of common sense and knowledge in the battle over a plaintiff’s standing, these decisions demonstrate that the plaintiff who makes the effort to develop specific facts to support his or her harm may be able to succeed without employing the opinion of an expert.

D. A Case of Standing on Summary Judgment

In analyzing Standerwick’s lessons, it is important to understand the specific rule of civil procedure being employed. The SJC applied the well-settled standard of review under rule 56 that allows a court to enter judgment as a matter of law where there are no material disputes in dispute, including of course no issues of credibility underlying an issue of material fact.277 Under rule 56, the moving party has the burden of proving that there is no triable issue of fact.278 The court must review the facts in the light most favorable to the non-moving party and draw any reasonable inferences from them in favor of the non-moving party.279 In cases where the party opposing summary judgment will have the burden of proof at trial, the moving party is entitled to summary judgment if he or she demonstrates that his or her proffer of material admissible under rule 56(c) is unmet by countervailing materials and that the party with the burden of proof has no reasonable expectation of proving an essential element of that party’s case.280 “[A] moving party need not submit affirmative evidence to negate one or more elements of the other party’s claim.”281 As discussed below, summary judgment presents an important means by which both the plaintiff and defendant can make their case on standing in a zoning appeal.

1. Possibilities for a plaintiff to prove standing on summary judgment

As an initial observation, rule 56 presents several possible outcomes for a plaintiff that should always be considered during a zoning appeal. First, the plaintiff’s appeal may reach the merits of the local zoning decision. This will occur either because a defendant who challenges the plaintiff’s presumption of standing nonetheless fails to produce sufficient evidence to rebut the presumption or because the plaintiff produces credible evidence to support legally cognizable claims of injury in the face of a properly rebutted presumption. Where the defendant only challenges the plaintiff’s standing on summary judgment, the plaintiff who successfully supports claims of aggrievement and does not file a cross motion for summary judgment on the merits of the local zoning decision will likely see the appeal proceed to trial.282

Second, the plaintiff’s appeal may not reach the merits of the local zoning decision. This will occur where the defendant does not claim a legally cognizable injury or produce credible evidence sufficient under rule 56(c) to support a claim of injury. Where a plaintiff has no presumption of standing, his or her burden to invoke the jurisdiction of the court is immediate, and should be met first with a proper complaint that alleges the elements of standing in order to avoid a motion to dismiss. Even in cases where the defendant produces no evidence to support a challenge to standing, the plaintiff will not have the opportunity to address the merits of the local decision unless he or she produces credible evidence.

Third, the determination of whether the plaintiff has standing may not be reached on summary judgment because there are material factual disputes regarding the plaintiff’s aggrievement.283 Factual disputes may arise when the issue of standing is to be determined on “all the evidence,” which “is essentially a question of fact for the trial judge.”284 Under rule 56(c), the defendant has the burden to

271. Id. at 385-86.
272. Id. at 386.
273. Id.
274. Id.
275. Id. at 387.
281. Id.
283. See, e.g., Raskind v. Town of Lexington Board of Appeals, 9 LCR 479, 480 (Mass. Land Ct. 2001) (decision denying cross-motions for summary judgment finding that credibility of plaintiff’s affidavit was raised on summary judgment requiring “the question of standing [to be] decided at trial, based on all the evidence”); Butler v. City of Waltham Zoning Bd. of Appeals, 9 LCR 473, 475 (Mass. Land Ct. 2001), aff’d, 63 Mass. App. Ct. 435 (2005) (ruling on summary judgment that no plaintiff had standing, except possibly one whose standing was based on claim of harm from traffic that could not be resolved on summary judgment); see also Pateuk v. Coppola, 6 LCR 312, 315 n. 8 (Mass. Land Ct. 1998) (“Even if there were a technical defect in the procedural route followed by [plaintiff] in taking his appeal to the board in the first instance, neither [defendant] questioned the board’s jurisdiction in the board’s initial consideration of the appeal…”).
show that there are no material facts in dispute in order to have the court address his or her challenge to standing. Disputes over the conclusions to be inferred from each party’s evidence, however, do not necessarily require a trial.

In zoning appeals, the determination of whether there is a factual dispute that would preclude summary judgment is tightly intertwined with the evidentiary standard required for standing. For example, a plaintiff may not have provided the type or quality of evidence (i.e., competent expert evidence or sworn evidence based on personal knowledge) needed to show the claimed harm. A plaintiff may have provided detailed factual information and expert opinion but still may not have provided factual support for all necessary aspects of its claimed aggrievement. In such cases, summary judgment in the defendant’s favor is appropriate even though there may exist material factual disputes.

The determination of whether there is a material factual dispute is especially difficult where the case involves two qualified experts whose opinions contradict each other. The parties should focus the judge on what is fact and what is opinion, because where Two qualified experts’ conclusions on undisputed facts disagree, it would appear that plaintiff has presented a plausible claim of harm.

2. Admissible evidence on summary judgment

Plaintiffs and defendants should be diligent in reviewing the evidence the other party submits under rule 56. It is usual for a summary judgment motion and the opposition on the issue of standing to be supported by affidavits and deposition transcripts. Rule 56(e) requires that “[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” These requirements apply as well to other evidence that may be submitted and considered by the judge regarding a plaintiff’s aggrievement.

In Standerwick, Avalon properly supported its motion for summary judgment on each element and issue of plaintiffs’ standing with admissible affidavits and excerpts from plaintiffs’ deposition testimony and interrogatory answers. A civil engineer opined favorably for the proposed development’s impacts on local water and sewer service and storm water management. A traffic engineer stated that there would be no unacceptable levels of traffic problems created by the proposed development. As for the remaining claims of aggrievement (light, noise, diminution of property values, decreased privacy, change of rural character of the neighborhood and increased crime), Avalon relied on the plaintiffs’ failure to produce evidence during discovery and argued under Kourowacalis v. General Motors Corp. that the plaintiffs had no likelihood of proving those claims of aggrievement at trial.

A motion to strike is a tactical tool that effectively brings to the court’s attention the inadequacies of a party’s evidence submitted in support of, or to challenge standing. In Standerwick, for example, the developer moved to strike the plaintiffs’ affidavits on the grounds that they were insufficient as expert affidavits, and that claims of diminution of value do not, as a matter of law, confer standing under chapter 40B. More importantly, however, the court may, in its discretion, rely on any facts uncontroversial by any evidence submitted on summary judgment, unless a party moves to strike the objectionable evidence proffered by the opposing party. By using prosaic motions to strike statements that are hearsay or lack personal knowledge of the affiant or deponent, a party can weaken the opponent’s evidence and increase the likelihood he or she will be successful in sustaining his or her burden.

Even more effective may be an attack on the reliability of a party’s expert opinion. Motions to strike an expert’s conclusions based on the expert’s qualifications or methods used to form the opinion can leave the plaintiff or defendant without evidence to support his or her position. A plaintiff who successfully strikes the defendant’s expert testimony, in whole or in part, may obviate the need for the court to determine standing on all the evidence offered. For a successful defendant, the court will not have to determine whether there is a factual dispute necessitating a trial.

E. Standing Based on “All the Evidence” — the Court’s Role

The determination of whether the plaintiff is aggrieved is usually not easy for the court. This is especially true when the court is faced with determining a plaintiff’s standing based on “all the evidence,” that is, both the defendant and plaintiff have produced admissible evidence and the defendant’s evidence is sufficient to warrant a “finding contrary to the presumed fact.” The ultimate determination based on all the admissible evidence is the “credibility.” Notwithstanding the plaintiff’s evidentiary burden, under the standard for summary judgment, the court must not weigh any of the evidence or judge its credibility. Whether the plaintiff’s evidence is credible in the context of summary judgment, however, is often presented in a relative or comparative context. Therefore, the court is faced with the task of carefully viewing the facts and balancing these two standards.

The SJC’s decision in Jepson demonstrates such a comparative
focus on the plaintiff’s evidence. In Jepson, the plaintiff provided competent, factual evidence of recent developments accompanied by flooding in the area that was adjacent to his property and the property of the proposed project that was the subject of the zoning decision. Based on “all the evidence,” the plaintiff had standing despite the defendant’s expert opinion that there would be no negative impacts from the project and the fact that the local decision imposed conditions on the project directed at alleviating flooding. The SJC stated the fact “[t]hat flooding can be controlled, or alleviated, has no bearing on standing as long as [the plaintiff] ‘put forth credible evidence to substantiate his allegations.”

In Michaels v. Zoning Board of Appeals of Wakefield, the Appeals Court characterized the determination of standing as truly evidentiary in nature when it compared the process to Commonwealth v. Lanigan and commented that “the question of standing … is a gatekeeper question and requires consideration solely of the quantity and quality of evidence the plaintiffs have presented.” Although the plaintiff and defendant each have a burden to produce evidence to support their respective positions on standing, it is the evidence that the plaintiff relies on that drives the determination of whether he or she is aggrieved. The Appeals Court’s statement in Michaels further clarifies the application of the “credible evidence” standard that governs this determination, but this time the procedural guidance is for the court. Nonetheless, there is a lesson in Michaels for the litigants in a zoning appeal. The land-use lawyer should always keep the court focused on the stage of litigation and the procedures and standards involved in sustaining standing to challenge a zoning appeal. One must understand and be able to correlate the specific facts of a zoning appeal to the standing requirement of considering “all the evidence” and the necessary finding of “credible evidence,” and to identify when the evidence is being improperly weighed or judged under the civil standard of proof by a preponderance of the evidence. The legal principles can be hard to distinguish, which is especially true where the evidence is provided by experts and a “battle of the experts” ensues.

**Conclusion**

From this review of the growing body of case law, it is clear that the SJC’s decision in Standerwick has revived the discussion of what facts constitute aggrievement sufficient to support a claim of standing. It may have also created some uncertainty for a plaintiff and defendant on a case-by-case basis as to how much evidence is needed to win the fight over standing. The cases demonstrate that, although there is now a heightened focus on the use of experts, the litigants should not overlook the obvious factual support that can be garnered and presented in admissible form by the proponent or opponent of a project.

Ultimately, it seems that Standerwick has intensified the focus on the procedural rules that govern the parties’ prosecution or defense of an appeal of a local zoning board decision. It is important for land-use lawyers to be ever vigilant in analyzing the claims of, or challenges to, standing at every stage of litigation. Standerwick also demonstrates that a plaintiff who sits on the presumption of standing by not producing evidence to support claims of aggrievement exposes himself or herself to the risk of not being heard on the merits of an appeal.

Standerwick’s progeny should be carefully monitored by land-use lawyers and municipalities for further changes in the legal standards regarding standing, and thus, the ability of individual plaintiffs and defendants to influence development of the landscapes of the cities, towns, farmlands and open spaces of Massachusetts.

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299. Id. at 91-92.
300. Id. at 90-91.
301. Id. at 91.
303. Id. at 450.
304. Id. at 453.
305. Id. at 453 n.7 (comparing Commonwealth v. Lanigan, 419 Mass. 15, 25-26 (1994)).
306. Id. at 453; see also Butler, 63 Mass. App. Ct. at 442 (stating that “primary evidence” on issue of impact of traffic from proposed project was plaintiff’s traffic expert).
Revisiting Dispositions and Sentencing Advocacy in the Massachusetts District Courts

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“With the exception of restrictions regarding certain sealed records not available in probation reports … the sentencing judge may consider virtually any information that would aid him or her in understanding the defendant, determining the goal[s] of the disposition[s], and deciding the likelihood of rehabilitation.”

INTRODUCTION

Sentencing is the most important stage in today’s criminal process, yet it is often the most neglected by attorneys. To serve their clients effectively, attorneys must keep abreast of legislative changes, new cases and collateral consequences that may follow a disposition. Additionally, they must prepare for sentencing at the same time that they prepare for trial, because, in most instances, a defendant is sentenced on the day of his guilty verdict or guilty plea.

Statistics from the most recent Massachusetts District Court and Boston Municipal Court (“BMC”) Departments’ criminal filings, fiscal year 2006, indicate that approximately 258,000 complaints were entered that year in the district courts of the commonwealth. During that same fiscal year, the BMC disposed of 25,570 complaints. Statistics for 2006 are unavailable for the District Court Department, but fiscal year 2005 statistics indicate 202,273 disposed complaints. In the Massachusetts Superior Court Department, the total number of cases entered during fiscal year 2006 was 5,534, and the number of disposed cases (including pending matters from 2005) was 5,995.

These numbers demonstrate that the district courts handle the bulk of criminal matters arising in Massachusetts. Defense attorneys and prosecutors engage in sentencing discussions and negotiations for a large percentage of these cases. Since the district courts of Massachusetts handle most of the criminal matters that arise in the commonwealth, this article is addressed primarily to district court practice.

Unlike the superior court, the district court has no promulgated sentencing guidelines for a judge to consult. Any sentencing decision is based upon the criminal statute the defendant is accused of violating. Most criminal statutes contain penalty clauses which set

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1. The author is grateful for the comments and suggestions made by David Breen, Lee Gartenberg, Sean Kealy, Eva Nilsen, David Rossman and Wendy Wayne. The author thanks Nellie Staley for her excellent research assistance and Katherine Robertson for her thoughtful comments and editing.


3. Standards of Judicial Practice: Sentencing and Other Dispositions, Standard 1:02 (District Court Department of the Trial Court, Sept. 1984).

4. See United States v. DiFrancesco, 449 U.S. 117, 150 (1980) (Brennan, J., dissenting) (“To the convicted defendant, the sentencing phase is certainly as critical as the guilt-innocence phase.”).


out the range of imprisonment and fines available to the court for sentencing. Advocates should consult the case-related statute to determine potential legislative sanctions.

This article outlines important aspects of sentencing practices in the Massachusetts district courts. The first section addresses recent legislative changes affecting sentencing. The second section discusses the options available to the court and counsel to fashion an appropriate and individualized disposition. The third section focuses on potential collateral consequences of district court sentences, and the fourth section addresses possible post-conviction relief. Four sentencing examples are presented in Parts I and II. Part V, Sentencing Advocacy, reviews the examples noted in the text and in each example suggests strategies for effective sentencing advocacy.

I. LEGISLATION AFFECTING DISTRICT COURT SENTENCING

There are frequent changes to the laws in Massachusetts affecting sentencing and disposition as legislators respond to court rulings and institutional concerns. Attorneys must be aware of legislative adjustments to criminal statutes, particularly those that alter penalties for specific offenses, or create additional responsibilities for defendants who are convicted.

Part I outlines specific legislative changes that directly affect, and in many instances limit, the sentencing options for convicted defendants.

Example 1: The defendant is charged with operating a motor vehicle while under the influence of intoxicating liquor ("OUI") and has a previous out-of-state conviction for the identical offense. The prior offense took place 11 years ago, when the defendant was 19 years old. In the current case, the defendant took a breathalyzer test, with the result of .09. Consider how the changes described below affect the dispositional choices for this person.

A. OUI

Within the past few years, there have been several pieces of legislation that affect the laws governing the offense of OUI. Chapter 302 of the Acts of 2002, "An Act Relative to Repeat Offenders of the Crime of Operating a Motor Vehicle under the Influence of Alcohol," removed the 10-year limit on the look back provision of Massachusetts General Laws chapter 90, section 24. The prior law did not consider, for purposes of a repeat offender provision, any prior conviction for OUI, or prior assignment to a drug or alcohol education, treatment or rehabilitation program as a result of an OUI charge, if the offense occurred more than 10 years before the recent arrest for OUI. The new legislation removed the 10-year "look back" limitation and now, any prior OUI conviction or assignment to an education, treatment or rehabilitation program, by any jurisdiction, is treated as a prior offense. But the law allows a second offender a "once in a lifetime" opportunity to enter a first offender program if the prior incident occurred more than 10 years before the second offense unless the drunk driving incident caused serious personal injury or death.

On June 30, 2003, the Massachusetts legislature enacted chapter 28 of the Acts of 2003, "An Act to Protect Federal Transportation Funding and Strengthen Drunk Driving Laws." This law changed the legal standard for operating under the influence by lowering the blood alcohol concentration on the basis of which intoxication can be inferred, from .1 to .08. Drivers under the age of 21 with a blood alcohol concentration of .02 will be prosecuted for OUI. Additionally, the law increased the penalty for refusing a breathalyzer or blood test by increasing a license suspension from 120 days to 180 days. The law also decreased the suspension period from 90 days to 30 days as penalty for failing the breathalyzer or blood test.

The most sweeping changes to the OUI law came about with the passage of chapter 122 of the Acts of 2005, better known as "Melanie's Law," named for a teenager killed in 2003 by a repeat drunk driver. Melanie's Law increased the penalties and administrative sanctions for OUI offenders, beginning with the initial police stop and extending to license revocation and reinstatement.

Under Melanie's Law, refusal to submit to a breathalyzer or blood test will result in immediate license suspension — which runs consecutively, not concurrently, with any OUI conviction penalty — and impoundment of the motor vehicle for 12 hours. A first-time OUI offender who refuses to take a breathalyzer or blood test is still subject to a 180-day license suspension. The license-suspension period for refusing a breathalyzer or blood test increases for second-time offenders (three-year suspension), third-time offenders (five-year suspension), and fourth-time or more offenders (lifetime suspension). Penalties for drivers ages 18 to 21 increase as well: for first and second offenders, a three-year license suspension, in addition to a 180-day suspension that may be waived for first-time offenders upon entry into an alcohol education program; third-time offenders face a five-year suspension with the additional 180-day suspension; and fourth-time offenders between 18 to 21 receive a lifetime suspension for refusing a breathalyzer or blood test.

First and second offenders drivers under 18 who refuse a breathalyzer or blood test are subjected to a three-year license suspension with an additional year suspension that may be reduced for first-time offenders to 180 days upon entry into an alcohol education program. Third-time underage offenders receive a five-year suspension with an additional year suspension, and an underage driver with three or more prior offenses who refuses a breathalyzer or blood test is subject to a lifetime license suspension.

If an arrested driver over 21 takes and fails the blood alcohol concentration test (.08), loss of license is imposed for up to 30 days.

12. For example, Mass. Gen. Laws ch. 265, § 13A (2008), the statute setting out the crimes of assault and assault and battery, provides for "punishment by imprisonment for not more than 2 1/2 years in a house of correction or by a fine of not more than $1,000." Id.
15. Id.
16. Id. § 24(2) & (3).
19. Id. § 24(1)(f)(1).
20. Id. § 24(1)(f)(2).
21. Id. § 24(1)(f)(2).
22. St. 2005, c.122("An Act increasing penalties for drunk drivers in the Commonwealth").
24. Id.
25. Id.
26. Id.; id. § 24P(a).
27. Id. §§ 24(1)(f)(1) & 24P(a).
28. Id. § 24(1)(f)(1).
29. Id. §§ 24(1)(f)(1) & 24P(a).
30. Id. §§24(1)(f)(1) & 24P(a).
31. Id. § 24(1)(f)(1).
32. Id. § 24(1)(f)(2).
Drivers under 21 with blood alcohol concentration test results of .02 or greater will experience a 180-day loss of license; for drivers under 18, a one-year loss of license is imposed. Melanie’s Law contains other provisions which penalize individuals for permitting a motor vehicle to be operated by an unlicensed person or one whose license has been suspended or revoked, or for allowing a person with an ignition interlock restricted license to operate a motor vehicle without such a functioning ignition interlock device.

Melanie’s Law, which expanded the types of documents that can satisfy prima facie evidence of a prior conviction, was challenged in *Commonwealth v. Maloney*. In this case, the Massachusetts Supreme Judicial Court (“SJC”) held that the new statute’s evidentiary provision did not violate the ex post facto clause, nor did it alter the legal rules of evidence.

### B. Firearm Possession

Pursuant to General Laws chapter 269, section 10(a), the penalty for unlawfully carrying a firearm was increased in 2006 from a mandatory one year in a jail or house of correction to eighteen months in a jail or house of correction. The legislation specifically mandates that

> [t]he sentence imposed … shall not be reduced to less than 18 months, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, work release, or furlough or receive any deduction from his sentence for good conduct until he shall have served 18 months of such sentence …. Prosecutions commenced under this subsection shall neither be continued without a finding nor placed on file.

### C. Sex Offender Registry

In 1996, the legislature established the Sex Offender Registry Board (“SORB”). The SORB is directed to “establish and maintain a central computerized registry of all sex offenders required to register pursuant to sections 178C to 178P [of General Laws chapter 6]”. A number of defined “sex offenses” fall within the jurisdiction of the district court and may expose a defendant to sex offender registration requirements. Failure of a sex offender to register with the SORB is a separate crime within the jurisdiction of the district court and punishable by fine or imprisonment or both.

### D. Submission of DNA Sample by Persons Convicted of Certain Offenses

According to General Laws chapter 22E, section 3, “[a]ny person who is convicted of an offense that is punishable by imprisonment in the state prison … shall submit a DNA sample to the department within 1 year of such conviction … or, if incarcerated, before release from custody, whichever occurs first.” The submitted DNA sample becomes part of the statewide DNA database. This requirement applies to defendants convicted in the district court of concurrent felonies that carry the potential of state prison incarceration.

### E. Fees and Assessments

In order to help defray the costs of criminal cases, the legislature has increased the number and amounts of court costs and fees payable by the defendant at the conclusion of a case. A conviction or a finding of sufficient facts will trigger the imposition of a victim/witness assessment fee. According to the statute, the victim/witness assessment fee “shall be the defendant’s first obligation,” meaning that this payment takes precedence over other court assessments, such as probation supervision fees, fines and other assessments. In 2002, the victim/witness assessment fee was increased to $90 for a felony and $50 for a misdemeanor. The victim/witness assessment fee may not be reduced or waived without the court making a written finding that the imposition of the assessment would cause severe financial hardship.

If the convicted defendant is incarcerated within the commonwealth, the superintendent or sheriff of the correctional facility is directed to deduct from monies earned or received by the inmate in order to satisfy this assessment.

Probation supervision fees were raised by statute in 2003. Defendants placed on supervised probation must pay a monthly fee of $60 plus a $5 “victim services surcharge” in addition to the victim/witness assessment fee. Defendants placed on administrative supervised probation must pay a monthly fee of $20 and a $1 victim services surcharge. These fees may be waived by the court, after hearing and in writing, if their imposition would constitute a severe financial hardship.

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33. *Id.* § 24P(a).
34. *Id.* § 12(b).
35. *Id.* § 12(c).
36. St. 2005, c. 122, § 6A reads, in part:
   > introduction into evidence of a prior conviction or a prior finding of sufficient facts by either certified attested copies of original court papers, or certified attested copies of the defendant’s biographical and informational data from records of the department of probation, any jail or house or correction, the department of correction, or the registry, shall be prima facie evidence that the defendant before the court had been convicted previously …. Such documentation shall be self-authenticating and admissible …. The commonwealth shall not be required to introduce any additional corroborating evidence, nor live witness testimony to establish the validity of such prior convictions.
38. *Id.* at 588.
42. *Id.*
45. See discussion of collateral consequences for sex offense convictions, *infra* notes 296 to 307 and accompanying text.
48. *Id.*
51. *Id.*
54. *Id.*
58. *Id.*
an undue hardship on the defendant or his family “due to limited income, employment status or any other factor.”\textsuperscript{59} In lieu of payment of the probation supervision fee, the court may order the defendant to perform community work service, one day a month in lieu of the $60 fee, and four hours a month in lieu of the $20 fee.\textsuperscript{60}

An indigent defendant to whom appointed counsel is assigned is required to pay a $150 counsel fee, which may be waived upon the court’s determination that the defendant is unable to pay.\textsuperscript{61}

\textbf{Practice tip:} Counsel should be aware that a conviction or a finding of sufficient facts to warrant a finding of guilt for particular crimes may include certain cost assessments. Examples of this are: certain drug offenses that carry a drug analysis fee;\textsuperscript{62} domestic assault cases that have a batterers intervention program assessment fee;\textsuperscript{63} and OUI offenses that carry a mandatory fee for placement in a driver alcohol education program,\textsuperscript{64} an OUI victims assessment fee,\textsuperscript{65} and a head injury assessment fee (also imposed when a defendant is convicted or a finding of sufficient facts is entered).\textsuperscript{66}

\section*{F. Office of Community Corrections}

In 1996, the legislature established the Office of Community Corrections, whose purpose is to provide intermediate sanctions for appropriate offenders.\textsuperscript{67} The legislation defines an “intermediate sanctions program” as one that has been determined to impose an appropriate sanction upon an offender for whom imprisonment may not be necessary or appropriate … [and includes such programs as] standard probation, intensive supervision probation, community service, home confinement, weekend jail sentences, day reporting, residential programming, substance abuse treatment, restitution, means-based fines, continuing education … vocational training, special education, and psychological counseling.\textsuperscript{68}

According to the statute, the court may sentence any eligible offender to a community corrections program as a condition of probation, with a designated “suspended sentence of imprisonment that otherwise would have been imposed.”\textsuperscript{69} Offender eligibility is determined by factors such as: the nature and circumstances of the offense; the offender’s mental state at the time of the offense; any relationship between the offender and victim; the nature and degree of harm caused by the offense; the community view of the offense’s gravity; public concern; age of the offender; the deterrent effect of the sentence on commission of the offense by others; the mental and emotional condition of the offender; the offender’s physical condition; the offender’s family ties and responsibilities; the offender’s character and personal history; prior arrest record of the offender; the offender’s amenability to correction, treatment and supervision; and the offender’s past history of violence.\textsuperscript{70} A defendant convicted of a firearm offense or a crime resulting in serious bodily harm is excluded from participation in the community corrections program.\textsuperscript{71}

\section*{G. Decriminalization of Marijuana Possession}

Pursuant to a popular initiative passed in state elections in November 2008, legislation made effective on January 2, 2009,\textsuperscript{72} amended Massachusetts General Laws chapter 94C by inserting three new sections.\textsuperscript{73} These sections created a new system of civil penalties for the possession of one ounce or less of marijuana, replacing the previous criminal penalties. Adult offenders are now subject to forfeiture of the marijuana in addition to a $100 civil penalty.\textsuperscript{74} The legislation includes examples that prohibit the civil penalty from use as a basis for other penalties, sanctions or disqualifications.\textsuperscript{75}

\section*{II. Pre- and Post-Trial Dispositions\textsuperscript{76}}

This section describes pre- and post-trial dispositions that are available to the district court at sentencing. Pretrial resolution of a criminal case alleviates the need for a formal trial or plea.

Although the majority of district court criminal matters are resolved after trial or guilty plea, there are a number of benefits, noted below, that make a pretrial disposition attractive to both the prosecution and defense. This section outlines potential sentencing options that a district court judge has at his or her disposal. \textbf{Practice tip:} Advocates are reminded that certain sentencing options may be precluded by legislation. (Examples of such legislation are noted in the previous section.)

\textbf{Example 2:} The defendant is charged with an assault and battery. It is a civilian complaint and the complainant is the defendant’s neighbor. There are no injuries, no police witnesses and the defendant has no prior criminal record. The defendant is not an American citizen. In light of the following considerations, consider how the case might be resolved.

\footnotesize
\begin{itemize}
\item 59. \textsuperscript{Id}
\item 60. \textsuperscript{Id}
\item 65. Id. § 24(1)(a)(l).
\item 66. Id. §§ 24(1)(a)(1), 24(2)(a).
\item 68. Id. § 1.
\item 69. Id. § 3(a). This is intended to be a more intensive probation than would normally be the case.
\item 70. Id. § 3(d).
\item 71. Id.
\item 74. Id. § 32L.
\item 76. It is important to note that all of the sentences described here pertain to \textit{adult} criminal defendants. The juvenile court system subscribes to a different adjudication scheme. A juvenile may qualify for a special pretrial diversion program, and there may well be grounds for dismissal of a juvenile complaint that parallel those mentioned here. After an admission to sufficient facts, a juvenile’s case may be continued without a finding. Mass. Gen. Laws ch. 119, §§5B (2008). After a jury trial, the juvenile will be found “delinquent” or “not delinquent” rather than “guilty” or “not guilty.” Mass. Gen. Laws ch. 119, §5B (2008). The most severe disposition that the juvenile court may mete out for a delinquency complaint is a commitment to the Massachusetts Department of Youth Services (“DYS”). Once committed to DYS, the juvenile’s status is determined by that agency, and is out of the hands of the court. In 1996, a new category of juvenile offenders was created. Mass. Gen. Laws ch. 119, §52 (2008) (defines a youthful offender as “a person who is subject to an adult or juvenile sentence for having committed, while between the ages of fourteen and seventeen, an offense against a law of the commonwealth which, if he were an adult, would be punishable by imprisonment in the state prison, and (a) has previously been committed to the department of youth services, or (b) has committed an offense which involves the infliction or
A. Pretrial Dispositions

A criminal complaint may be resolved without either a trial or a guilty plea. A pretrial resolution of the case is beneficial to the defendant who is apprehensive about the risks of trial, or who is reluctant to admit to sufficient facts or plead guilty to the charges. Pretrial resolution of a criminal case means that no conviction will appear on the defendant’s probation history. It is appealing as well to the prosecutor who may have a weak case. The following is a brief outline of available pretrial dispositions:

1. Nolle prosequi. One means of disposing of a criminal matter prior to trial or plea is the nolle prosequi. The nolle prosequi is filed by the prosecutor, indicating the district attorney’s wish not to prosecute the case. It is within the exclusive power of the district attorney to file a nolle prosequi. Though used infrequently, the nolle prosequi is an important law enforcement tool as it may provide an incentive for a defendant to cooperate with authorities in return for dismissal of pending criminal matters.

2. Dismissal. Dismissal of the criminal complaint is probably the most frequently employed pretrial disposition. Requests for dismissal based on legal grounds are made by defense counsel in writing, stating the grounds for the motion, and are accompanied by an affidavit signed by a person with personal knowledge of the factual basis for the motion. Requests for dismissal based on other grounds may be made orally, with or without the assent of the commonswealth.

Common grounds for dismissal include:

a. Lack of speedy trial. The right to a speedy trial is governed by the Sixth Amendment to the United States Constitution, the Massachusetts Declaration of Rights, part 1, article 11, and rule 36 of the Massachusetts Rules of Criminal Procedure. A motion to dismiss under rule 36(b) because of prosecutorial delay does not require a showing of prejudice. A dismissal on speedy trial grounds is a bar to further prosecution for the same threat of serious bodily harm in violation of law, or (c) has committed a violation of paragraph (a), (b), or (c) of section ten or section ten E of chapter two hundred and sixty-nine . . . .” Mass. Gen. Laws ch. 119, § 58(2008) provides three sentencing options for convicted youthful offenders: 1) a commitment to DYS until age 21; 2) a commitment to an adult sentence as provided in the charged offense; and 3) a combination sentence, consisting of a commitment to DYS until age 21, followed by an adult sentence which is intended to be concurrent and is suspended with probation supervision. Id.

77. Resolving a case pretrial also eliminates certain immigration consequences. See generally 8 U.S.C. § 1101(a)(48)(A)(2006), and Griffis v. I.N.S., 243 F.3d 45 (1st Cir. 2001). The Griffis case states that without a formal adjudication of guilt, there must be “(i) sufficient finding of support for a conclusion of guilt, and (ii) the imposition of some form of punishment in order to find a ‘conviction’ for immigration purposes.” Id. at 53. This reasoning would seem to exclude any pretrial disposition where the defendant has not pleaded guilty or nolo contendere, or admitted to sufficient facts, and there was no adjudication of guilt. The SJC recognized this fact in Commonwealth v. Rodriguez, 441 Mass. 1002, 1003 (2004) (noting that guilt was not established, and there would never be a conviction under Massachusetts law, but that I.N.S. had denied defendant’s application for naturalization based in part on pretrial probation). Under Griffis, however, it does not seem likely that pretrial probation would stand up as a conviction if the case came before a federal judge.


79. Mass. R. Crim. P. 13 (applicable to cases initiated by indictment or complaint on or after September 7, 2004) sets forth the requirements for pretrial motions in the district court. General requirements are that the motion be in writing, signed by the party making the motion and filed in a timely manner.


82. Mass.R.Crim.P. 13 (applicable to cases initiated (by indictment or complaint) on or after September 7, 2004).


90. See Commonwealth v. Aldrich, 21 Mass. App. Ct. 221, 224-25 (1985). Note that jeopardy does not attach when the court accepts a defendant’s guilty plea to
c. Failure to state a crime. Practically speaking, if the defendant moves to dismiss a criminal complaint based on failure to state a crime, the commonwealth, having been alerted to the defect in the complaint, will move to amend the complaint, or will acquiesce in its dismissal and seek a new complaint. But a conviction on a complaint that fails to state an essential element of the crime will not be valid and will be subject to challenge on appeal.91

f. Dismissal based upon the filing of an accord and satisfaction. Section 55 of chapter 276 of the General Laws provides for the dismissal of certain misdemeanors92 upon the filing of a written agreement between the two parties (the “accord and satisfaction”).93 In Commonwealth v. Guzman, 94 the SJC said that

[b]esides requiring that the injured party appear before the court and acknowledge, in writing, that he or she has been satisfied, the statute requires, among other things, that the defendant be accused of a misdemeanor for which he could be liable in a civil action, and that the crime was not committed against a law enforcement officer or with intent to commit a felony.95

The court also noted that the “satisfaction itself need not be monetary and may be de minimis.”96 Typically, this agreement is viewed as a form of dispute resolution that provides limited court oversight without recourse to a criminal conviction. An accord and satisfaction agreement is subject to the court’s approval and is not considered a private payment.97 Acceptance of an accord and satisfaction is a bar to further civil action.

g. Dismissal upon the request of the complainant, with the defendant not objecting. Although the commonwealth is the complainant in all criminal matters, if a crucial civilian witness does not wish to testify (due to self-incrimination or other concerns), and the commonwealth cannot proceed without this witness, the prosecutor may have to request dismissal of the case. The prosecution may also request a dismissal as part of a negotiated plea bargain with the defendant. This situation is not uncommon when the defendant is charged with multiple charges and has agreed to plead guilty to some of them in return for dismissal of the remaining charges.

h. Dismissal as a sanction against the commonwealth. The court may grant a motion to dismiss as a result of some prosecutorial misconduct or failure to comply with a court order.98 Should the commonwealth fail to be ready for trial on the appointed date, the defense may move for dismissal. Unless the complaint is dismissed with prejudice, the commonwealth may seek a new complaint at a later date.99

The dismissal of a criminal complaint may carry with it the imposition of court costs which are defined as the “reasonable and actual expenses” of the prosecution.100 The order to pay court costs may be agreed upon by the parties or imposed by the court. Witness fees, witness travel and parking expenses, stenographer fees and overtime pay to police officers are all examples of expenses the court may order the defendant to pay. Court costs may be substituted by community service with permission of the court.101

3. Mediation. Alternative dispute resolution, through referral to a court-approved mediation program, is another means of resolving a case without having a trial or plea. All district courts have mediation programs where willing parties can be directed to work out solutions to the issues which have led them to the court. It is important to note that both parties to the criminal complaint, the defendant and the prosecution (speaking on behalf of the police or civilian interests involved) must be amenable to mediation. The nature of the alleged offense is also a consideration, since serious felonies are normally excluded from mediation. This approach to criminal matters is typically employed in cases where the parties have an ongoing relationship (e.g., neighbors, employers and employees, mutual acquaintances, patrons at the same business establishment, etc.) and it is deemed in the best interest of both to work out their grievances in a noncriminal setting.

Once the parties have agreed to mediation, the court mediation program is contacted and meetings are arranged between the parties, usually without counsel present.102 When the court is informed that a case is referred to mediation, the criminal

92. E.g., assault and battery or other misdemeanor for which the defendant is liable in a civil action.
95. Id. at 348.
96. Id.
97. Id. at 349.
98. For example, Mass. R. Crim. P. 14(c) Sanctions for Noncompliance. (1) Relief for Nondisclosure states, “[f]or failure to comply with any discovery order issued or imposed pursuant to this rule, the court may make a further order for discovery, grant a continuance, or enter such other order as it deems just under the circumstances.”
99. Commonwealth v. Joseph, 27 Mass. App. Ct. 516, 519 (1989). As this case indicates, the commonwealth is likely to appeal any dismissal made with prejudice; see also Commonwealth v. Connelly, 418 Mass. 37, 38 (1994) (dismissal with prejudice has to be supported by egregious misconduct); Commonwealth v. Clegg, 61 Mass. App. Ct. 197, 200-02 (2004) (judge’s refusal to grant continuance where commonwealth’s police officer witness did not appear was tantamount to dismissal with prejudice; this effective dismissal would leave prosecution with a nonexistent case and no further options, which court thought was too drastic a sanction).
100. Mass. Gen. Laws, ch. 280, § 6 (2008), and Mass. Gen. Laws ch. 275, § 6 (2008). See Commonwealth v. Scagliotti, 373 Mass. 626, 629 (1977) (costs were improper because they were not imposed under § 6); Commonwealth v. Casserly, 23 Mass. App. Ct. 947, 948 (1986) (costs may be imposed as condition of probation); see also Commonwealth v. Zawatsky, 41 Mass. App. Ct. 392 (1996), which includes the following language: “Under G.L. c.280, s. 6, there is a general prohibition against the imposition of costs as a penalty for a crime” and “the statute does permit a court to order a defendant to pay the reasonable expenses of a prosecution as a condition of the dismissal.” Id. at 400 & n.7 (citations omitted).
102. Counsel needs to exercise discretion in advising a client facing criminal charges to enter into ununclesed discussions with a complainant.
matter may be continued for a period of time to allow formulation of an agreement.\textsuperscript{103} Once reached, the written agreement is signed by the parties (defendant and complaining witness), presented to the court, and incorporated in the court documents. The criminal case may be dismissed on that court date, or it may be continued to a further date by which certain conditions of the agreement must be fulfilled. If such conditions are not fulfilled, the court may either reinstate the case on the trial docket or allow additional time to meet the conditions. After a case is dismissed, the court no longer has the power or authority to impose conditions upon the defendant.

4. Pretrial diversion. A defendant may resolve his criminal matter by participating in a pretrial diversion program. Generally, pretrial diversion programs vary among the district courts, although they often include participation in anger management or counseling programs. Several statutes provide for this type of case resolution. General Laws chapter 276A applies to adult defendants between the ages of 17 and 21 who have no prior convictions, traffic offenses excluded.\textsuperscript{104} At arraignment, the case may be continued for 14 days in order to give the probation department time to screen the defendant's suitability for the pretrial diversion program.\textsuperscript{105} Once a defendant is accepted into the diversion program, which may vary among the different district court probation offices as to prerequisites and operation, the criminal matter is stayed for 90 days.\textsuperscript{106} If the defendant successfully completes the diversion program conditions, the case is then dismissed, with the prosecutor's consent, after the 90-day period.\textsuperscript{107} Defense counsel must make sure that her client understands the conditions of the pretrial diversion program in order to ensure compliance with the program. In the event that the client does not complete the program conditions, the case will be returned to the trial docket and proceed to either trial or plea.

5. Pretrial probation. Pretrial probation\textsuperscript{108} is a more formal arrangement than diversion under which the defendant agrees to probation-like terms, which may include regular supervision by a probation officer, participation in a substance abuse program, obtaining counseling at the court clinic or finding a steady job. General Laws chapter 276, section 42A\textsuperscript{109} and section 87,\textsuperscript{110} authorize pretrial probation. Section 42A is targeted at charges arising out of troubled family situations. Section 87 is more general in its reach as it applies to “[a]ny person before the court charged with an offense or a crime,” providing that the defendant satisfies the other requirements of the statute and consents to the pretrial probation.\textsuperscript{111} As in a pretrial diversion program, failure to comply with pretrial probation conditions will lead to reinstatement of the criminal case on the trial docket. If the defendant successfully completes the established pretrial probationary period, then the criminal case will be dismissed as long as the prosecutor consents to the dismissal.\textsuperscript{112}

6. Statutory diversion. A defendant charged with a drug offense, defined as “an act or omission relating to a dependency related drug which constitutes an offense pursuant to section twenty-one or subdivision (1) or section twenty-four of chapter ninety, section eight of chapter ninety B, chapter ninety-four C or section sixty-two of chapter one hundred and thirty-one,” or a defendant whom counsel knows has a drug addiction problem, is entitled to evaluation for drug dependency.\textsuperscript{113} Section 10 of chapter 111E of the General Laws permits a stay of criminal proceedings if the defendant is drug dependent and willing to accept assignment to a drug rehabilitation facility, defined in section 1 of chapter 111E as any public or private place, or portion thereof, which is not part of or located at a penal institution and which is not operated by the federal government, providing services especially designed for the treatment of drug dependent persons or persons in need of immediate assistance due to the use of a dependency related drug.\textsuperscript{114}

\textsuperscript{103} The decision to refer a case to mediation may be made at any time during the criminal process, although it usually occurs at either arraignment, pretrial conference or pretrial hearing dates.


\textsuperscript{105} Mass. Gen. Laws ch. 276A, § 2 (2008) states that a defendant is eligible for pretrial diversion if the offense is one “for which a term of imprisonment may be imposed and over which the district courts may exercise final jurisdiction,” providing that the defendant does not have, in addition to previous convictions, any outstanding warrants, continuances, appeals or criminal cases pending before any state or federal court. Mass. Gen. Laws ch. 276A, § 4 (2008), however, excludes defendants who are charged with offenses against victims over 60 years of age. Mass. Gen. Laws ch. 276A, § 3 (2008) notes that when a judge considers whether to grant a defendant the 14-day continuance for program suitability assessment, “the opinion of the prosecution should be taken into consideration.”


\textsuperscript{107} Although the court has the power to place a qualified defendant in a pretrial diversion program, the court lacks authority to dismiss the case over prosecution objection, due to the principal of separation of powers.


\textsuperscript{109} Id. § 42A.


\textsuperscript{112} See Cheney, 440 Mass. at 574-75 & n.12. (ruling, based on separation of powers, that judge, prior to verdict, finding or plea, is precluded from dismissing “legally adequate criminal indictment in interests of public justice” over commonwealth’s objection). See discussion of “continuance without a finding” infra notes 141-65 and accompanying text.


Time committed to the treatment facility may be as long as the maximum term of imprisonment that the defendant could receive for the charged offense, but may not exceed 18 months. If the defendant successfully completes the program, the charges against him shall be dismissed.

7. Mental health commitment. Commitment to a mental health facility for evaluation is another means of resolving certain cases on a pretrial basis. At any stage of representation, it may become apparent that the defendant is acting in a manner which causes concern for her competency to stand trial. Counsel may request a court-ordered evaluation by the court clinic professional, and the defendant may be committed to an in-patient, locked mental health facility for further evaluation both for competency to stand trial and criminal responsibility. A commitment order is initially for 20 days, but may be extended for an additional 20 days upon motion of the mental health facility. If the defendant is found to be incompetent, the psychiatric report will be sent to the court, the criminal case may be dismissed, and, if the defendant presents a danger to herself or others, a civil commitment will be sought. Alternatively, the defendant may be held and the case continued until such time as the defendant becomes competent.

8. File without a change of plea. The district court has the authority to place a case on file prior to conducting a hearing or making a finding, provided that the court has final jurisdiction over the offense. This course of action essentially suspends any active criminal prosecution, although the court or the prosecutor may bring a filed case forward upon motion, affording the defendant the right to claim a trial or to tender a plea at that time. Since she has the right to be adjudicated and, upon a guilty finding, to be sentenced, a defendant must consent to the pretrial placing of her case on file. Since the commonwealth has the right to move for trial, it is unlikely that the court would file a case before trial or plea over the commonwealth’s objection. Although not a common pretrial disposition, the court may invoke this procedure when the defendant has a number of criminal charges pending and the court has imposed a sentence on more serious, and often unrelated, matters. Rather than compel the defendant to undergo a plea colloquy or trial on the less serious matters, the court, with the defendant’s consent, may place these matters on file without a change of plea.

9. Treatment of a violation of municipal ordinance or by-law, or misdemeanor offense as a civil infraction. General Laws chapter 277, section 70C allows the court, upon its own motion at any time, and upon motion by the commonwealth or the defendant at arraignment or pretrial conference, to treat a violation of a municipal ordinance or by-law, or misdemeanor, as a civil infraction. The statute provides for the imposition of a civil fine, not to exceed $5,000, as a possible penalty. It is important to note that the statute exempts a number of offenses from its provisions.

B. Post-Trial or “Plea” Dispositions

If a criminal case is not resolved in a pretrial proceeding, it will then be resolved by trial, a guilty plea, an admission to sufficient facts to warrant a finding of guilty, or, with the consent of the court, a plea of nolo contendere.

At trial, if the trier of fact determines that the government has not met its burden of proof, then a “not guilty” finding will be entered for the defendant. The “not guilty” finding is an acquittal of the charges.

116. Id. § 10.
117. Id.
118. Arresting officers, court officers, probation officers, prosecutors or defense counsel may bring concerns about a defendant’s competency to the court’s attention. For a discussion of ethical considerations for defense counsel regarding a client’s competency, see Sup. Jud. Ct. Rules of Prof’l Responsibility 1.14, which is under consideration for revision.
119. The defendant has the right to have an independent psychiatric evaluation, and, if indigent, defense counsel may petition the court for funds for such an independent evaluation. See Mass. Gen. Laws ch. 261, §§ 27B-27D (2008). In determining whether or not the funds are needed for an indigent’s defense, “the test is whether the item is reasonably necessary to prevent the party from being subjected to a disadvantage in preparing or presenting his case adequately, in comparison with one who could afford to pay for the preparation which the case reasonably requires.” Commonwealth v. Lockley, 381 Mass. 156, 160-61 (1980).
122. Id. § 15.
123. Id. § 16.
124. Id. (governing the hospitalization and commitment of persons determined to be incompetent to stand trial.)
125. Mass. Gen. Laws ch. 218, § 38 (2008). If the complaint charges a felony, or the defendant has either a prior felony conviction or felony placed on file, the court is prohibited from placing the complaint on file.
126. See White v. I.N.S., 17 F.3d 475, 478-79 (1st Cir. 1994), (stating in context of discussing whether filed charge should be construed as conviction for immigration purposes that: “Under Massachusetts law the ‘filing’ of a charge at any stage completely suspends the adjudicative process.”).
129. See supra note 126.
130. One case that address the separation between executive and judicial powers is Cheney, 400 Mass. at 569 (holding that “a judge (prior to verdict, finding, or plea) may not ‘dismiss a legally adequate criminal indictment in the ‘interests of public justice’ over the Commonwealth’s objection”); cf. Commonwealth v. Pyles, 423 Mass. 717, 720-24 (1996) (affirming legislative authority behind Mass. Gen. Laws ch. 278, § 18 (2008), and judicial authority to enter CWOF over commonwealth’s objection).
132. Id. § 18 (2008) says: “The provisions of this section shall not apply to the offenses in sections 22F, 24, 24D, 24G, 24L, and 24N of chapter 90, sections 8, 8A, and 8B of chapter 90B, chapter 119, chapter 119A, chapter 209, chapter 209A, chapter 265, sections 1, 2, 3, 6, 6A, 6B, 8, 13, 13A, 13B, 13C, 14, 14B, 15, 15A, 16, 17, 18, 19, 20, 23, 28, 31 and 36 of chapter 268, chapter 268A, sections 10, 10A, 10C, 10D, 10E, 11B, 11C, 11E, 12, 12A, 12B, 12D and 12E of chapter 269 and sections 1, 2, 3, 4, 4A, 4B, 6, 7, 8, 12, 13, 16, 28, 29A and 29B of chapter 272.”
and acts as a jeopardy bar to further prosecution for the same charges based on the same facts. But if the trier of fact determines that the government has met its burden of proof beyond a reasonable doubt, the court will make a disposition and will sentence the defendant.

Both the prosecution and defense have a right to be heard on the issue of sentencing.

A plea of guilty or an admission to sufficient facts eliminates the necessity of trial. Typically, the court is presented with a recitation of the facts in support of the complaint sufficient to justify a guilty finding. A defendant’s offer to plead guilty or admit to sufficient facts is often the basis of plea negotiations with the prosecution. In exchange for an admission or guilty plea, a defendant may benefit from a charge reduction, or a favorable sentencing recommendation which the court is likely to accept. The prosecution benefits as well because a plea eliminates the risk of losing at trial, saves the time and cost of a trial and alleviates the necessity of exposing witnesses to the rigors of examination.

Example 3: The defendant is accused of possession of a Class D controlled substance (marijuana) with the intent to distribute. The defendant, age 20, has no prior criminal record, but does have a juvenile matter that was continued without a finding and eventually dismissed. What additional facts about this case and this person might the defense and prosecuting attorneys want to learn in order to formulate a sentencing recommendation?

Example 4: The defendant is charged with larceny of a motor vehicle. He has a criminal history that consists of prior convictions for shoplifting, possession of a Class B controlled substance (cocaine), assault and battery by means of a dangerous weapon (broom handle), and participating in an affray. The most recent conviction, for assault and battery on a police officer, was a year ago, and the defendant received a split sentence of two years in the house of correction, six months to serve, balance suspended for two years. He has been served with a notice of probation surrender. How does the probation surrender affect the sentencing considerations for the larceny of a motor vehicle complaint? If a finding of probation violation is made, what potential sentencing options are available to the court?

The following dispositional alternatives, available post-trial or plea, are discussed in order of leniency:

1. Continuance without a finding (“CWOF”)

Defendants, particularly those without criminal records, may be given an opportunity to avoid a criminal conviction and the negative collateral consequences that frequently result from such a conviction, by admitting to the facts of the charges and accepting a disposition called a continuance without a finding (“CWOF”).

The CWOF exemplifies the rehabilitative theory of sentencing. The rationale for such a disposition is founded on the principle that eventual dismissal of the case is in the best interests of public justice.

When a CWOF disposition is sought, the judge must conduct a plea colloquy with the defendant, pursuant to rule 12(c) of the Massachusetts Rules of Criminal Procedure. The plea colloquy, conducted once the defendant submits a signed plea tender form, insures that the defendant understands, and knowingly waives, all of his trial rights. In this manner, the procedure resembles a guilty plea, but unlike a guilty plea, it does not result in a criminal conviction. The defendant’s probation record (formally referred to as the “CORI”-criminal offender record information) will show that the case was continued without a finding for a period of time and dismissed, if there are no further contacts with the criminal justice system. Despite the fact that a guilty finding is not recorded, the CWOF is considered a final adjudication.

145. The alternative sentence is enumerated on a court form that the defendant assents to and signs. Should the defendant fail to comply with any conditions of the CWOF, the court, after a hearing, may impose the alternative sentence. (This process is akin to a probation revocation hearing.)

Some of the conditions accompanying a CWOF disposition may include the payment of court costs, restitution to the victim, participation in drug or alcohol rehabilitation, psychiatric counseling, completion of a batterer’s program, completion of community service hours, compliance with specific “stay away” orders and regular reporting to the probation department.

Additionally, a CWOF disposition allows the court to collect certain court-related fees from the defendant. Such fees may include the payment of court costs, restitution to the victim, participation in drug or alcohol rehabilitation, psychiatric counseling, completion of a batterer’s program, completion of community service hours, compliance with specific “stay away” orders and regular reporting to the probation department.

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include: a victim-witness fee ($50 for a misdemeanor offense, $90 for a felony offense);\textsuperscript{150} an appointed counsel fee;\textsuperscript{151} a drug analysis fee (in the case of controlled substance offense);\textsuperscript{152} a head injury fee (motor vehicle accident cases);\textsuperscript{153} and a probation supervision fee.\textsuperscript{154} The money collected from these fees is paid into statewide funds which compensate victims of criminal offenses, help finance the court-appointed counsel system, offset costs of drug laboratories, compensate brain-injured victims of crimes and help defray the costs of probation supervision.\textsuperscript{155}

The CWOF is not an available disposition following a bench or jury trial,\textsuperscript{156} and there are certain offenses which mandate a guilty finding and specifically prohibit the imposition of a CWOF.\textsuperscript{157}

A continuance without a finding is not without pitfalls, although it is almost always a desirable disposition for a defendant. The difficulty with this disposition arises at the conclusion of the CWOF period when the expectation is a dismissal of the case. If the commonwealth objects to a dismissal, the defendant, and the court, must follow precepts established by the SJC in \textit{Commonwealth v. Brandano} in order to avoid the constitutional issue of separation of powers (judicial vs. executive powers). If the dismissal is in dispute, the defendant may file a motion to dismiss, with supporting affidavit, which the commonwealth may contest with its own motion and affidavit. After a hearing, if the judge concludes that the “interests of public justice” warrant the dismissal, the judge must record the findings of fact and the reasons for the decision.\textsuperscript{160} The commonwealth has the right to appeal the decision under General Laws chapter 278, section 28E.\textsuperscript{162} \textit{Brandano} has been limited in subsequent rulings that are careful to draw the distinction between a CWOF and a pretrial probation. \textit{Commonwealth v. Sebastian S.} upheld the validity of the CWOF disposition, but made clear that its statutory underpinning, General Laws chapter 278, section 18, cannot be the basis for a pretrial probation disposition.\textsuperscript{164} The SJC has held that a pretrial probation is not a lawful disposition if it is pursuant to an admission to sufficient facts.\textsuperscript{165}

2. Mandatory probation

Prior to enactment of “An Act Establishing a Sensible State Marijuana Policy,”\textsuperscript{166} which decriminalizes the possession of an ounce or less of marijuana, a first offender, convicted under General Laws chapter 94C, section 34 of possession of a Class D controlled substance (e.g., marijuana) or a Class E controlled substance,\textsuperscript{167} would have been entitled to a disposition of either a CWOF or probation.\textsuperscript{168} A number of questions remain with respect to the new law and its effect on this particular statute. Presumably, a first offender charged with possession of more than an ounce of marijuana is still entitled to the disposition enumerated in this statute. The statute allows for the dismissal and sealing\textsuperscript{169} of the conviction or CWOF upon the defendant’s successful completion of the probation or CWOF period.

3. Guilty-filed

A complaint may be filed after a finding or verdict of guilty is entered, “if the public justice does not require an immediate sentence.”\textsuperscript{170} This disposition may be employed where the defendant has multiple charges before the court and sentences are imposed on the major charges. The minor accompanying charges may be filed as a matter of expediency by the court,\textsuperscript{171} or as part of a plea bargain.

This particular disposition may present future problems for a defendant who has acquiesced to the filing of a case after completing a plea colloquy, as described in a recent case, \textit{Commonwealth v. Simmons}.\textsuperscript{172} In this case, it appears the defendant had an expectation that the filed matters would never be revived. But according to the SJC, “the [trial] court retains the ability, at any time, to remove the indictment from the file.”\textsuperscript{173} Following the \textit{Simmons} decision, the SJC referred the matter to its Standing Advisory Committee on the Rules of Criminal Procedure, which has issued a proposed amendment to rule 28 of the Massachusetts Rules of Criminal Procedure.\textsuperscript{174}

159. Id. at 337.
160. Id.
161. Id.
164. Id. at 307.
166. St. 2008, c. 387.
171. For example, filing of the minor offenses will enable the clerk’s office to avoid the \textit{mittimus} paperwork required on the major complaints upon which the defendant has received incarceration sentences.
173. Id. at 695. The court noted that the common-law practice of placing cases on file was a long-established one, acknowledged by the Massachusetts legislature. Id. at 692-95. The defendant’s consent to the filing of a case indicates his consent to any delay in sentencing, and thus is not a violation of the right to speedy sentencing. Id. at 698. The case history in \textit{Simmons} involved a defendant who pled guilty to 13 indictments. Id. at 688. He was sentenced on six of the charges to a concurrent 8-12 year prison sentence and the remaining indictments were placed on file with the defendant’s consent. Id. at 692-95. Five years later the defendant was rearrested for a new crime. The prosecution moved for sentencing on one of the previously-filed indictments and the sentencing judge, not the original judge, imposed an 18-20 year sentence on the previously filed indictment. Id. at 689. The Simmons court reversed and remanded the case for resentencing, explaining that the “discord between the two sentences (the original 8-12 year sentence vs. the new 18-20 year sentence) creates a substantial risk of a miscarriage of justice.” Id. at 699. See Roger Michel, \textit{Comment, Criminal Law — Placing Criminal Convictions on File}, 91 Mass. L. Rev. 39 (2007).
174. The proposed Rule 28(e) reads:
(e) Filing. The court may file a case after a guilty verdict or finding without imposing a sentence if the defendant and the Commonwealth both consent. With the consent of both parties, the judge may specify a time limit beyond which the case may not be removed from the file, and any events that may cause the case to be removed
4. Guilty-fine

A fine is "a pecuniary criminal punishment or civil penalty payable to the public treasury."175 Unlike court costs, a fine is considered a sentence and can be imposed only upon conviction.176 In Massachusetts, fines are authorized and limited by criminal statute.177 Money collected as fines by the court is paid to the state, through the court clerk's office, and not to any individual.178

The court may suspend payment of a fine for a set period of time if the defendant is indigent or unable to pay the entire amount at once.179 Nonpayment of the fine within the prescribed time frame will result in the court conducting a hearing to determine whether the defendant should be jailed for the nonpayment.180 The court must examine any good-faith efforts made by the defendant to pay, and must look to alternatives to incarceration if the defendant's failure to pay is not willful.181 If the crime charged does not provide for a sentence of imprisonment, the defendant may not be jailed unless the court has already attempted alternative means to obtain payment.182 If failure to pay is deemed willful by the court, the defendant can be imprisoned in the county jail or house of correction to "work off" the fine at the current statutory rate of $30 per day.183 If the failure to pay is found to be not willful, the court has the authority to remit, or remove the obligation, to pay the fine.184

The imposition of a fine for any crime other than a juvenile offense or act of delinquency, or a minor motor vehicle offense,185 carries with it an additional 25 percent surcharge.186 The surface payment, along with that of the fine, may be suspended to a specified later date. Failure to pay the surcharge incurs the same penalties as failure to pay a fine. Payment, usually in the form of cash, credit card or a money order, is made to the court clerk's office. Practice tip: Defendants should be counseled to maintain their payment receipts.

5. Guilty-"straight" probation and suspended sentence

Probation has been defined as a "formal legal relationship between the defendant and the court through the probation office."187 This legal relationship is a period of court supervision under conditions which may be extended beyond the set time period.188 The probationary status may also be revoked and sentence imposed for failure to comply with the conditions of probation, as set out in the probation contract. Accepting a sentence of "straight" probation requires a certain degree of confidence in the defendant's ability to comply with the conditions of probation since it exposes her to the maximum penalty for the offense if there is a subsequent violation of probation. Many defense lawyers prefer to request a specific suspended sentence of less than the maximum statutory penalty to accompany the probationary period. There are no statutory restrictions on the length of the probationary period.189

Although a sentence of probation may be imposed as the sole disposition in a criminal case,190 where it is referred to as "straight probation," it may also be imposed in conjunction with a suspended sentence.191 A suspended sentence is a period of incarceration imposed by the court, with the understanding that the actual serving of the sentence will be suspended during the period of probation. Successful completion of probation means that the suspended sentence will not be imposed. Violation of probation may lead to the imposition of the suspended sentence. Absent a statutory bar,192 the combination of a suspended sentence and probation is available in the district court as a disposition.193

When imposing a suspended sentence and probation, the court from the file. The defendant shall file a written consent with the court. Prior to accepting the defendant's consent, the court shall inform the defendant on the record in open court: (i) that the defendant has the right to request sentencing on any or all filed case(s) at any time; (ii) that subject to any time limit imposed by the court, the prosecutor may request that the case be removed from the file and sentence imposed if a related conviction or sentence is reversed or vacated or upon the prosecutor's establishing by a preponderance either that the defendant committed a new criminal offense or that an event occurred on which the continued filing of the case was expressly made contingent by the court; and (iii) that if the case is removed from the file the defendant may receive additional punishment. In sentencing the defendant after the removal of a case from the file, the court shall consider the all-of-scheme of punishment employed by the original sentencing judge.

177. Many statutes provide that punishment shall be a fine or sentence of imprisonment or both. If a statute does not provide for a fine as punishment, a fine may be imposed in accordance with "custom and usage." Mass. Gen. Laws ch. 279, § 5 (2008). Defense counsel is appointed for indigent defendants only in cases where the defendant faces the possibility of imprisonment. Mass. Gen. Laws ch. 211D, § 2A (2008).
179. See Bearden v. Georgia, 461 U.S. 660, 672-73 (1983) (if defendant is indigent and cannot pay restitution, judge should consider alternative punishments); Tate v. Short, 401 U.S. 395, 400 & n.5 (1971) (noting among alternatives ordering that defendant pay in installment).
181. Bearden, 461 U.S. at 672-73; Commonwealth v. Gomes, 407 Mass. 206, 210 (1990)(hearing was necessary to determine whether defendant's default was "solid" or willful); Commonwealth v. Elder, No. 04-P-1769, 2005 WL 3357960, at *2 (Mass. App. Ct. Dec. 9, 2005) (defendant's failure to pay was indeed willful, and therefore holding of Bearden did not apply).
sets two distinct time periods. The first is the length of the suspended sentence itself, which is the actual imprisonment to be imposed if probationary conditions are violated. That sentence may not exceed the maximum sentence of imprisonment under the relevant criminal statute. The second period is the length of time the defendant is subject to probation supervision. These two time periods do not have to be identical. A typical suspended sentence, for example, might be six months in the house of correction, suspended for two years, with the defendant under probation supervision for two years and subject to imprisonment for six months if she is found to have violated the terms of her probation.

Probation is accompanied by general, and sometimes special, written conditions of probation which must be agreed to by the defendant at the time of sentencing. Defense counsel should consult with the defendant, the probation office and the court, to set probation conditions which the defendant can realistically meet.

A defendant placed on probation will be assessed a monthly probation supervision fee of $60. A court may determine that the defendant requires only an administrative probation supervision, which calls for an administrative probation supervision fee of only $20 per month. If the defendant is indigent, community service will be required in lieu of any probation supervision fee.

Special terms of probation may depend on the nature of the case and the defendant’s personal situation. These terms may include, for example, an order of restitution to the victim of the crime, participation in drug or alcohol rehabilitation or some other behavior modification program such as a batterers’ treatment program, psychiatric counseling, an order to stay away from a particular person or place, or performance of community service. A defendant may be ordered to report to one of the Office of Community Corrections centers for participation in a program based there. Compliance with the conditions of probation will result in the termination of probation at the conclusion of the established time period, and the defendant will be discharged from court supervision.

Noncompliance with probation conditions, however, will result in a surrender proceeding for violation of probation. These proceedings are governed by the District Court Rules for Probation Violation Proceedings, adopted in 2000. The defendant is entitled to notice of surrender for a probation violation, the grounds for the surrender, appointment of counsel, if indigent, a preview of the evidence against her and a hearing. A defendant is also entitled to present witnesses on his behalf and to cross-examine the witnesses against her. The most frequent causes for surrender are arrest or conviction on new charges, failure to attend a program or counseling, or simply failure to report as required to one’s probation officer. A probation revocation finding cannot be based on unreliable hearsay.

If the court finds that a defendant has violated probation conditions, the judge may either: (1) continue the period of probation; (2) modify the conditions of probation; (3) terminate the probation; or (4) revoke the probation. If the probation is revoked, the judge may impose a sentence of incarceration not to exceed the statutory maximum or, in the case of a suspended sentence, to exceed that suspended sentence.

6. Guilty-committed sentences

Incarceration serves the punishment goal of incapacitation by removing the defendant from the community. District court jurisdiction provides for incarceration either in a county jail or a house of correction. A district court sentence may not exceed two and one-half years, although a defendant may serve a longer house of correction sentence if convicted on several charges where a court imposes either concurrent or consecutive sentences. Male defendants serve their jail or house of correction sentences at individual county facilities. Females who are sentenced to committed time by the district court serve their sentences at the local jail or house of correction as well, although women sentenced in the district courts in certain counties, among them, Essex, Middlesex, Norfolk, Plymouth and Worcester, serve their sentences at the Massachusetts Correctional Institute at Framingham, in a separate house of correction unit at that facility.

194. Typically, the standard district court probation contract terms are: obey all local, state or federal laws and court orders; report to the assigned probation officer at such time and place as required; notify probation immediately of a change of residence or employment; allow the probation officer to visit the residence; do not leave the commonwealth without written permission of the probation department; and report to probation within 48 hours of release from any arrest or incarceration.


196. Id.

197. Id.


199. See also Commonwealth v. Cotter, 415 Mass. 183 (1993), where the defendant refused to accept the conditions of probation (forbidding him from engaging in illegal activity) and instead was sentenced to the house of correction. Id. at 188.


202. Id.

There are a variety of committed sentences which the district court judge may consider when determining disposition. Prosecutors and defense attorneys should be familiar with the following sentencing options:

a. Weekend or special sentencing

General Laws chapter 279, section 6A authorizes a judge to order that a defendant serve a sentence on weekends, holidays or at other periodic intervals. The special sentence may be used for all or part of an imposed sentence, but is limited in application to those defendants sentenced for a first offense for a term of imprisonment that does not exceed one year. This form of commitment is particularly suitable to a first-time offender who has steady employment and a family relying upon her income. There may be other extenuating circumstances in a defendant’s background which persuade the court to consider and balance societal interests with those of incapacitation.

A defendant sentenced to weekend or special sentencing, unless otherwise directed by the court, must report to the correctional institute on her own, usually by 6:00 PM on a Friday. She will remain in custody until 7:00 AM on the following Monday. This “weekend” period of incarceration is credited as four days of incarceration unless Monday is a holiday, when the defendant remains in custody until Tuesday morning and is given five days of institutional credit. Many correctional administrators oppose this type of sentencing because they deem it disruptive to the institution and difficult to oversee. Consequently, any failure by the defendant to report timely to the correctional institution, or subsequent criminal conviction, may result in recission or modification of the special sentence.

b. Split sentencing

“Split sentencing” is the imposition of a term of incarceration that includes a portion to serve, and a balance to be suspended, in conjunction with a probationary period. This type of sentence allows the court to give the defendant a “taste” of incarceration in the hopes that she will be motivated to do well under probation supervision and thus avoid further incarceration. A subsequent violation of probation, however, can result in commitment for the portion of the sentence that was suspended. The split sentence may not be imposed for certain offenses having statutory mandatory minimum sentences, nor is it available to a defendant previously convicted of a felony or any offense involving being armed with a dangerous weapon.

c. Concurrent sentencing

“Concurrent sentencing” is the imposition of two or more sentences of incarceration to be served simultaneously. A sentence imposed by a district court can be served concurrently with an already existing state prison sentence. Defense counsel should know that any sentence imposed after a defendant has begun serving a first committed sentence will not be concurrent retroactively unless the court so specifies. The period of concurrency begins on the date the second sentence was imposed, unless the court specifically orders that a new sentence not take effect until after the sentence being served is completed. A district court may impose the second sentence “nunc pro tunc” making the second sentence retroactively concurrent with a sentence already being served.

d. Consecutive sentencing

“Consecutive” or “from and after” sentencing is a sentence of incarceration which is to be served after a prior sentence of incarceration is completed. The order of sentences on the defendant’s mittimus determines the order in which the sentences are to be served. A consecutive sentence will only be “from and after” the sentence or sentences specifically identified on the mittimus. A presumption exists that a sentence will be concurrent, however, with any other sentences that a defendant might be serving at the time of sentence imposition. A consecutive sentence is mandated when the defendant commits a crime while released on personal recognizance for a prior offense.

e. Conditional sentencing

A “conditional sentence” is an imposition of a fine in conjunction with a term of imprisonment that is to be served only if the fine is not paid within a specified period of time. The conditional sentence is imposed after the court makes a finding that the defendant is capable of paying the fine. Conditional sentencing is deemed not to involve a suspension of a sentence of imprisonment or probation during the period allowed for the payment of the fine. It differs from the imposition of a straight fine, which, if not paid, leaves open the possibility of a hearing regarding the failure to pay and subsequent incarceration until the fine is paid. The conditional sentence is rarely used.
f. Mandatory sentencing

A “mandatory sentence” is a sentence of incarceration which must be imposed if the defendant is found guilty of the crime charged.233 A mandatory sentencing statute specifically prohibits the imposition of a suspended sentence, a filing of the case or a continuance without a finding.234 The court has limited discretion in this sentencing scenario as it must impose at least the minimum mandatory sentence set forth in the statute.

Mandatory sentencing provisions are found in the statutes setting the penalties for firearm offenses,235 motor vehicle fraud,236 motor vehicle theft,237 operating under the influence of intoxicating liquor or drugs and related operation offenses,238 and a variety of other offenses which may or may not be within the final jurisdiction of the district court.239 Other statutes call for mandatory sentencing if the defendant is a recidivist, or repeat offender. Second and subsequent penalties for violation of drug laws,240 or for driving under the influence of liquor or drugs,241 are commonly encountered examples of enhanced punishment statutes with mandatory sentences. In order for this particular penalty provision to be imposed as an “enhanced” sentence, the prosecution must allege in the complaint that the defendant is a second or subsequent offender, and then prove this aspect of the complaint at a trial.242 The prosecutor can meet this burden of proof by providing the court with a certified copy of the defendant’s previous court conviction, along with a certified copy of appearance of counsel or the defendant’s waiver of counsel for that prior offense.243

g. Deferred sentencing

The judge may enter a finding of guilty, but defer the imposition of the sentence for a specific period of time.244 Sentencing is deferred in order to obtain further information about the defendant, typically in the form of a probation department pre-sentence investigation report. Defense counsel may also seek the opportunity to prepare a sentencing memorandum for submission to the court.

h. Stay of execution

A “stay of execution” of sentence means that a sentence of incarceration is imposed but delayed upon a defendant’s motion. The decision to grant a stay of execution of sentence is discretionary with the trial judge or a single justice on appeal.245 A defendant may move for a stay of execution in order to seek appellate review,246 or to attend to personal concerns such as family, employment or financial matters.247 The stay of execution, in the latter case, is set for a specific period of time, and the defendant is ordered to return to court on the appointed date to begin serving the sentence of imprisonment. A sentence of incarceration is not the only disposition that can be stayed pending an appeal. A disposition involving payment of a fine or fine and costs, as well as a disposition to place a defendant on probation, with or without a suspended sentence, may also be stayed pending an appeal.248 The district court may employ a stay of execution following a probation revocation hearing in order to give the defendant a final opportunity to comply with probationary terms and avoid incarceration.249

i. Custom and usage sentencing

When a criminal statute fails to provide a penalty, a sentence which conforms to the “common usage and practice in the Commonwealth”250 may be imposed. For example, the common-law misdemeanor offense of participating in an affray251 is punishable by a fine or sentence for a similar crime, such as disorderly conduct or simple assault. These are crimes that are similar and that contain statutory penalties.

III. COLLATERAL CONSEQUENCES

A criminal conviction may have serious civil and economic collateral consequences in addition to the statutory punishment for the crime. Given the wide latitude and discretion accorded judges, coupled with the lack of sentencing guidelines for the district court,252 it is critical for counsel and client to discuss and plan the sentencing presentation well in advance of a trial or guilty plea.

Defense counsel must consider a number of factors when advising a client about the sentencing stage of a criminal case. The Committee for Public Counsel Services (“CPCS”) includes, in its Performance Guidelines Governing the Representation of Indigent Defendants, an extensive presentation on discretion and special factors in the sentencing phase.253 The Committee suggests the following special factors in the sentencing stage of a criminal case.

233. Id. Standard 7:10, Mandatory Sentencing.
234. It is important to check the precise limitations on sentencing imposed by the particular statute under which the defendant is charged.
237. Id. § 28(a).
244. Standards of Jud. Practice: Sentencing and Other Dispositions, Standard 7:11 (District Court Department of the Trial Court, September, 1984).
246. Mass. R. Crim. P. 31; Mass. R. App. P. 6(a). Because service of a district court sentence may be completed before appellate review can be had, it often makes sense to seek a stay pending appeal. If the stay is denied by the trial court, the motion for stay may be brought de novo in either the Appeals Court or the SJC or both. See Commonwealth v. Hodge, 380 Mass. 851, 854-55 (1980). Conditions, even extending to house confinement, may be imposed during the stay of execution. Commonwealth v. Beauchemin, 410 Mass. 181, 185-87 (1991).
Clients, a list of factors for counsel to address in the sentencing process. These include: statutory penalties for the offenses charged as well as lesser included offenses; recidivism provisions; the client’s official probation record (referred to as the CORI); the probation department’s recommendation at sentencing, if any; the prosecutor’s recommendation at sentencing, including victim impact statements; the use of expert testimony at sentencing, including social services representatives; the availability of referrals to the court clinic or other community agency; the sentencing practices of the particular court or judge; and the collateral consequences of a conviction. The following is a list of potential collateral consequences that counsel and client should discuss.

A. Civil Rights

There are several civil rights which, under certain circumstances, are denied to those convicted of felonies. With respect to jury service, a felony conviction within seven years of a summons for jury duty will disqualify a person from such service. Likewise, incarceration in a correctional institution will disqualify an individual from jury duty, and a person convicted of a felony or any other offense punishable by imprisonment for more than one year may be stricken by the court from the jury list. It should be noted that a person’s right to serve on a jury is automatically restored seven years after the completion of the imposed sentence.

The right to vote is denied a citizen “incarcerated in a correctional facility due to a felony conviction.” The right to legally carry a firearm, predicated on obtaining a license to carry such firearm, is curtailed by certain convictions, defined as “a finding or verdict of guilt or a plea of guilty, whether or not final sentence is imposed.” Massachusetts law precludes issuance of a license to carry a firearm to any person convicted of: (1) a felony; (2) a misdemeanor punishable by imprisonment for more than two years; (3) a violent crime as defined in General Laws chapter 140, section 121; (4) “a violation of any law regulating the use, possession, ownership, transfer, purchase, sale, lease, rental, receipt or transportation of weapons or ammunition for which a term of imprisonment may be imposed;” or (5) a violation of most controlled substance laws, including use, possession or sale of a controlled substance. A person, however, may apply for a firearm identification card, which permits her to possess but not carry a firearm, five years after conviction or release from confinement, whichever is later. The licensing authority retains discretion to deny the application only on the grounds of mental illness, drug addiction or habitual drunkenness, age, alien status, existing restraining order or outstanding arrest warrant.

B. Immigration Consequences

A district court disposition has the potential to create serious immigration consequences for a non-United States citizen. Such consequences include deportation or removal, exclusion upon re-entry, or denial of naturalization. Massachusetts law acknowledges the severity of these immigration consequences by mandating that each defendant who tenders a plea or admits to sufficient facts must be advised of the possible consequences for a non-citizen.

The following is a brief summary of some common considerations in cases where the client is a non-citizen. This is by no means a complete discussion of the subject, and counsel is advised to consult with an immigration practitioner about sentencing strategies in a specific case.

Criminal grounds of removal from the United States typically are premised upon a conviction. The Immigration and Nationality Act defines “conviction” as:

- a formal judgment of guilt of the alien entered by a court or, if adjudication of guilty has been withheld, where:
  - (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
  - (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

This definition appears to treat a Massachusetts district court disposition of a CWOF as a conviction, since a CWOF is imposed after an admission to sufficient facts and almost always includes probation (supervised or unsupervised) or other conditions, which are considered “restraint[s] on liberty.” However, pretrial dispositions such as pretrial probation and dismissal based on an accord and satisfaction, would not be considered a conviction.

which has established sentencing guidelines for the Superior Court Department of the Trial Court, but none have been approved yet for the District Court Department of the Trial Court.


254. Criminal Offender Record Information, Mass. GEN. LAWS ch. 6, § 168A (2008), governs probation commissioner’s authority and responsibility to maintain and provide CORI to court.


257. Id.


262. Id. § 131.

263. Id. § 129B(1)(i).

264. Id.

265. Id.

266. Id. § 129B (1) (iii-ix).


The court shall not accept a plea of guilty, a plea of nolo contendere, or an admission to sufficient facts...unless the court advises such defendant...‘If you are not a citizen of the United States, you are hereby advised that the acceptance by this court of your plea of guilty, plea of nolo contendere, or admission to sufficient facts may have consequencess of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States.’


274. Griffiths v. INS, 243 F.3d 45 (1st Cir. 2001), noted that a Massachusetts
Certain categories of criminal offenses will trigger removal proceedings. Among those categories are: crimes of moral turpitude; controlled substance offenses; aggravated felonies; firearm offenses; and crimes of domestic violence.

In addition to deportation or removal, a non-United States citizen may be denied re-entry, if she has been “convicted of, or ... admits committing acts which constitute the essential elements of ... a crime involving moral turpitude.”

Denial of re-entry may be based on an admission without a conviction, although the statute provides for exceptions: (1) to those who committed only one crime before age 18 and the offense was more than five years before the date of application to enter the United States; and (2) crimes for which the maximum penalty does not exceed one year, and the person was not sentenced to more than six months of imprisonment.

A person may be denied admission to the United States due to controlled substance violations as well as conviction of two or more offenses where the aggregate sentences of confinement actually imposed were five or more years. Additionally, a non-United States citizen who has “engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status” is precluded from admission to the United States. Lastly, exclusion from the United States may be based on a broadly defined area related to “security and related grounds” and “terrorist activities.”

District court dispositions may also affect a non-citizen’s application for naturalization, which is dependent upon a finding that the applicant is of “good moral character.” Ordinarily, the government looks to the five years preceding the citizenship application to determine good moral character. The Immigration and Nationality Act denies a finding of “good moral character” to certain status and criminal offenders.

The importance of learning a client’s complete family immigration and naturalization history must not be underestimated. Practice tip: For effective representation by counsel, it is imperative to explore and discuss the possible immigration consequences of district court dispositions, especially since in some instances, the mere admission to the offense is sufficient to trigger these collateral immigration consequences.

C. DNA Registry

The Massachusetts legislature determined in 1997 that a statewide DNA database was necessary to assist law enforcement agencies in “(1) deterring and discovering crimes and recidivistic criminal activity; (2) identifying individuals for, and excluding individuals from, criminal investigation or prosecution; and (3) searching for missing persons.” This legislation authorized the collection of biological samples from an individual convicted of any one of 33 specific crimes. In 2003, the legislature expanded the scope of the statute to include biological sample collection from any person “convicted of an offense that is punishable by imprisonment in the state prison.” The statutory language has been interpreted to mean that a defendant convicted in district court of a concurrent felony (one carrying the potential of state imprisonment) is required to submit a DNA sample to the state database. District court defense counsel should determine whether or not a lesser included offense exists for a charged offense. If so, reduction and disposition of the complaint to that lesser included offense might avoid triggering the DNA registry requirement.

disposition of “guilty-filed” was not deemed a conviction for immigration purposes when no punishment or restraint on the individual’s liberty was imposed. Id. at 52. But see Commonwealth v. Simmons, 448 Mass. 687, 697-98 (2007)(upholding removal of defendant’s conviction from file and imposition of sentence). 275. 8 U.S.C. § 1227(a)(2)(A)(i) (2006) states that “Any alien who (I) is convicted of a crime involving moral turpitude committed within five years ... after the date of admission, and (II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.” Examples of crimes involving moral turpitude have been found to include: serious crimes against the person (e.g., murder; voluntary manslaughter; accessory to murder; kidnapping; attempted murder; assault with intent to murder; assault with intent to rob; assault and battery with a dangerous weapon; indecent assault and battery; sex offenses (e.g., rape; prostitution); certain crimes against property (e.g., arson, robbery, destruction of property); crimes where theft or fraud is an element (e.g., larceny; credit card fraud). A cautionary note: check the Board of Immigration Appeals (BIA) administrative decisions regarding specific offenses since the administrative decisions are subject to Federal review and this is a much-litigated area.

276. See id. § 1227(a)(2)(B). Note that the statute exempts “a single offense involving possession for one’s own use of thirty grams or less of marijuana.” 277. 8 U.S.C. § 1227(a)(2)(A)(iii) (2006) states that “any alien who is convicted of an aggravated felony at any time after admission is deportable.” An aggravated felony conviction causes severe consequences. A noncitizen with an aggravated felony conviction is precluded from admission to the United States. The definition of an aggravated felony at any time after admission is deportable. An aggravated felony conviction is automatically deportable with virtually no relief available; it carries severe consequences. A noncitizen with an aggravated felony conviction is precluded from admission to the United States. The definition of an aggravated felony at any time after admission is deportable.

278. 8 U.S.C. § 1227(a)(2)(C) (2006) dictates deportation for violation of “any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device ....” 279. 8 U.S.C. § 1227(a)(2)(E)(i)’s description of domestic violence offenses is broad, and includes “crimes of violence, stalking, child abuse, child neglect, child abandonment, and certain violations of protective orders.”Id. 280. 8 U.S.C. § 1182(a)(2)(A)(ii)(I) (2006). 281. Id. § 1182(a)(2)(A)(ii)(II). However, a suspended sentence is deemed a term of imprisonment from the United States. 282. Id. § 1182(a)(2)(A)(ii)(III). 283. In 2003, the legislature expanded the scope of the statute to include biological sample collection from any person “convicted of an offense that is punishable by imprisonment in the state prison.” The statutory language has been interpreted to mean that a defendant convicted in district court of a concurrent felony (one carrying the potential of state imprisonment) is required to submit a DNA sample to the state database. District court defense counsel should determine whether or not a lesser included offense exists for a charged offense. If so, reduction and disposition of the complaint to that lesser included offense might avoid triggering the DNA registry requirement.

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D. Sex Offender Registry

Massachusetts enacted the Sex Offender Registry and Notification Act in 1996.296 Following a number of successful constitutional challenges to the original act,297 this legislation was replaced in 1999.298

The section of the act relevant to district court dispositions defines a “sex offender” as “a person who resides, has secondary addresses, works, or attends an institution of higher learning in the commonwealth and who has been convicted of a sex offense ….”299

The statute enumerates what crimes constitute “sex offense[s].”300 Practice tip: Defense counsel should be familiar with the list, as some of these crimes are within the jurisdiction of the district court.301 A defendant convicted of a sex offense is obligated to register with the SORB,302 and a knowing failure to register is a separate crime,303 as well as a likely ground for probation or parole revocation. According to the statute, a sex offender must register annually with SORB for a period of 20 years, unless he can demonstrate, upon clear and convincing evidence, that he has not committed a sex offense within 10 years following the conviction or release from custody or supervision, and is not likely to be a safety concern to the community.304

A defendant convicted of a sex offense in the district court must be informed not only of his responsibility to register with SORB, but also that he will be assigned a classification level305 that will dictate the amount of public disclosure allowed under the statute.306 A defendant is entitled to a hearing with respect to SORB’s recommended classification level.307

E. Registry of Motor Vehicles

With respect to certain offenses, the Registry of Motor Vehicles will either suspend or revoke a driving license.308 The general categories of offenses that can jeopardize an individual’s right to drive are: moving motor vehicle violations; drug offenses; and violations of out-of-state license suspensions or revocations.

The most common type of criminal motor vehicle moving violation is the OUI law, discussed in Part IA. Defendants must be made aware that a conviction or continuance without finding under the OUI statute carries with it mandatory license suspension and revocation provisions. Other criminal moving violations usually carry a mandatory period of suspension or revocation, and some are mandated by statute.309

A district court drug conviction will trigger a motor vehicle license suspension.310 The period of suspension is governed by registry regulations, and it is important to note that early reinstatement hearings are available once an individual has completed 50% of the suspension period.311

The Registry of Motor Vehicles will suspend or revoke a Massachusetts driver’s license if that driver has received a suspension or revocation in another state.312

F. Future Employment and Licensing Opportunities

A prospective employer may inquire about certain misdemeanor convictions within the five years prior to an application for employment, and may inquire about second or subsequent convictions for other misdemeanors during this time period.313 The criminal history systems board is empowered by separate statute314 to allow access to an individual’s criminal offender record information (“CORI”) under certain circumstances.

General Laws chapter 6, section 172, provides for dissemination of information only to “(a) criminal justice agencies; (b) such other agencies and individuals required to have access to such information by statute … and (c) any other agencies and individuals where it has been determined that the public interest in disseminating such information to these parties clearly outweighs the interest in security and privacy.”315

Other legislation provides authority to government agencies,316 some private agencies,317 crime victims, witnesses or family members of homicide victims,318 to obtain CORI information. With so many opportunities for the dissemination of CORI information,319 a defendant must be made aware that prospective employers may review his criminal record.

In addition to having an impact on future employment, a criminal conviction may have repercussions on a person’s ability to obtain...
or maintain a professional license. The Division of Professional Licensure, an agency under the jurisdiction of the Office of Consumer Affairs and Business Regulation, is mandated to “protect the public health, safety and welfare by licensing qualified individuals who provide services to consumers.” Most of the licensing boards require an applicant to demonstrate “good moral character,” and the existence of a criminal record may preclude the granting of the particular license. Practice tip: Defense attorneys should be mindful of their clients’ professional background or interest when considering dispositional alternatives.

G. Sentence Enhancements

Some Massachusetts statutes provide for the application of enhanced sentencing provisions for repeat offenders. The operating under the influence statute, operating after suspension of license statute, certain drug offenses and a variety of other criminal offenses are all examples of legislation mandating harsher punishment for second or subsequent offenses. Massachusetts state convictions have federal repercussions as well. They serve to enhance a federal defendant’s criminal sentence by contributing to the calculations of that defendant’s criminal history category. Counsel should be aware that a Massachusetts disposition of a continuance without a finding may be considered a prior sentence by the federal court and thus included in the defendant’s criminal history calculation.

H. Housing

A criminal conviction has consequences for an individual attempting to access or maintain public housing. State legislation gives local public housing authorities, and other agencies that oversee subsidized housing programs, approval to obtain CORI information about housing applicants. Federal legislation gives similar authority to federal public housing agencies. The purpose of the state and federal legislation is to ensure the safety, security and health of tenants on the premises. A criminal conviction may be a cause for eviction from state or federal public housing.

Federally funded housing programs and federally subsidized housing assistance programs disqualify applicants due to drug use, alcohol abuse, certain sex offender registration requirements, drug-related or violent crime activity. Practice tip: Federal public housing leases contain lease termination language about which counsel should be aware.

Under state law, lease termination may be based on a reason to believe that a tenant or member of the tenant’s household:

1. (1) unlawfully caused serious physical harm to another tenant or employee of the housing authority, or any other person lawfully on the premises of the housing authority;
2. (2) threatened to seriously physically harm another tenant or housing authority employee, or any person lawfully on the premises of the housing authority;
3. (3) destroyed, vandalized or stole property of a tenant or the housing authority or any person lawfully on the premises of the housing authority which thereby created or maintained a serious threat to the health or safety of a tenant or employee of the housing authority or any person lawfully on the premises of the housing authority;
4. (4) on or adjacent to housing property, possessed, carried, or illegally kept a weapon in violation of section ten of chapter two hundred and sixty-nine or possessed or used an explosive or incendiary device or has violated any other provisions of section one hundred and one, or has violated any other provision of sections one hundred and one, one hundred and two, one hundred and two A or one hundred and two B of chapter two hundred and sixty-six; (5) on or adjacent to housing authority property, unlawfully possessed, sold, or possessed with intent to distribute a controlled substance as defined in classes A, B, or C of section thirty-one of chapter ninety-four C; or (6) engaged in other criminal conduct which seriously threatened or endangered the health or safety of another tenant, an employee of the housing authority or any other person lawfully on the premises of the housing authority.

I. Education

Massachusetts law provides for the suspension or expulsion of any adult student (defined as being over 17 years of age at the time of the offense) convicted of certain offenses. General Laws chapter 71, section 37H1/2 allows a principal or school headmaster to initiate a suspension process when a criminal complaint charges a student with a felony. Upon conviction of a felony, the same statute gives approximately 10,000 organizations certified for access to CORI.

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a principal or school headmaster the discretion to initiate expulsion proceedings.339

The Massachusetts Fair Educational Practices Act340 precludes in-state colleges and universities from inquiring about an applicant’s criminal history regarding (i) an arrest which did not result in a conviction; (ii) first convictions for specified misdemeanors, namely “drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the peace”; or (iii) “any conviction of a misde-meanor where such conviction occurred more than five years prior to the date of such application for admission, unless the applicant was sentenced to imprisonment upon conviction of such misde-meanor, or such individual has been convicted of any offense within the five years’ period.”331

Federal law may preclude a person with a drug conviction from receiving federal financial aid.342 It appears that a first offense for drug possession bars a student from receiving financial aid for one year; a second conviction disqualifies financial aid for two years; and a third conviction results in an indefinite disqualification. A first offense drug sale conviction results in a two-year financial aid ineligibility and a second such offense results in an indefinite ineligibility.343

J. Civil Forfeiture

Civil forfeiture of certain properties is a potential collateral consequence of drug prosecutions, pursuant to General Laws chapter 94C, section 47.344 According to the statute, “all conveyances, including aircraft, vehicles or vessels,”345 as well as “all real property … used to commit or to facilitate”346 certain enumerated offenses, are subject to civil forfeiture. The enumerated offenses include: the manufacture, distribution, dispensing or possession with intent to manufacture, dispense or distribute, a Class A, Class B, Class C, Class D or Class E controlled substance;347 trafficking in marijuana, cocaine, heroin, morphine, opium, etc.; unlawful manufacture, distribution, dispensing or possession with intent to manufacture, distribute or dispense Classes A, B, and C controlled substances to minors;348 unlawful creation, distribution, dispensing or possession with intent to distribute or dispense counterfeit substances;349 sale, possession or manufacture with intent to sell drug paraphernalia;350 controlled substances violations in, on, or near school property;351 and conspiracy to violate controlled substance laws.352 Additionally, any defendant who was assigned to an alcohol or controlled substance education, treatment or rehabilitation program or who was convicted of OUI at least three times, is subject to forfeiture of “a motor vehicle or vessel.”353

K. Civil Tort Liability for Shoplifting

General Laws chapter 231, section 85R 1/2 allows store merchants to initiate a civil action for recovery for damages to property as a result of a larceny or attempted larceny of that property.354 In addition to any actual damage caused to the property, a merchant, in this tort action, may request damages between $50 and $500.355

IV. POST-CONVICTION RELIEF

A. Review of the Sentence

After sentencing, a defendant may seek post-conviction relief from the disposition imposed. Although there is always appellate review available for questions of law,356 a sentence also may be reviewed by a motion to revise or revoke.357 The timely filing of a motion to revise or revoke a sentence, pursuant to rule 29 of the Massachusetts Rules of Criminal Procedure, provides a further opportunity for the judge to review her own sentencing determination “if it appears that justice may not have been done.”358 A motion to revise or revoke a sentence addresses the issue of disposition only, and cannot overturn the underlying conviction.359 The rule, which provides the judge with broad discretion,360 may be raised by the judge herself,361 or upon the defendant’s written motion, accompanied by an affidavit setting forth the factual basis for the motion.362 Rule 29 dictates that the prosecutor must be served with the motion and the affidavit, and she may file and serve affidavits reflecting the district attorney’s position on the sentence review.363

The motion to revise or revoke must be filed within 60 days after the imposition of the sentence, or within 60 days after a rescript or other final appellate court order is issued.364 This time limit cannot be waived or extended, but there is no time requirement for action on the motion.365 In fact, defense counsel may file the motion, but indicate that she does not wish to have it marked for hearing or further action at the present time.366 Defense counsel should note that the sentencing judge may increase a defendant’s sentence pursuant

339. Id. § 37H1/2 (2).
341. Id. § 2(f).
343. Id.
345. Id. § 47 (a)(5).
346. Id. § 47 (a)(7).
347. Id. §§ 32, 32A, 32B, 32C, 32D.
348. Id. § 32F.
349. Id. § 32G.
350. Id. § 32I.
351. Id. § 32J.
352. Id. § 40.
355. Id.
358. Id.
361. Id.
363. Id.
366. But defense counsel should note that the SJC has determined that timely filed motions to revise or revoke that have lain dormant for an unreasonable period of time preclude the judge’s consideration of the motion. See Commonwealth v. Barclay, 424 Mass. 377, 380 (2004); Commonwealth v. Layne, 386 Mass. 291, 294-96 (1982). But the SJC has not set out an absolute time limit within which a rule 29 motion must be heard. See Layne, 386 Mass. at 296. Defense counsel should also note that, since the motion judge can only rely on facts or circumstances that existed at the time of sentencing, a defendant must be able to articulate the basis for relief when he files the motion. Commonwealth v. DeJesus, 440 Mass. 147, 152 (2003). The rule 29 motion therefore must be accompanied by an affidavit or must otherwise set out the grounds for relief. Id. at 152.
to the motion,\textsuperscript{367} and that the judge is limited to considering only factors that existed at the time of the original sentencing.\textsuperscript{368}

The court may act favorably on a Rule 29 motion based on the papers filed by counsel, or the judge may hold a hearing on the motion. It is usually advisable for counsel to request a hearing. This motion hearing must be before the judge who imposed the original sentence, unless that judge is no longer available.\textsuperscript{369} In that event, the chief justice of the district court will assign another judge.\textsuperscript{370} In practice, most judges will not revise a sentence imposed by another judge, unless there is new and relevant information, which existed at the time of sentencing but was not brought to the court’s attention at the original sentencing hearing.

**B. Sealing of the Record**

A defendant may be eligible to have his court and probation records “sealed” within a specified time after his court appearance.\textsuperscript{371} If, after trial, a defendant is found not guilty, or, after hearing, a finding of “no probable cause” is entered, the defendant is entitled to have his record sealed by the court.\textsuperscript{372} Additionally, if a \textit{nolle prosequi} is entered, or a dismissal is entered by the court, and it “appears to the court that substantial justice would best be served, the court shall direct the clerk to seal the records of the proceedings.”\textsuperscript{373} Certain Massachusetts statutes contain sentencing provisions that allow for the sealing of records upon successful completion of a probationary period.\textsuperscript{374}

A defendant with a record of criminal court appearances and dispositions may petition the commissioner of probation to seal the files, using a form furnished by the commissioner.\textsuperscript{375} The commissioner’s power to seal a record is governed by the statute, which sets out the time requirements for prior misdemeanors (not less than 10 years) or felonies (not less than 15 years) that a petitioner must meet in order to qualify for sealing of the record.\textsuperscript{376}

Sealing means that the defendant’s court and probation records are segregated from the general records, and only law enforcement agencies and the courts will have access to them.\textsuperscript{377} Although a record may be sealed, the criminal history systems board\textsuperscript{378} may report the existence of such a record to law enforcement agencies. If an unauthorized person or agency makes a request for information, such a request will elicit a response that no record exists. The sealing of a record, however, does not mean that unauthorized persons will never receive information about a defendant’s criminal history. Information in sealed records \textit{may leak} outside appropriate channels.\textsuperscript{379}

**V. SENTENCING ADVOCACY**

This section suggests how prosecution and defense attorneys can prepare for effective and zealous advocacy at the disposition stage of a criminal hearing. The section outlines strategies for preparation and discusses issues presented in the context of the several sentencing examples noted in the text.

The prosecuting attorney can best prepare for sentencing by familiarizing herself with the defendant’s prior criminal probation record, if any, speaking with her office’s victim-witness advocate,\textsuperscript{380} and conferring with police and civilian witnesses acquainted with the defendant and the circumstances of the pending case. The district attorney’s office may have formal sentencing guidelines in effect, but more often, a prosecuting attorney consults with her supervisor and determines what the normative recommendation is for certain types of offenses and offenders. When addressing the court at sentencing, a prosecutor should refer to the specific factors that underscore and justify her recommendation.

A defense attorney seeking guidance in sentencing advocacy should consult CPCS. CPCS promulgates performance guidelines that encompass the preparation and presentation of sentencing recommendations.\textsuperscript{381} Section 7.1 of the CPCS Performance Guidelines sets out specific information that defense counsel needs in preparation for disposition.\textsuperscript{382}

In addition to stated factors in the CPCS Performance Guidelines, counsel should gather information concerning the client’s background during the course of the attorney-client relationship. An understanding of juvenile justice system to rehabilitate and treat youthful offenders). This latter case has not been extended to expunging an arrest record where the charge was not further prosecuted, see \textit{Commonwealth v. Roberts}, 39 Mass. App. Ct. 355, 356-59 (1995), sealing a record after a full pardon, see \textit{Commonwealth v. Vickey}, 381 Mass. 762, 766-72 (1980), or expunging juvenile probation record where a juvenile was wrongfully accused, see \textit{Commonwealth v. Gavin G.}, 437 Mass. 470, 482-83 (2002).


381. CPCS Guidelines, \textit{supra} n. 4, Standard VII. Sentencing, Sections 7.1-7.6.

382. CPCS Guidelines, \textit{supra} n. 4, Standard VII. Sentencing, Section 7.1 states that:

Defense counsel should be familiar with and consider: a. the statutory penalties for each possible conviction, including each lesser-included offense and any repeat offender penalties; b. the official version of the client’s prior record, if any; c. the position of the probation department with respect to the client; d. the sentencing recommendation and memorandum, if any, of the prosecutor’s; e. seeking the assistance of an expert-either through community resources, G.L. c. 261, §§ 27A-G (2004), or the Committee for Public Counsel Services; f. the collateral consequences attaching to any possible sentence, e.g. parole or probation revocation, immigration consequences, later exposure as a repeat offender, possibility of sexually dangerous person proceedings, loss of license, Sex Offender Registration, DNA Seizure, lifetime community parole, or civil forfeiture of property; g. the sentencing practices of the judge, to the extent they may be determined; h. the sentencing guidelines, as they would apply to the case; i. referrals to court clinics or other community agencies, and the possibility of commitment to a mental hospital as an aid to sentencing under G.L. c.
of the major factors in the client’s background contributes to a thorough and persuasive dispositional presentation. This presentation is most effective as a written memorandum in aid of disposition. The memorandum in aid of disposition allows counsel to individualize and personalize the defendant’s situation for the court. A persuasive memorandum in aid of disposition contains specific information that pertains to the sentencing recommendation that counsel presents. Although there is no standard format for such a written memorandum, defense counsel may organize the information in sections that describe the client’s family situation, educational background, employment history, medical history, prior exposure to the criminal justice system and future goals. The memorandum should document the sources of the information presented (e.g., discussion with the client, the client’s spouse and family members, employer, medical doctor, therapist, social worker, community service contacts, teachers and others). If possible, supportive letters from those who know the client should be submitted to the court with the memorandum. Having the persons in court to testify on behalf of the defendant at sentencing is also beneficial.

Any attorney-client discussion of disposition must include disclosure of the collateral consequences that accompany convictions, and, in the immigration area, continuances without a finding. It is important for counsel to explore different areas of the client’s background. Some of these areas, such as the client’s immigration status, may not be appropriate for inclusion in a memorandum in aid of disposition, but are important, nevertheless, for preparing the client for sentencing. Examples of background questions to explore for disposition are: What is the client’s family history? What relatives live in the area? With whom does the client live? Does the client have child support obligations? Does the client have child care obligations? Does the client live in public housing? What is the client’s immigration status? What is the client’s educational background, i.e., what is the last completed level of schooling? Did the client receive special educational training? Are there any learning disabilities? Does the client receive any disability benefits, and if so, what is the disability? What is the client’s employment history? Does the client have particular work skills? Has the client participated in any job training courses? Is there a physical or mental health issue? If so, does the client receive treatment? Where is the treatment administered and who are the client’s doctors? Is there a history of drug or alcohol abuse? Does the client engage in therapy or counseling for such problems? What programs has the client attended and how recently? Does the client participate in community activities (e.g., YMCA, religious groups)? Is the client on probation or parole? If so, who is the probation or parole officer? Has the client completed a prior probation or parole? Did he complete that probation or parole without violations? The foregoing is not an exhaustive list, but it should provide some direction for counsel’s inquiries about the client.

Several sentencing scenarios were noted in earlier sections of this article. For purposes of discussion, assume that these cases do not present issues for trial, and must be resolved by either a pretrial disposition or a plea. What follows are some questions and potential dispositions to consider in each example.

Example 1: The new “look back” provision described in Part IA, applies in this situation. Despite the age of the prior out-of-state conviction, the defendant will be treated as a second offender. In order for the defendant to qualify for a “once-in-a-lifetime” opportunity to enter a first offender program, counsel must determine whether the earlier conviction involved serious personal injury or death. If either the earlier conviction or the present charge involves these factors, the defendant is NOT qualified for the first offender program. The defendant did take the breathalyzer test and failed it (.09), thus triggering an automatic 30-day suspension of license. Counsel should be aware of future Registry of Motor Vehicle consequence (e.g., license revocation), potential immigration consequences and possible future sentencing enhancements for a subsequent similar offense.384

Example 2: Determining the defendant’s immigration status is important because a conviction for assault and battery may affect the defendant’s ability to remain in or re-enter the United States, or to become a citizen. Defense counsel’s goal is a pretrial resolution of this case in order to avoid potential immigration problems. The fact that this incident is a civilian complaint indicates that the parties may have grievances best discussed in the context of a court referral to mediation. It appears that they have an ongoing relationship, and it is reasonable for a prosecutor to assert to mediation where there was no injury involved and the defendant has no prior record. Other suggestions for pretrial disposition include referral to pretrial diversion, depending on the age of the defendant (17-21) and the age of the complainant (not older than 60), or assignment to pretrial probation, which may carry with it certain probationary terms.

Example 3: Considering that the maximum sentence for this misdemeanor offense is two years imprisonment, there is substantial leeway in crafting an appropriate disposition. More facts about the case and the defendant must be determined in order to fashion a sentencing recommendation. For example: what is the quantity of marijuana seized; where were the drugs seized; was any money confiscated during the arrest; is there a possibility of reducing charge to a lesser included offense such as mere possession of marijuana; what was the nature of the prior juvenile offense; does the defendant have a drug abuse problem; and what is the defendant’s immigration status? A prosecutor, speaking with the arresting officers, can determine some of these facts, including whether there are pending forfeiture proceedings. Defense counsel needs to inquire about the defendant’s background, asking many of the questions earlier in this article. For purposes of discussion, assume that these cases do not present issues for trial, and must be resolved by either a pretrial disposition or a plea. What follows are some questions and potential dispositions to consider in each example.

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section. Defense counsel may note that the defendant, now 20 years old, has been out of the juvenile justice system for at least three years. The prior juvenile offense was continued without a finding and dismissed. This usually indicates the defendant’s ability to abide by probationary conditions. The juvenile probation officer may be a good source of information and support for an adult sentencing recommendation. This is a relatively youthful defendant. If the defendant is not a citizen, there are immigration consequences to consider. If the defendant is a student, or applying for certain employment, a criminal conviction affects educational loans and employment. After considering the defendant’s background, defense counsel may request that the court continue the case without a finding. The prior juvenile matter does not preclude such a request. The CWOF recommendation should be accompanied by a memorandum in aid of sentencing which particularizes the defendant’s situation and provides the court with information to support the CWOF request, including certain conditions, such as participation in a drug counseling program. Ideally, the prosecutor will have consulted with her witnesses and may be persuaded that this disposition is reasonable, given the defendant’s lack of prior convictions, among other factors. If a CWOF is deemed inappropriate, the court may make a finding of guilty and then impose a fine, pursuant to the statute, place the case on file or place the defendant on probation, with or without a suspended sentence. Although a committed sentence of up to two years is possible, it is doubtful that the court would commit the defendant to imprisonment on this first adult offense. Defense counsel must advise the defendant of the potential collateral consequences that a guilty finding may carry.

Example 4: The sentencing options in this fact pattern are significantly affected by the pending violation of probation where the defendant faces the possibility of commitment on the suspended 18-month portion of his split sentence. Assuming, for purposes of this situation, that the defendant will plead guilty to the new offense, how can defense counsel reduce the amount of committed time that the defendant is facing? Are there any lesser included offenses to the crime charged? Questions for defense counsel to consider include whether the new arrest is the sole basis for the violation of probation and what the probation officer will recommend for the violation. Notwithstanding the new arrest, has the defendant complied with the conditions of probation (e.g., regular meetings with the probation officer, performance of community service hours or payment of probation supervision fees, attendance at court-mandated programs, such as drug or alcohol counseling, anger management)? If a finding of violation of probation is made, and the court decides to impose the suspended sentence, there are at least several sentencing options possible for the new offense.

The first and most favorable is a sentence of incarceration on the new offense that runs concurrently with the time to be served on the violation of probation. This disposition allows the defendant to “wrap up” his two sentences simultaneously. Some judges view this as a practical sentencing solution, but others disfavor it, believing that each offense (the new arrest and the violation of probation) deserves a different sentence. If a concurrent sentence is not possible, then the defendant may face a consecutive (“from and after”) sentence, meaning that he first serves the violation of probation sentence (in this case, 18 months), and then serves a sentence for the new offense. The sentence for the new offense may be for additional imprisonment or it may be additional probation, either with or without a suspended sentence. Consultation with the defendant may determine which sentencing recommendation counsel presents to the court. As in the other examples, there are collateral consequences for the defendant and counsel to discuss.

These examples are meant to provide some general guidance for the practitioner facing a dispositional hearing in the district court. The individual circumstances of each defendant facing sentencing must be considered. Judges tend to focus on whether or not a defendant has a prior criminal record, the basis for the prosecution’s recommendation, and the quality and specificity of the defense counsel’s recommendation. Judges differ in their sentencing theories. Some judges will entertain a sentencing recommendation that does not automatically increase a penalty based on the defendant’s prior record, believing that defendants have the capacity to improve their lives. Other judges adhere to the notion that a defendant, once given a lenient sentence, does not deserve another similar opportunity. Counsel is advised to anticipate these differing sentencing approaches.

Conclusion

The variety of sentencing options available to the district court enhances the importance of effective advocacy at the sentencing, or dispositional, hearing. When presented with well-prepared sentencing arguments, the sentencing judge can reach an informed and just disposition which will address the circumstances of the individual defendant and satisfy the concerns of society.

387. See supra Part III.
388. See supra Part III.
Conflict of Laws in Massachusetts
PART II: RELATED PROBLEMS IN SELECTING THE APPLICABLE LAW

by Joseph W. Glannon & Gabriel Teninbaum*

INTRODUCTION

This is the second half of a two-part article on conflict of laws in Massachusetts. Part I, which was published in the preceding issue of the Massachusetts Law Review, provided a background on the “functional approach” that Massachusetts courts apply to conflict-of-laws problems, and analyzed the application of that approach to several major areas of substantive law. This part of the article focuses on the approach of Massachusetts courts to conflict-of-laws problems that involve statutes of limitations and repose, choice-of-law clauses, forum selection clauses and the elusive distinction between substance and procedure.

I. LIMITATIONS ON ACTIONS

A. Conflict-of-Laws Problems in Determining the Applicable Statute of Limitations

Until 1995, Massachusetts courts treated statutes of limitations as “procedural” rather than “substantive,” and generally applied Massachusetts’s statute of limitations to all claims brought before them. However, in New England Telephone & Telegraph Co. v. Gourdeau Construction Co.,1 the Supreme Judicial Court (“SJC”) followed a nationwide trend and concluded that its former per se rule was no longer viable.2 Instead it adopted the position of section 142 of the Restatement (Second) of Conflict of Laws (“Second Restatement”) and applied a “functional approach” to determine “the state which, with respect to the issue of limitations is the state of most significant relationship to the occurrence and to the parties.”3 The SJC reasoned that the “court’s treatment of the application of statutes of limitations as procedural [would] no longer be continued,” because “[t]he certainty of the traditional answer as to which statute of limitations to apply does not justify a refusal to apply the statute of limitations of another jurisdiction in particular circumstances.”4

Section 142, which governs statute of limitations issues, provides that whether a claim will be maintained against that defense is determined under the principles stated in § 6. Section 142 provides:

1. The forum will apply its own statute of limitations barring the claim.

2. The forum will apply its own statute of limitations permitting the claim unless: (a) maintenance of the claim would serve no substantial interest of the forum; and (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence.5

(Second) of Conflict of Laws (“Second Restatement”) and applied a “functional approach” to determine “the state which, with respect to the issue of limitations is the state of most significant relationship to the occurrence and to the parties.”5 The SJC reasoned that the “court’s treatment of the application of statutes of limitations as procedural [would] no longer be continued,” because “[t]he certainty of the traditional answer as to which statute of limitations to apply does not justify a refusal to apply the statute of limitations of another jurisdiction in particular circumstances.”5

Section 142, which governs statute of limitations issues, provides that whether a claim will be maintained against that defense is determined under the principles stated in § 6. Section 142 provides:

In general, unless the exceptional circumstances of the case make such a result unreasonable:

(1) The forum will apply its own statute of limitations barring the claim.

(2) The forum will apply its own statute of limitations permitting the claim unless: (a) maintenance of the claim would serve no substantial interest of the forum; and (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence.5

* The authors appreciate the assistance of Marcy Rolerson, J.D. candidate, Suffolk University Law School, in researching and preparing this article.

2. Id. at 664.
3. Id. at 663 (quoting Restatement (Second) of Conflict of Laws § 142 cmt. c (1988 Revisions) (emphasis added)).

4. Id. at 664.
5. Restatement (Second) of Conflict of Laws § 142 (1988 Revisions). The general principles section for “Procedure,” under which section 142 falls, does not provide any “contacts” section as with torts and contracts and is not particularly helpful in choice-of-law analyses. It simply advises the reader that “[a] court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case,” Restatement (Second) of Conflict of Laws § 122 (1971).
In deciding whether Massachusetts has a substantial interest and which jurisdiction has a more significant relationship to the parties and the claim, the court focuses on the statute of limitations issue, and not on the type of underlying claim. This means that regardless of the nature of the cause of action (e.g., personal injury, defamation, contract), if there is a conflict of law involving limitations, the conflicts analysis will rely on the Second Restatement sections that address limitations, and not the issue or topic-related section relating to the area of law of the cause of action.7

When section 142 was applied in *Gourdeau Construction Co.*, it appeared that the court understood section 142 to mean that Massachusetts would apply its own statute of limitations unless the commonwealth both lacked a substantial interest in the claim, and another state had a more significant interest in it. This squared with the stated policy that the forum state “should not entertain a claim when doing so would not advance any local interest and would frustrate the policy of a state with a closer connection with the case and whose statute of limitations would bar the claim.”8 However, under the court’s interpretation of section 142(2) in *Gourdeau Construction Co.*, as long as Massachusetts had a substantial interest in a case, Massachusetts’s statute of limitations would apply even if another state had a more significant relationship to the parties and occurrence.9

Within a short time, the court appeared to reinterpret section 142 in *Nierman v. Hyatt Corp.*10 In *Nierman*, the plaintiff, a Massachusetts resident, who made his reservation from Massachusetts, brought a negligence action after sustaining injuries at the defendant’s hotel in Texas.11 The defendant was a Delaware corporation with its principal place of business in Illinois. It owned at least one hotel in Massachusetts and regularly solicited business in the state.12 The suit was filed more than two years, but less than three years, after the plaintiff was injured at the defendant’s hotel.13 As a consequence of the timing, the action would be barred by the Texas statute of limitations, but timely filed under Massachusetts law.14

The Massachusetts Appeals Court held that the Massachusetts statute of limitations governed and that the action should proceed.15 Applying section 142, the court stated:

Massachusetts has a substantial interest in the maintenance of the plaintiffs’ claims. The plaintiffs are not out-of-State forum shoppers; they are Massachusetts residents, and the impact of their injuries will be felt in this State. Massachusetts has an interest in providing an opportunity for resident plaintiffs to seek compensation for personal injuries. Moreover, although Hyatt is not a citizen of Massachusetts, it has an ongoing, significant business presence here of the same non-citizen character as its business presence in Texas. For that reason, the interest of Massachusetts in affording a forum to its resident plaintiffs is not undercut by any interest Massachusetts may have in maintaining comity with a sister State. Because Hyatt is not exclusively, or even principally, based in Texas, it does not fall within the ambit of any protection that Texas may wish to afford to local defendants from the prosecution of what Texas, but not Massachusetts, perceives to be stale claims. … By allowing the claim to go forward, Massachusetts can advance its interest in providing its citizens with an opportunity to maintain their action without offending Texas policy concerns.16

Taking a different view of section 142, the SJC reversed.17 It determined that while Massachusetts had “a general interest in having its residents compensated for personal injuries suffered in another State,” nonetheless, it had “no substantial interest that would be advanced by entertaining the plaintiffs’ claims.”18 Texas, the court decided, had closer connections to the issue because the alleged negligence and injuries occurred there, the hotel was located in Texas and employed Texans, and the allegedly negligent employee presumably lived in Texas.19 Therefore, the court held, Texas had “the dominant interest in having its own limitations statute enforced.”20

The SJC’s reversal of the Appeals Court’s decision in *Nierman* is questionable for two reasons. First, the SJC decision in *Nierman* is inconsistent with the language of section 142. The SJC focused on which jurisdiction had a more significant relationship without first analyzing the question of whether Massachusetts had any substantial interest.21 Section 142(a)(2) requires that a state apply its own statute of limitations unless it has no substantial interest in the claim.22 Only if it does not have a substantial interest should the analysis move to which state has a more significant relationship to the proceeding. Second, to the extent the SJC did analyze whether Massachusetts had a substantial interest in the claim, it is difficult to accept the court’s determination that Massachusetts had none when the case involved an injury that occurred to a Massachusetts domiciliary who contracted from Massachusetts with a national corporation that owned property in Massachusetts.23

The SJC’s *Nierman* decision was not the first, or only, time a Massachusetts court deemphasized section 142’s requirement of determining, in the first instance, whether Massachusetts has any substantial interest in the case. In *Newburyport Five Cents Savings Bank v. MacDonald*,24 the defendant, a Massachusetts resident, defaulted


7. *See Kahn*, 429 Mass. at 574.

8. *Gourdeau*, 419 Mass. at 661 (emphasis added) (quoting *Restatement (Second) of Conflict of Laws § 142 cmt. g (1988 Revisions)*).

9. *See id. at 664 n.6 (“Our analysis does not reach the question presented by § 142(2)(b), under which the State with the more significant relationship to the parties and the occurrence must be determined.”).* In *Gourdeau*, the court held that Massachusetts had a “substantial interest” when both of the parties had their principal places of business in Massachusetts, the plaintiff was a Massachusetts corporation, and the contract was executed in Massachusetts. *Id.* at 663.


11. *Id.* at 693-94.

12. *Id.* at 694.

13. *Id.*

14. *Id.*


16. *Id.* at 848-49 (citation omitted).


18. *Id.* at 697.

19. *Id.*

20. *Id.* at 698.

21. *Id.* at 696-98.

22. *Restatement (Second) of Conflict of Laws § 142(a)(2) (1988 Revisions).*

23. *Cf. Kahn v. Royal Ins. Co.*, 429 Mass. 572, 574-75 (1999) (holding Massachusetts had no substantial interest when plaintiffs “elected … to rely on an entirely Florida-based insurance transaction, thereby placing themselves outside the substantial interest of Massachusetts” and fact that underlying tort occurred in Massachusetts “provide[d] Massachusetts no substantial interest in the insurance policy claim”).

on promissory notes secured by commercial real estate in New Hampshire, and the plaintiff, a Massachusetts bank, foreclosed on the property. The defendant challenged the foreclosure, claiming it was barred by the applicable Massachusetts statute of limitations. The Appeals Court disagreed, holding that New Hampshire had significantly more relationship to the occurrence and parties because the foreclosure sale had been conducted under New Hampshire law, and the deficiency action involved the financing and purchase of New Hampshire property by New Hampshire trusts. Although section 142(a)(2) requires a preliminary inquiry into whether the forum state has any substantial interest, the court initially determined that New Hampshire had a more substantial relationship to the claim, and only thereafter, did the court note that "no substantial interest of Massachusetts would be adversely affected" by applying New Hampshire's statute of limitations.

Summary
Section 142 requires a forum to apply its own statute of limitations unless: (a) maintenance of the claim would serve no substantial interest of the forum; and (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence. However, the SJC has put greater weight on which state has a more significant relationship to the claim, and has paid short shrift to the preliminary question of whether the forum state has a substantial interest in the claim.

B. Conflict-of-Laws Treatment of Statutes of Repose
The SJC has described the statute of repose as "a cousin, if not a sibling, of a statute of limitations," to which a wholly separate choice of law analysis applies. The court has determined that, because statutes of repose are not "clearly procedural," they must be treated as substantive law and, using a functional approach, analyzed to determine which jurisdiction has the "more significant relationship." Repose problems are analyzed by application of the Second Restatement sections that undergird the applicable substantive law. For example, when a wrongful death case presents a statute of repose conflict, the Second Restatement analysis begins with the issue-specific section for wrongful death.

Statute of repose issues typically arise in the context of personal injury actions. The functional approach requires application of Second Restatement sections 145 (the topic section for torts), and 146 (the issue-specific personal injury section). Each of these sections calls for application of the law of the jurisdiction with the more significant relationship, as measured by the factors set out by section 6(2). For example, in Cosme v. Whitin Machine Works, a Massachusetts resident working in Connecticut was injured in the course of his employment while cleaning a machine. The accident occurred in 1986. The machine that caused the injury was designed, manufactured, and delivered in 1939. Connecticut law provided a ten-year statute of repose for product liability actions of the type involved in this case, while Massachusetts had no such limitation. To determine which state's law applied, the court applied the factors identified in Second Restatement section 145, which are "applicable to all torts and to all issues in tort," as well as section 146, which applies to all cases involving personal injury. Both sections refer to the general underlying principles contained in section 6(2). Although the court cited the four contacts in section 145, there was no apparent reliance on them. Rather, the court relied on section 146 and the section 6 factors in rendering its decision. Of the seven section 6 factors, the Cosme court focused on the relevant policies of the jurisdictions to determine the outcome. Because Massachusetts had no statute of repose in products liability actions, the court reasoned that Massachusetts had no policy to protect tortfeasors from injuries caused by older products as did Connecticut. Further, although Connecticut had an interest in having its laws apply, it was "not as compelling … as it would be if [the defendant] were a Connecticut business, and Connecticut's corresponding interest in protecting its courts from such claims is obviously not at stake." Finally, the court reasoned, Massachusetts had a strong interest in seeing its resident compensated and holding its resident-defendant (even though the accident itself occurred outside the state) accountable. As a result, the Cosme court, after providing a complete Second Restatement analysis that touched on all three levels, held that Massachusetts law applied because the state had a more significant interest in the matter than did Connecticut.

25. Id.
26. Id. at 905.
27. Id. at 906.
28. Id.
30. The borrowing clause of the Massachusetts tolling statute, Mass. Gen. Laws ch. 260, § 9 (2008), requires the court to determine which jurisdiction's statute of limitations applies under certain circumstances. The tolling statute suspends the statute of limitations when the defendant has left the jurisdiction either at the time, or after, the action accrues.
32. Cosme, 417 Mass. at 647.
34. Id. at 646-50 (quoting Restatement (Second) of Conflict of Laws §§ 145, 146 (1971)). The section 145 factors are: (a) the place where the injury occurred,(b) the place where the conduct causing the injury occurred,(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered.
35. Restatement (Second) of Conflict of Laws §§ 6, 146 (1971). Section 6(2) provides that the relevant considerations include:
(a) the needs of the interstate and international systems, (b) the
The result of Cosme is helpfully compared with Alves v. Siegel's Broadway Auto Parts, Inc. In Alves, the decedent, a Connecticut resident, was crushed to death by a garbage truck in Connecticut, while in the course of employment for his Connecticut-incorporated employer. The defendant impleaded the compacting mechanism manufacturer (a Massachusetts corporation which sold and delivered the unit to the decedent's employer in Massachusetts) as a third-party defendant. The court granted the third-party defendant summary judgment on the ground that, under Connecticut law, a products liability cause of action was barred by a statute of repose, which, unlike a statute of limitations, was substantive because it barred a cause of action from arising. The court held that Connecticut law applied because, under Massachusetts choice-of-law rules, the law of the place of the injury "should be supplanted only if Massachusetts has a more significant relationship to the cause of action." Here, the court applied the section 6 factors and determined that no state, including Massachusetts, had a more significant relationship to the cause of action than the place of the injury, and therefore that Connecticut law should apply. The outcome determinative difference between Cosme and Alves appears to be that the defendant in Alves was a Connecticut corporation (whereas in Cosme it was a Massachusetts corporation), thus tilting the balance toward Connecticut with respect to which jurisdiction had the most significant relationship.

Summary

Statute of repose issues are governed by the Second Restatement sections that underlie the area of law in which the case arises. For example, when a statute of repose arises in a tort case, the necessary analysis must include a review of the issue-related section of the Second Restatement (e.g., personal injury), the section 145 topic section, and the policy factors in section 6.

II. Treatment of Choice-of-Law Clauses by the Massachusetts Courts

A. Early Case Law in Massachusetts

Contracting parties frequently seek to avoid choice-of-law problems by including a "choice-of-law" clause in their agreement, specifying which state's substantive law will govern disputes arising from their agreement. If accepted by the courts, such choice-of-law clauses can provide certainty to the parties as to the applicable law and avoid litigation over complex choice-of-law issues.

The treatment of choice-of-law clauses by Massachusetts courts reflects broader trends in choice-of-law theory. Professor Beale, reporter for the first Restatement of Conflict of Laws ("First Restatement"), rejected the proposition that the parties could choose the law applicable to their contracts. He argued that honoring such agreements "involves permission to the parties to do a legislative act. It practically makes a legislative body of any two persons who choose to get together and contract." Conferring such authority on the parties' rights are defined by the law of the place in which their legal rights accrued.

Early Massachusetts cases appeared to accept Beale's argument. Yet, in Mittenath v. Mascagni, a 1903 decision, the SJC enforced a forum selection clause in a contract made in Italy that called for all suits to be brought there. The court's discussion emphasized the practical reasons for the parties, who were only temporarily in the United States, to specify Italian courts for the resolution of disputes arising from their transaction, and in so doing, suggested a more hospitable attitude toward forum selection clauses. After Massachusetts adopted a section of the Uniform Commercial Code ("U.C.C.") permitting parties to specify the governing law in commercial contracts, the SJC began to express its receptivity to choice-of-law clauses, and thereby applied the law chosen by the parties in several cases.

B. Massachusetts Adopts the Second Restatement Approach to Choice-of-Law Clauses

The Second Restatement, promulgated in 1971, allows parties entering into a contract to specify the law governing their agreement. Section 187, entitled "Law of the State Chosen by the Parties," provides:

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no

43. See Dolan v. Mutual Reserve Fund Life Ass'n, 173 Mass. 197, 199 (1899) ("doubtful" that parties may nullify local laws by stipulation that contract will be governed by laws of another state); Brockway v. American Ex. Co., 171 Mass. 158, 162 (1898) (rejecting contention that stipulation as to governing law would be given effect to modify rights of the parties).
44. 183 Mass. 19 (1903).
other reasonable basis for the parties’ choice, or
(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

In Steranko v. Inforex, Inc., the Appeals Court cited section 187 of the Second Restatement, but did not formally adopt it. Steranko held that “Massachusetts courts will uphold the parties’ choice [as to the governing law] as long as the result is not contrary to public policy, and as long as the designated State has some substantial relation to the contract.” 48 In Hodas v. Morin, 49 the SJC expressly relied on section 187 to determine whether to honor the parties’ contractual choice of law in a gestational carrier contract. The Hodas court methodically applied the subsections of section 187(2) in determining whether to enforce the choice-of-law clause. Under section 187(2)(a), a choice-of-law clause will not be applied if the state “has no substantial relationship to the parties or the transaction.” Because the contract in Hodas contemplated both prenatal care and delivery of the child at a Massachusetts hospital, the court concluded that Massachusetts did have a substantial relationship to the transaction, so that section 187(2)(a) did not bar application of the law chosen by the parties.

The court then turned to the more complex analysis required under section 187(2)(b). That subsection provides that the parties’ choice should not be honored if another state has a “materially greater interest” in the issue than the chosen state; that state’s law would apply absent the choice-of-law clause and honoring the parties’ choice would be against the public policy of the state whose law would apply under choice-of-law principles. 50 Clearly, these requirements create a heavy presumption in favor of enforcing choice-of-law clauses, since it is only where each of the relevant considerations is met that the parties’ choice will be overridden. In Hodas, the court suggested that New York might have a materially greater interest in the issue, but concluded that New York law would not apply absent the choice-of-law clause. Thus, after touching all the section 187(2) bases, the court honored the parties’ contractual choice of law.

A good example of a federal district court using Massachusetts choice-of-law principles applying section 187(2) is Boulder Santa Rosa, LLC v. Henry. 51 The choice-of-law clause in Boulder Santa Rosa, LLC occasioned application of Massachusetts law to a loan transaction by Massachusetts-based lenders to Florida borrowers secured, in part, by Florida properties. The court concluded, under section 187(2)(a), that Massachusetts did have a substantial relationship to the transaction, since several parties were from Massachusetts and negotiations took place there. Judge Rya Zobel decided that no determination was needed under section 187(2)(b) as to whether Florida had a materially greater interest in the issue, because, while Florida law prohibits usury, Florida courts did not regard enforcing an interstate contract calling for a high interest rate as against its public policy. Thus, even if Florida law would otherwise apply, the parties could displace it, because (under section 187(2)(b)) the law they chose was not contrary to a fundamental policy of Florida. Here again, the court did a careful section 187(2) analysis, and again, the heavy burden to override the parties’ choice of law was not met.

Application of section 187(2) does not always lead to enforcement of a choice-of-law clause. In Roll Systems, Inc. v. Shupe, 52 a Massachusetts corporation hired Shupe, a California resident, as a sales representative. After Shupe left Roll Systems and went to work for a competitor, Roll Systems sought an injunction to enforce a noncompetition agreement barring him from doing so. Shupe’s contract with Roll Systems provided that Massachusetts law would govern. Judge George O’Toole examined section 187(2)(b). He concluded that California had a materially greater interest in the transaction than Massachusetts, since Shupe was a California resident who worked out of California. Judge O’Toole held that applying Massachusetts law would be contrary to a fundamental policy of California, which bars noncompetition clauses by statute. 53 Lastly, he decided that California law would apply if there were no choice-of-law clause, because California had the most significant relationship to the transaction. The result was that Shupe was not enjoined from working for his former employer’s competitor. While the question in Roll Systems is a close one, 54 Judge O’Toole, like the judges in the cases discussed above, carefully followed the steps in section 187(2) to decide whether to honor the choice-of-law clause. Choice-of-law issues often necessitate a balancing of several competing policy factors and are otherwise complex. The authors suggest that adoption of a single and consistent standard by the courts would benefit all concerned.

Sometimes, parties may be able to structure their conduct to enhance the likelihood that a court will approve their contractual choice of law. In Hodas, the gestational carrier case, the contract called for prenatal services and delivery to take place in Massachusetts, although the parties were from other states. Their contract also included a choice-of-law clause calling for application of Massachusetts law, which was more likely to uphold the transaction than at least one of the other states involved. 55 The fact that the contract required prenatal services and delivery in Massachusetts created a “substantial relationship to the parties or the transaction,” 56 thus satisfying the first step of a section 187(2) analysis. Hodas illustrates that, where conduct contemplated by a contract might take place in several states, the parties can increase the likelihood that their choice of law will be honored by specifying that it will take place in a state that applies the Second Restatement approach. This allows a certain amount of “law shopping” by the parties, by including a choice-of-law clause in the contract, and calling for performance of the contract in a state that is likely to honor the choice-of-law clause.

Despite this possibility — or perhaps in part because of it — the

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54. The strongest argument for honoring the parties’ choice of Massachusetts law is that Massachusetts had as strong an interest in the transaction as California, since Roll Systems was a Massachusetts company. If that were the case, then California’s interest was not “materially greater” (section 187(2)(b)), and the choice-of-law clause would be enforced.
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Restatement section 187(2) formula makes sense. When the law of several states might legitimately apply to a transaction, it furthers predictability and avoids litigation to allow the parties to designate in advance which of those states’ laws will apply. Section 187(2)(a) assures that the chosen jurisdiction will have a meaningful relationship to the transaction. Section 187(2)(b) also provides some protection against the party with the stronger bargaining position imposing a choice on the weaker party that violates the public policy of one of the two states. The SJC can best promote the goals of certainty, predictability and avoidance of choice-of-law litigation by faithfully applying section 187(2) to determine the enforceability of choice-of-law clauses.57

C. The Scope of Choice-of-Law Clauses: The Importance of Careful Drafting

Counsel should recognize in drafting choice-of-law clauses that such clauses will not automatically govern all claims that arise from the transaction. R.R. v. M.H.58, for example, involved a contract which provided that “Rhode Island Law shall govern the interpretation of this agreement.” The SJC held that this provision did not require it to apply Rhode Island law to determine whether the agreement (a surrogacy agreement) was enforceable. It construed the choice-of-law clause to call for application of Rhode Island law on matters of interpretation (the meaning of the terms in the contract) but not matters of contract validity or formation.59 By contrast, the contract in Hodas provided, “The parties further agree that this Agreement shall be governed by Massachusetts law.”60 The SJC determined that this clause expressed the parties’ intent that Massachusetts law should govern the validity of the agreement as well as interpretation of its terms.61

A frequent issue in cases involving contractual choice of law is whether the parties intended that related, non-contractual claims would be governed by the chosen law. For example, in Stagecoach Transportation, Inc. v. Shuttle, Inc.,62 the plaintiff recovered double damages under General Laws chapter 93A for unfair and deceptive trade practices. However, the contract provided, “This agreement shall be governed and interpreted in accordance with the laws of the State of New York,” and the defendant argued that multiple damages were not authorized under New York law. The court held that New York law did not apply to the chapter 93A claim, because it was “not a dispute arising out of the agreement but more properly resembled a tort action of deceit.”63 The court contrasted the parties’ choice-of-law clause with a clause analyzed by the United States Court of Appeals for the Second Circuit that called for the chosen law to “resolve any controversy or claim arising out of or relating to this contract or breach thereof.”64 In BNY Financial Corp. v. Fitwel Dress Co., Inc.,65 by contrast, a party asserted chapter 93A claims that resembled contract violations, rather than related tortious conduct. The court held that a choice-of-law clause providing that the parties’ agreements would be “governed by and shall be construed in accordance with” New York law barred the plaintiff from asserting claims under General Laws chapter 93A.66

The federal district court faced a similar problem in construing the scope of a choice-of-law clause in Neuro-Rehab Associates v. Amresco Commercial Finance, L.L.C.67 The plaintiff brought suit for rescission based on misrepresentations in the negotiations leading up to a loan transaction. Judge O’Toole concluded that the choice-of-law clause, which required application of Idaho law to govern “the validity, enforceability, construction and interpretation” of the agreement, required application of Idaho law to these pre-contractual claims, since they challenged the “validity” and “enforceability” of the contract.68

To avoid litigation of this sort, parties drafting choice-of-law clauses should be precise about whether the clause applies to all disputes arising from the transaction, or solely to interpretation and enforcement of the contract. A broad clause, for example, should specify that a particular state’s law will be applied “to govern, construe and enforce all rights and duties of the parties arising from or relating in any way to the subject matter” of the contract.69

A further issue in drafting choice-of-law clauses is whether to specify that the parties are choosing only the substantive law of the chosen state, not its conflicts law as well. Suppose, for example, that the parties choose California law to govern their agreement. It may be that California law would look to the law of some other state to govern an issue (for example, a performance issue if the contract were performed outside California). Unless the parties specify that they only intend California contracts law to apply, a court may be unclear about how to honor the choice-of-law clause: Should it apply California law to the performance issue (because the parties have chosen it) or the law of the state that California would choose based on application of California choice-of-law principles, on the premise that the parties meant the court to act like a California court in choosing the applicable law?

The Second Restatement takes the position that, when the parties specify that the law of a particular state will govern their transaction, the reference is to the “local law,” i.e., the substantive law, of the chosen state and should not lead a court to consider the choice-of-law rules of the chosen state as well.70 Since the Massachusetts

57. It should be noted that Mass. Gen. Laws ch. 260, § 22, ¶ 1 (2008) bars choice-of-law clauses calling for application of foreign law (i.e., law other than Massachusetts law) in contracts insuring lives, property or interests in the commonwealth.
59. Id. at 508.
60. Hodas, 442 Mass. at 546-47.
61. Id. at 550.
63. Id. at 818; see also Aspen Tech., Inc. v. Applied Mfg. Tech., Inc., No. 05CV3113F, 2008 WL 241095, at *1 (Mass Super. Ct. Jan. 9, 2008). In that case the choice-of-law clause provided that the agreement would be “governed by and construed in accordance with the laws of the State of Texas.” Id. at *3. The superior court applied Texas law to the contractual claims, but did a separate choice-of-law analysis as to non-contractual claims asserted based upon the same commercial dispute. Id. at *4.
68. Id. at *8-*10.
69. See the discussion in Inacom Corp. v. Sears, Roebuck & Co., 254 F.3d 685, 687 (8th Cir. 2001); see also Nissenberg v. Fellenman, 339 Mass. 717, 718 n.1 (1959), in which the clause provided that “this agreement and all transactions, assignments and transfers hereunder, and all rights of the parties, shall be governed as to validity, construction, enforcement and in all other respects by the laws of . . . New York.”
70. Restatement (Second) of Conflict of Laws § 187(3) (1988 Revisions)
courts have approved section 187, they are likely to reach the same conclusion. Parties sometimes specify that the choice-of-law clause applies only to the “local law” of the chosen state, “without regard to the conflict-of-laws rules” of that state. This makes explicit what will likely be concluded under general conflicts principles such as section 187. However, it may occasionally bring the parties to grief, where it is clear that the chosen state would have looked to a third state on a particular issue, and that the parties — had they thought about it — would have intended the court to do so. It may be better to leave this to the operation of section 187(3), which allows the court some flexibility in making this decision.

Where the parties have included a choice-of-law clause in their agreement, the Massachusetts courts have construed the clause to cover some issues that fall between substantive law and matters of local procedure. For example, in Morris v. Watsco, Inc., the parties provided that Florida law would apply to their agreement. Suit was brought on the contract in federal court in Massachusetts, and that court certified to the SJC the issue of whether the rate of interest on the judgment should be governed by Florida law — the law designated by the parties — or by Massachusetts law, the law of the forum. The court concluded that the choice-of-law clause, which called for the contract to be “construed and enforced” according to the conflict-of-laws rules, applies only to the “local law” of the chosen state, “without regard to the conflict-of-laws rules” of that state. This makes explicit what applies only to the “local law” of the chosen state, “without regard to the conflict-of-laws rules” of that state. It may be better to leave this to the operation of section 187(3), which allows the court some flexibility in making this decision.

Section 187 of the Second Restatement contains the following puzzling provision: “(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.”

This section essentially authorizes parties to incorporate by reference a body of law to govern issues they could have spelled out themselves in their contract. As the Second Restatement comment explains:

“In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.”; see also id. cmt. h.

71. See supra Part II.B. (discussing treatment of choice-of-law clauses by Massachusetts courts).


73. For the requisite complexities that may arise from such drafting, see Michael Gruson, Governing Law Clauses Excluding Principles of Conflict of Laws, 37 Iowa L. Rev. 1023, 1023-31 (2003).

74. 385 Mass. 672 (1982).

75. Id. at 672-73.

76. Id. at 675-78.


78. Id. at 905.


81. Id. cmt. c.

82. Examples of forum selection clauses are given in Part III.A through D, infra.

83. 72 Mass. 174 (1856).

84. Id. at 180.


86. 407 U.S. 1 (1972).


88. Id. at 64.

89. Id. at 65 (“In the light of present day trends, attorneys advising clients...
approved enforcement of forum selection clauses in dicta in Jacobson v. Mailboxes Etc. U.S.A., Inc. 94. "We accept the modern view that forum selection clauses are to be enforced if it is fair and reasonable to do so." 95 The court cited section 80 of the Second Restatement, with approval, suggesting that the commentary to that section will be a helpful guide for lawyers in considering when a forum selection clause is reasonable, or in fashioning arguments against enforcement. 96 Since Jacobson, the Massachusetts decisions have recognized the enforceability of forum selection clauses, even when parties have designated the courts of another nation as the proper forum. 97

B. Arguments to Avoid Dismissal Based on a Forum Selection Clause

Typically, cases involving the enforcement of forum selection clauses arise because a party has agreed that suits will be brought in a particular state, but later sues in another. The defendant moves to dismiss based on the clause, and the plaintiff argues that it should not be enforced. Although Jacobson indicated that forum selection clauses are presumptively enforceable under Massachusetts law, several arguments may support dismissal based on such a clause.

In Jacobson, the SJC held that forum selection clauses "are to be enforced if it's fair and reasonable to do so." It would likely be unreasonable for the parties to choose a forum with no substantial connection to the transaction or the parties. 98 In M/S Bremen, which has been repeatedly cited by Massachusetts cases, the Supreme Court held that "a forum clause should control, absent a strong showing that it should be set aside or that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." 99 M/S Bremen also suggested that a clause might not be enforced if the chosen forum "will be so gravely difficult and inconvenient that the party will for all practical purposes be deprived of his day in court." 100

While the cases suggest several arguments parties may make to avoid a forum selection clause, such clauses will usually be enforced by the Massachusetts courts. The party seeking to avoid the clause will bear the burden to establish that it would not be fair and reasonable to enforce it. 101 The Second Restatement commentary probably would be unwise to rely on the persistence of the Nute principle in future Massachusetts cases where the parties purport to bind themselves by a contractual choice of forum provision and no special considerations make it unjust to enforce the parties' agreement."

90. 419 Mass. 572 (1995); see also W. R. Grace & Co. v. Hartford Accident & Indemn. Co., 407 Mass. 572, 582 n.13 (stating in dicta "we see nothing inherently inappropriate in a forum selection clause").

91. 419 Mass. at 574-75.

92. Id. at 581.


94. Cf. Lambert v. Kysar, 983 F.2d 1110, 1120 (1st Cir. 1993) (inconvenience argument applies where selected forum is unrelated to parties and contract at issue in the case).


96. 407 U.S. 1, 18 (1972); see also Cambridge Biotech Corp., 433 Mass. at 131 (no showing that forum selection clause "was obtained by fraud, duress, the abuse of economic power, or any other unconscionable means"); Karty v. Mid-America Energy, Inc., 74 Mass. App. Ct. 25, 30 (2009) (clause itself, rather than entire contract, must be shown to have been fraudulently obtained).

97. See Cambridge Biotech Corp., 433 Mass. at 133 (plaintiffs "have not met their substantial burden of showing that honoring the forum selection clause would deprive them of any meaningful day in court"); see also Restatement (Second) of Conflict of Laws § 80 cmt. c (1988 Revisions).

98. Restatement (Second) of Conflict of Laws § 80 cmt. c (1988 Revisions).


100. Id. at 1117-21. While the Lambert court applied Washington law to determine the enforceability of the clause, its discussion suggested that Washington's standards are very similar, if not identical, to those of the federal and Massachusetts courts. See id. at § 116-19.


103. Id. at 131.

104. Id. at 132.

105. Id. at 132 n.13.


107. Id.


109. Id. at 62.

110. Id. at 66.
was the fact that the case had already been litigated to judgment in Massachusetts, and the limitations period had passed in Connecticut, the state designated in the forum selection clause.\footnote{111} Regarding “the modern view as flexible and one where all equitable considerations will be taken into account,” the court declined to enforce the clause.\footnote{112} In its remand in Jacobson, the SJC suggested that similar arguments might avoid a forum selection clause, depending upon whether California would bar the plaintiff’s claims on statute of limitations grounds,\footnote{113} and whether California would refuse to enforce the plaintiff’s General Laws chapter 93A claims.\footnote{114}

It may also be unreasonable to designate a forum that will be seriously inconvenient for one of the parties, especially in consumer cases. In Kirby v. Miami Systems Corp.,\footnote{115} a case from the Massachusetts Appellate Division, the court refused to dismiss based on a forum selection clause requiring suits to be brought in Ohio. The suit was brought by a Massachusetts employee for wages under a Massachusetts statute, against her employer, a corporation with three places of business in the commonwealth.\footnote{116} The court stated:

\[ [W]here a solitary Massachusetts resident, employed in Massachusetts by a foreign corporation whose “national” activities include three places of business in Massachusetts, brings an action pursuant to G.L. c. 149 ss. 148, 150 to recover a modest amount of wages and benefits under what is apparently an adhesion contract of employment, Massachusetts courts will not enforce forum selection clause in that contract.\footnote{117}

Similarly, in Williams v. America Online,\footnote{118} a superior court judge refused to dismiss a class action on behalf of Massachusetts consumers, despite a forum selection clause calling for suits in Virginia. As one ground for its refusal, the court held that “public policy suggests that Massachusetts consumers who individually have damages of only a few hundred dollars should not have to pursue AOL in Virginia.”\footnote{119} These cases reflect a certain skepticism about forum selection clauses that are drafted by the party in the dominant bargaining position. This argument is unlikely to persuade a court, however, in a case between business entities. For example, in Cambridge Biotech Corp., the court noted that “two sophisticated parties voluntarily agreed in advance [to the forum selection clause]. Massachusetts law requires us to respect their wishes, and international comity requires us to respect the ability of the French courts fairly and competently to settle the parties’ dispute.”\footnote{120}

In Casavant v. Norwegian Cruise Line, Ltd.,\footnote{121} the court rejected a motion to dismiss based on a forum selection clause. Casavant involved the recurring scenario concerning contractual language on a ticket for a cruise conducted by a foreign cruise line, purchased by Massachusetts passengers from a Massachusetts travel agent.\footnote{122} The passengers argued — and the court held — that they had not been made aware of the forum selection clause at a time when they could realistically decide whether or not to accept it.\footnote{123} The court agreed, since the plaintiffs did not receive the contract (which had been fully paid for) until 13 days before sailing.\footnote{124} Since they had not had a reasonable opportunity to reject the clause, the court concluded, under Massachusetts law, that they had not accepted the contract and the clause was unenforceable.\footnote{125}

C. Varieties of Forum Selection Clauses

Forum selection clauses vary considerably in language and effect. At one end of the spectrum, the clause may confine all suits to a single court or county. In Nute v. Hamilton Mutual Insurance Co.,\footnote{126} the clause provided that “the suit should be brought at a proper court in the county of Essex [Massachusetts].”\footnote{127} In Ernst & Norman Hart Bros., the clause provided that “Connecticut law shall have jurisdiction in the event of a legal dispute between the parties to this contract, and such disputes shall be adjudicated in Hartford County.”\footnote{128} This clause might be interpreted to confine suits to the state courts, due to its reference to a county. A similar clause in LFC Lesors, Inc., v. Pacific Sewer Maintenance Corp.\footnote{129} provided that “the rights and liabilities of the parties hereto [shall be] determined in accordance with the law, and in the courts, of the Commonwealth of Massachusetts.”\footnote{130} The United States Court of Appeals for the First Circuit read this clause as intended to confine suits to the Massachusetts state courts, and enforced the clause, affirming dismissal of an action brought in the federal district court for the District of Massachusetts.

111. Id. at 67.
112. Id.
113. A party arguing for dismissal could avoid this argument by agreeing to waive any limitations defense in the state designated by the forum selection clause.
116. Id. at 198.
117. Id.
119. Id. at *3 (footnote omitted).
122. Id. at 788.
123. Id.
124. Id. at 789.
125. \textit{See generally} Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991), a much cited case establishing standard for enforcement of forum selection clauses under admiralty law. In JPS Elastometrics Corp. v. Mattel, Inc., No. SUCV2004-03841-C, 2004 WL 5302041, at *1 (Mass. Super. Ct. Oct. 7, 2004), the controversy over enforcement of a forum selection clause arose in an unusual context. The clause in that case called for arbitration in Boston; however a California court had previously ordered the parties to proceed to arbitration in Kentucky. JPS sought a preliminary injunction in the Massachusetts superior court enjoining Mattel from proceeding to arbitration in Kentucky. Although the superior court concluded that the forum selection clause “is likely to be enforceable,” it still denied injunctive relief, on the ground that Mattel’s violation of the clause threatened only economic harm, which could be remedied by monetary damages. Id. at *2.
126. 72 Mass. 174 (1856).
127. Id. at 176.
129. 739 F.2d 4 (1st Cir. 1984).
130. Id. at 6.
Other forum selection clauses confine suits to the state or federal courts in a particular state.

This Agreement shall be governed by the laws of the State of Ohio. Company … and Representative … hereby agree [sic] that any action to enforce any provision of this Agreement shall be brought only in a state or federal court located in Hamilton County Ohio.131

Still another variant is the “non-exclusive” forum selection clause, whereby the parties agree that suits may be brought in a particular court, but does not require that they be brought there:

Without limiting in any way the jurisdiction of the courts of any state, nation or province, or [party's] right to invoke the jurisdiction of such courts, [second party] hereby submits and consents to the jurisdiction of the United States of America and the State of New York... 132

This clause provides the first party with the option to sue in the New York state courts (and apparently a federal court in New York), but does not bind the first party to bring all actions in those courts. Parties should be clear on this issue, but frequently are not. This has led to litigation about whether suit may be brought in a court other than the one specified in the clause. For example, courts have differed on whether a forum selection clause that provides that the parties “submit to the jurisdiction of” a particular court is exclusive or non-exclusive.133 Inclusion of a sentence stating that “jurisdiction [of the chosen court] shall be exclusive,” or that litigation arising out of the transaction “may be brought only in the [courts of the chosen state]” should eliminate the ambiguity.134

Since the purpose of a forum selection clause is to assure that suits may or must be brought in a particular state, they will normally be interpreted to waive any objections the parties might otherwise have to venue or to personal jurisdiction in the chosen court.135 Consent is a constitutionally permissible basis for personal jurisdiction,136 and a forum selection clause is consent, in advance, to the jurisdiction of the chosen court. Sometimes a forum selection clause will expressly provide that the parties (or one of them) waive all objections to personal jurisdiction in the chosen forum.137

D. Scope of the Forum Selection Clause

Just as questions may arise concerning the scope of a choice-of-law clause,138 problems may arise concerning the scope of a forum selection clause. The language of a forum selection clause may cover certain claims between the parties, but not others. If so, the court could find itself in the position of reluctantly dismissing parts of the case in favor of the chosen forum, but retaining others. In Lamber t v. Kysar,139 the plaintiff brought contract and tort claims arising from a commercial transaction, and claimed that the tort claims (alleging tortious conduct in the formation of the contract) were not within the scope of the forum selection clause. The First Circuit (applying Massachusetts conflicts doctrine) took a jaundiced view of this argument. “The better general rule, we think, is that contract-related tort claims involving the same operative facts as a parallel claim for breach of contract should be heard in the forum selected by the contracting parties.”140

In Jacobson v. Mailboxes Etc. U.S.A., Inc., the court also considered whether a forum selection clause applied to “not only claims made under the agreement but also to claims of pre-contract deceit and other wrongs that allegedly induced the plaintiffs to sign the franchise agreement.”141 The forum selection clause in Jacobson provided, “Venue and Jurisdiction for all actions enforcing this agreement are agreed to be in the City of San Diego, County of San Diego, California.”142 The court concluded that the “restrictive language of the clause”143 did not encompass allegations of wrongdoing that induced the contract. Consequently, it had to decide whether to dismiss the claims covered by the forum selection clause and hear the wrongful inducement claims, to dismiss all claims, or to retain jurisdiction over all claims.

The court held that “separate actions should not be encouraged.”144 Consequently, the trial court on remand should determine whether the “greater focus” of the plaintiff’s claims was on the pre-contract conduct or on the breach of contract claims.145 If the wrongful inducement claims predominated, the court should retain jurisdiction over the entire case, despite the forum selection clause. If the contract claims formed the principal focus of the case, it should dismiss those claims in deference to the parties’ chosen forum, and decline jurisdiction over the related claims on forum non conveniens grounds, leaving the entire case to be litigated in California. “A


133. See cases cited at Peter Hay et al., Hornbook on Conflict of Laws 479 n.4 (4th ed. 2004).

134. A slightly different clause was considered in Cambridge Biotech Corp. v. Pasteur Sanofi Diagnostics, 433 Mass. 122 (2000). The provision at issue stated, “Should any controversy exist or arise under the present Agreement, it is here- with agreed that the parties shall bring it before the courts in the country of the respective defendant.” This clause appears to require the party bringing suit always to sue in a court located in the other party’s domicile. Id. at 124.


137. For example,

You expressly agree that exclusive jurisdiction for any claim or dispute with AOL relating in any way to your membership or your use of AOL resides in the court of Virginia and you further agree and expressly consent to the exercise of personal jurisdiction in the courts of Virginia in connection with any such dispute.


138. See supra Part II. C.

139. 983 F.2d 1110 (1st Cir. 1993).

140. Id. at 1121-22.

141. 419 Mass. 572, 575 (1995). Because the parties’ contract contained a choice-of-law clause, the SJC applied California law to the question of the scope of the forum selection clause. Id. However, its discussion of the issue suggests that it would rule the same way if it were applying Massachusetts law.

142. Id. at 573.

143. Id. at 578.

144. Id. at 579.

145. Id.
plaintiff should not be allowed to vitiate the effect of a forum selection clause simply by alleging peripheral claims that fall outside its apparent scope.\textsuperscript{146}

This holding suggests that a party seeking to avoid a forum selection clause should plead as many claims as possible that fall outside the apparent scope of the clause. Conversely, parties who want the clause to broadly control the dispute should draft them accordingly, to cover not only contractual claims, but all claims arising out of or relating in any way to the transaction between the parties.

E. Treatment of Forum Selection Clauses in Federal Court

The complexities mount when a party moves to dismiss based on a forum selection clause in federal court. In diversity cases, \textit{Errie Railroad Co. v. Tompkins}\textsuperscript{147} requires the federal court to apply state law on substantive matters, but does \textit{Errie} require a federal court in a diversity case to apply state law with regard to the enforcement of forum selection clauses? The analysis of this issue is further complicated by 28 U.S.C. § 1404(a), which authorizes transfer of a case pending in a federal district court to another federal district “for the convenience of parties and witnesses, in the interest of justice.”

The United States Supreme Court held in \textit{Stewart Organization, Inc. v. Ricoh Corp.}\textsuperscript{148} that federal diversity courts should look to the federal transfer statute (section 1404(a)), not state law, in deciding whether to transfer a case with a forum selection clause.\textsuperscript{149} Under section 1404(a), the court should consider a number of interests in deciding whether to transfer, including the parties’ convenience, the presence of a forum selection clause, as well as various public interest factors.\textsuperscript{150} Thus, the state and federal courts in Massachusetts will not automatically treat forum selection clauses the same way; a case that would be dismissed based on the forum selection clause if brought in state court might not be dismissed or transferred, under the multi-faceted analysis required by \textit{Ricoh}, in federal court.

However, if a forum selection clause calls for suit to be brought in the courts of another country, or in state court, section 1404(a) does not apply — it only applies to transfers to another federal district. It remains unclear whether, in cases to which section 1404(a) does not apply, \textit{Errie Railroad Co.}\textsuperscript{151} requires a federal court to treat forum selection clauses the same way as do Massachusetts courts.\textsuperscript{152} Because the standard used by the Massachusetts courts closely tracks the federal approach under \textit{M/S Bremen} and \textit{Carnival Cruise Lines, Inc. v. Shute},\textsuperscript{153} it will seldom be necessary for the court to reach the complex issues posed by \textit{Errie}.

146. \textit{Id.; see also} Cambridge Biotech Co. v. Pasteur Sanofi Diagnostics, 433 Mass. 122, 130 n.7 (2000) (ort claims asserted in licensing case should be heard in forum selected by parties for disputes arising under their agreement).

147. 304 U.S. 64 (1938).


150. \textit{Id.}

151. 304 U.S. 64 (1938).

152. \textit{See} Lambert v. Kysar, 983 F.2d 1110, 1117 n.10 (1st Cir. 1993) (noting circuit split on this issue); \textit{see also} Royal Bed and Spring Co. v. Famouss Industria e Comercio de Moveis, Ltda., 906 F.2d 45, 49-52 (1st Cir. 1990).


154. This is not always the case, however. \textit{Cambridge Biotech Corp. v. Pasteur Sanofi Diagnostics}, 433 Mass. 122 (2000), the clause called for suit to be brought in the courts of the defendant’s country, but specified that Massachusetts law would apply to the interpretation of the agreement. \textit{Id.} at 124.


156. \textit{Id.} at 573.

157. \textit{Id.}

158. \textit{Id.}

159. \textit{Id.} at 575; \textit{see also}, Lambert v. Kysar, 983 F.2d 1110, 1118 (1st Cir. 1993); 

160. \textit{McAleer v. Certain Underwriters at Lloyd’s, No. Civ. A. 95-00116, 1996 WL 384248, at *1 (Mass. Super. Ct. June 12, 1996), involved an administrator’s effort to reach and apply the proceeds of an insurance policy in a wrongful death case. The defendant moved to dismiss based on a forum selection clause in the insurance contract requiring any suits to be brought in the English courts. Judge Patrick Brady began his analysis by deciding what body of law should govern the underlying insurance transaction. He noted that, under the Second Restatement, a court may conclude that the parties “wish[ed] to have the law of a particular forum apply,” even if they did not include a choice-of-law clause in the agreement. He concluded that the parties to the insurance contract intended English law to apply to their transaction. After concluding that the English courts would honor the clause, Judge Brady dismissed the case.}

F. The Combined Effect of a Forum Selection Clause and a Choice-of-Law Clause

Parties frequently include both a forum selection clause and a choice-of-law clause in their contracts. The combination of these two provisions makes it more likely that disputes between the parties will actually be decided under the law they have specified. The parties will almost always include a forum selection clause requiring actions to be brought in the courts of the state of the chosen law.\textsuperscript{154} If the forum selection clause is enforced, litigation between the parties will be decided in the courts of the state whose law has been selected by the parties. If the parties have selected a state that generally enforces choice-of-law clauses, it is likely that the case will be litigated in the chosen forum and under the law the parties have chosen.

This can work in reverse as well, that is, selecting the substantive law of a particular state may enhance the likelihood that the forum selection clause will be honored by the courts of other states. The Massachusetts courts have held that, where the parties include both a choice-of-law clause and a forum selection clause in their agreement, the law of the chosen state will be used to determine the enforceability of the forum selection clause. \textit{In Jacobson v. Mailboxes Etc. U.S.A., Inc.,}\textsuperscript{155} the franchise agreement contained both a choice-of-law clause and a forum selection clause. The forum selection clause required that all actions to enforce the agreement be brought in San Diego.\textsuperscript{156} When the franchisee brought suit in Massachusetts, the franchisor moved to dismiss based on the forum selection clause.\textsuperscript{157} The trial court analyzed the question of the enforceability of the clause under Massachusetts law.\textsuperscript{158} The SJC, however, held that that question must be determined under \textit{California law}, because the parties had properly chosen California law in their choice-of-law clause.\textsuperscript{159} This broad interpretation of the scope of the choice-of-law clause highlights the importance of analyzing carefully the issues the clause will govern.\textsuperscript{160} It might seem self-evident that a Massachusetts court would apply Massachusetts law to decide the validity of a forum selection clause. However, under \textit{Jacobson}, the court will evaluate the forum selection clause under the law of another state if that state has been chosen to govern the substantive issues in the case.

G. Procedure for Seeking Dismissal Based on a Forum Selection Clause

Parties seeking dismissal based on a forum selection clause might move to dismiss for improper venue, or lack of jurisdiction, for failure
to state a claim or perhaps for \textit{forum non conveniens}. The proper characterization may matter: if the motion challenges the venue, for example, it may be waived if it is not asserted at the outset of the case by pre-answer motion or in the answer to the complaint.\textsuperscript{161}

Although motions based on forum selection clauses have sometimes been styled as motions under rule 12(b)(1) (challenging subject matter jurisdiction) or rule 12(b)(3)\textsuperscript{162} (challenging venue) of the Massachusetts Rules of Civil Procedure, the court in \textit{Jacobson} rejected the argument that enforcement of a forum selection clause involves jurisdiction or venue, holding instead:

\begin{quote}
[T]his issue involves neither venue nor jurisdiction in the traditional sense. The trial court had jurisdiction of this case. Parties cannot deny jurisdiction by such an agreement. The question under forum selection clauses is whether an agreement of the parties as to where certain actions must be brought will be enforced in the circumstances. If so, the court will decline to exercise its undoubted jurisdiction in response to a voluntary choice of a different forum.\textsuperscript{163}
\end{quote}

Thus a motion to dismiss based on a forum selection clause is not subject to rules 12(g) and 12(h), which provide that certain objections are waived if not asserted by the time of pleading. While an objection based on the clause could be asserted by a pre-answer motion or be included in the answer (as was done in \textit{Jacobson}), it is generally not waived under rule 12, and may be raised after pleading.

In \textit{Casavant v. Norwegian Cruise Line, Ltd.},\textsuperscript{164} the Appeals Court held that a party seeking dismissal based on a forum selection clause should move to dismiss under rule 12(b)(6).\textsuperscript{165} In \textit{Lambert v. Kyser}, the First Circuit also held that a motion under Federal Rule of Civil Procedure 12(b)(6) is the proper procedure.\textsuperscript{166} \textit{Lambert}, like the \textit{Jacobson} court, held that the clause “does not divest a court of jurisdiction or proper venue over a contractual dispute. Rather, a court … is to consider whether it must, in its discretion, decline jurisdiction and defer to the selected forum.”\textsuperscript{167} In \textit{Scafuri v. Lumenis Ltd.},\textsuperscript{168} the Appeals Court held that a motion to dismiss based on a forum selection clause “may be raised at any time in the proceedings before disposition on the merits.”\textsuperscript{169}

However, in \textit{Scafuri}, the court recognized that a defendant might waive the forum selection clause by affirmative conduct in court before seeking dismissal. The court identified three factors as relevant to waiver: whether the party has taken any action inconsistent with waiving its right to dismiss, whether the “‘litigation machinery’ had been substantially invoked prior to the party’s assertion of waiver, and whether the other party was affected, misled, or prejudiced by any delay in asserting the objection.”\textsuperscript{170} “This suggests that, while the right to seek dismissal based on the clause is not automatically lost by raising it later in the case, the court may find that the moving party has acquiesced in the plaintiff’s choice of forum, or delayed raising the objection to the plaintiff’s prejudice.”\textsuperscript{171}

Dismissing claims under rule 12(b)(6) based on a forum selection clause may lead to problems when the plaintiff re-files in the state designated in the forum selection clause. Massachusetts courts generally treat a rule 12(b)(6) dismissal as an adjudication on the merits,\textsuperscript{172} which bars a further action on the underlying claim.\textsuperscript{173} Thus, when the litigant whose case is dismissed by a Massachusetts court re-files in the state designated by the forum selection clause, the defendant may argue that the Massachusetts action precludes a further action on the underlying claim. To avoid this argument, courts should specify in the dismissal order that it is not meant to preclude litigation in the court designated in the forum selection clause.\textsuperscript{174} Even if the Massachusetts court fails to do so, the court in the designated forum should recognize that a dismissal on the basis of the forum selection clause is based on a procedural impediment to reaching the merits, and is not meant to bar litigation in the selected forum.\textsuperscript{175}

\section*{IV. The Persistent Problem of Substance v. Procedure}

\subsection*{A. The Substance v. Procedure Distinction Under the \textit{First} and \textit{Second Restatements}}

Under traditional choice of law principles, a court would apply its own procedural rules, even though it chose to apply the substantive law of another state.\textsuperscript{176} The \textit{First Restatement} included some 35
sections detailing what issues would be regarded as “procedural,” so that the forum court would apply its own principles, even though it applied another state’s substantive law to the case. Under the First Restatement, forum law governed issues such as the form of the action,177 the proper party to bring an action,178 methods of service, when an action is commenced,179 proper methods of service of process,180 matters of pleading and “conduct of proceedings in court,”181 right to jury trial,182 competency of witnesses,183 evidence issues184 and methods and limits on execution.185

During the First Restatement era, Massachusetts case law reflected the dichotomy between “substance” and “procedure” in choice of law: “It is elementary that the law of the place where the injury was received determines whether a right of action exists, and the law of the place where the action is brought regulates the remedy and its incidents, such as pleading, evidence and practice.”186 Based on this distinction, Massachusetts cases employed the First Restatement to apply Massachusetts law on the burden of proof, while coincidentally, they applied another state’s tort law to the case.187 Similarly, the court applied the Massachusetts standard for a directed verdict in a case based on New York tort law,188 and applied its own law in determining whether res ipa loquitur applied to a case based on New Jersey tort law.189

Section 122 of the Second Restatement provides that a court “usually applies its own local law rules prescribing how litigation shall be conducted” even if it applies the substantive law of another state.190 Succeeding sections specify procedural issues that should be governed by forum law, including the proper court within the local court system to hear a claim,191 the form of proceeding that may be brought to enforce a claim,192 service and notice,193 “pleading and conduct of proceedings,”194 the right to jury trial,195 and methods of enforcing a judgment.196 For some “procedural” issues, however, the Second Restatement leaves the court discretion to look to the law of another state. For example, section 125 provides that forum law governs who may be parties, “unless the substantial rights and duties of the parties would be affected by the determination of this issue.”197 As an example, the commentary on this section states that forum law will not apply to determine whether parties are jointly liable in tort, but will be applied in determining whether they can be sued together in a single action.198 Similarly, section 133 provides that forum law applies on the issue of burden of proof, “unless the primary purpose of the relevant rule of the state of the otherwise applicable law is to affect decision of the issue rather than to regulate the conduct of the trial.”

Provisions like these reflect the underlying premise of modern conflicts doctrine, that choice of law should further the substantive policies underlying state laws. If the court recognizes that State A has adopted an otherwise “procedural” rule to further a substantive interest, a court that adopts the substantive law of State A to govern an issue may, for example, adopt an associated burden of proof rule meant to further that interest. It is relevant, in this regard, whether the burden of proof rule is a general one, found in a procedural section of the state’s statute, or a specific one tied to the substantive issue before the court. “A rule which singles out a relatively narrow issue from the general norm and gives it peculiar treatment may have been designed primarily to affect decision of the particular issue.”199

B. The Likely Approach of Massachusetts Courts to the Procedure v. Substance Distinction

While Massachusetts is not formally a Second Restatement state, our courts have relied on it in solving choice-of-law problems.200 Thus, while some cases continue to cite the proposition that “Massachusetts will apply its own law on procedural issues,”201 Massachusetts courts will probably look to the Second Restatement provisions when confronted with issues that hover between substance and procedure.

Some state rules governing court process go beyond case management, and appear intended to further substantive state policy apart from litigation efficiency or fairness. In such cases, Massachusetts courts are likely to undertake a functional analysis under the Second Restatement to determine which state’s law to apply, even though the issue might traditionally be classified as a “procedural” matter. For example, in Commerce Insurance Co. v. Cameron,202 the right of an insurer to demand a release of the claim against its insured when it tendered the policy limits to a plaintiff raised a conflicts issue. While this practice is barred in Massachusetts, it is permitted in Connecticut. Cameron involved a Massachusetts insurer, a Connecticut accident victim and a Connecticut accident. Judge Francis Fecteau recognized that the practice might be characterized as a matter of procedure, but noted that “where it is not clear that a rule of law is procedural in the Commonwealth for choice-of-law purposes, we take a functional approach to determining the choice of law issue.”203 He characterized the release issue as “substantive"

177. Id. § 587.
178. Id. § 588.
179. Id. § 591.
180. Id. § 589.
181. Id. § 592.
182. Id. § 594.
183. Id. § 596.
184. Id. §§ 597, 598, 599.
185. Id. § 600.
188. Murphy v. Smith, 307 Mass. 64, 66 (1940).
190. Restatement (Second) of Conflict of Laws § 122 (1971).
191. Id. § 123.
192. Id. §124.
193. Id. §126.
194. Id. §127.
195. Id. §129.
196. Id. §131.
197. Id. §125.
198. Id. §125.
199. Id. §133 cmt. b.
203. Id.
and applied Connecticut law. Alternatively, he held that, under section 6(2) of the Second Restatement, Connecticut had “the more significant relationship to the facts at bar.” Either way, its law should apply.

This characterization problem is most likely to arise with regard to evidence law. The Second Restatement provides that forum law generally governs admissibility of evidence, but includes special provisions governing privileges, parol evidence and statutes of frauds. These sections either specify that general choice of law principles for substantive issues will apply, or, in the case of privilege, require consideration of the underlying policy for the privilege in deciding whether to apply forum law on a privilege issue or the law of another interested state.

Privileges present a classic example of issues that have both substantive and procedural aspects. In MacIntosh v. Interface Group Massachusetts-Com, Inc., a Massachusetts-bound airline passenger who was removed from a flight in Connecticut sued for libel. The defendant raised the defense that it had a privilege to communicate information concerning an alleged crime by the plaintiff to the police. The judge, in analyzing the applicability of the privilege, properly looked to Connecticut law. Here, the privilege is a substantive defense to a tort, not solely a matter of evidence, so the court appropriately applied the law of the state that would govern the elements of the libel claim.

A closer call on this issue is illustrated by Commonwealth v. Fitzpatrick. In that case, E-ZPass transponder records from a New Hampshire toll booth were used in a Massachusetts prosecution. Both states have statutes that arguably bar evidentiary use of such records, though the scope of the privilege to exclude them varies slightly under the two statutes. Judge Thomas Billings suggested, in dicta, that the Massachusetts privilege statute would be applied, even though the toll transaction happened in New Hampshire. He reasoned, in part, that this is a matter of procedure. He further suggested that, if the privilege issue is treated as substantive, the law of the place of the crime should apply, since that state has the more significant contacts with the case.

Under the First Restatement, a court would likely resolve this conflict by labeling the privilege issue “procedural” and looking to local law. Massachusetts courts today would likely look to the Second Restatement to resolve conflicts in this murky area, and focus on section 139(2), dealing with “privileged communications.” That section provides:

Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect.

In Fitzpatrick, the state with the “most significant relationship with the communication” at issue is probably New Hampshire, where the E-Z Pass transactions took place. If correct, the court must then ask whether there is a “special reason” to look to the privilege law of the non-forum state, instead of applying local evidentiary law. Thus, if that state had an important policy protecting the communication, and the parties had relied on that policy, the interest balancing that follows likely would lead to application of the evidence law of the state where the communication took place. In this respect, section 139(2) suggests that forum privilege law will ordinarily apply, but gives the court flexibility in considering the policies underlying the privilege law of the interested states.

Commonwealth v. Miller also considered a choice-of-law issue regarding admissibility of evidence. The defendant, who was arrested in New York, argued that his confession should be suppressed, since the Massachusetts police officers who interrogated him in New York did not comply with New York statutory procedures requiring presence of counsel to waive Miranda rights. The Miller judge noted that courts ordinarily apply their own procedural rules, but went on to consider (without citing the Second Restatement) whether Massachusetts or New York had the most significant relationship to the prosecution. Because he concluded that the Massachusetts contacts prevailed, he applied Massachusetts law on the validity of the Miranda waiver. The judge also concluded that applying New York law would not further the statutory purposes of either state. Here again, the court declined to solve the choice-of-law problem by simply labeling the issue procedural, analyzing instead the interests of each state in applying its law to the case.

C. Choice-of-Law in Massachusetts Federal Courts in Diversity Cases

Every veteran of the first-year civil procedure course remembers that federal courts, in cases based on diversity jurisdiction, must apply state substantive law, not make up their own substantive law. However, law school veterans will also recall that federal courts do not exactly mimic state law in every regard. They are generally free to apply their own procedural rules in diversity cases even though they look to state law on applicable rules of substantive law. Thus, federal courts must draw a divide between “procedure” and “substance,” somewhat akin to the distinction just described in state law cases. However, this distinction, mandated by Erie, is analytically

204. Restatement (Second) of Conflict of Laws § 138 (1971).
205. Restatement (Second) of Conflict of Laws § 139 (1988 Revisions).
206. Id. For a Massachusetts case applying the parol evidence standards of the state that provided the governing substantive law in a contracts case, see Metrics, Inc. v. Source Healthcare Analytics, Inc., No. 05479IBLS1, 2006 WL 3201065, at *1 (Mass. Super. Ct. Sept. 5, 2006).
207. Restatement (Second) of Conflict of Laws § 587 (1971).
208. See id. § 140 (parol evidence).
210. Id. at *2.
211. Id. at *3.
213. Id. at *1.
214. Id. at *2.
215. Id. at *3.
217. Restatement (Second) of Conflict of Laws § 139(2) (1988 Revisions).
218. Note that section 139 focuses on the place of the communication, not the crime for which the defendant is being prosecuted.
220. Id. at *1.
221. Id. at *2-*3.
222. Id. at *3.
223. Id.
224. Id.
different from that utilized by a state court deciding whether to apply local procedural rules to a case to which it applies another state’s substantive law.

Oceans of academic and judicial ink have been spilled in elucidating the distinction between “substance” and “procedure” under *Erie*. This article does not permit a rehearsal of that commentary. Significantly, for choice-of-law purposes, the crucial point is that a federal district court sitting in Massachusetts must apply the same choice-of-law rules that would be applied if the case were pending in a Massachusetts state court. In *Klaxon Co. v. Stentor Manufacturing Co.*,226 the Supreme Court held that, in order to assure uniformity of outcomes in diversity cases, federal courts should not only apply state substantive law in such cases, but must use the local choice-of-law rules to decide which state’s substantive law to apply. If a Massachusetts state court, applying its own choice-of-law rules, would apply the substantive law of Delaware, the Massachusetts federal court should do so as well. If, however, under Massachusetts choice-of-law rules, the Massachusetts state court would apply Massachusetts law, a federal diversity court must follow that regimen.

Occasionally, there may be issues which require a double “procedure v. substance” analysis in a federal diversity case. An example is the statute of limitations. Under *Erie* analysis, statutes of limitations are regarded as substantive, so a federal diversity court must apply state law to determine whether a claim is barred.227 However, a Massachusetts court facing a limitations issue in a case that has contacts with several states will apply section 142 of the *Second Restatement* to determine whether to apply the Massachusetts statute or look to another state.228 Thus, while the issue is “substantive” for *Erie* purposes, so that some state’s law must be applied, the Massachusetts court would do a “horizontal choice of law” analysis in deciding whether to apply its own limitations period or that of the other state. Thus, the federal court, after recognizing that it must look to state law on limitations, must echo the state court’s horizontal choice of law analysis in deciding which state’s limitations period applies. The crucial point is that *Erie* analysis and state choice-of-law analysis proceed from different premises, and should not be commingled.

**Conclusion**

As we urged at the conclusion of the first part of this article (but which bears repeating here), the SJC can take a step toward a more rational, predictable choice-of-law jurisprudence by explicitly adopting the *Second Restatement*, to the exclusion of any other methodology, for resolving conflict-of-laws issues. The court should specifically focus on applying the principles found in the topic and issue sections, in light of the basic policy factors in section 6(2), to determine the state of the most significant relationship to the issue.

Massachusetts decisions in cases involving choice-of-law clauses and limitations exemplify both how the *Second Restatement* should, and should not, be applied. In the context of limitations, the SJC’s decision in *Nierman* is inconsistent with the *Second Restatement* and could potentially result in valid cases being dismissed. In the future, the SJC should focus its initial inquiry in statute of limitations cases on whether Massachusetts has any substantial interest in a case, as required by section 142. Only after determining the commonwealth does not have a substantial interest should the analysis turn to which jurisdiction has a more significant relationship to the claim. Although it was overturned, the Appeals Court’s decision in *Nierman* was an example of the proper application of section 142.

By contrast, the courts have correctly used the *Second Restatement* in cases dealing with choice-of-law clauses. The case law in this area consistently applies each part of section 187, contributing to analytic consistency and enhancing predictability. Given the inherent complexity of choice-of-law problems, this may be the best that can be expected from a choice-of-law regime.

226. 313 U.S. 487 (1941).
228. See *supra* Part I. A.
Civil Practice — Contracts — Coercion or Duress

Cabot Corp. v. AVX Corp., 448 Mass. 629 (2007)

It is not news that a party to a contract may avoid performance (i.e., the contract becomes unenforceable) if entry into the contract was the product of duress.\(^1\) In Cabot Corp. v. AVX Corp.,\(^2\) a buyer of a rare metal that is needed to build electronic capacitors claimed economic duress and sought relief from its contract with a seller of the metal. A superior court judge denied the relief and found the contract between the parties to be binding. The Supreme Judicial Court (“SJC”) affirmed. What makes the Cabot opinion particularly worthy of interest is its exegesis of the proposition that gaining an advantageous contract through tough bargaining, backed by superior market power, is not an imposition of coercion or duress.

Duress may occur by physical compulsion.\(^3\) In Andreini v. Hultgren,\(^4\) for example, a surgeon told his patient that he would not perform an operation that the patient needed urgently unless the patient first signed a form that released both the surgeon and the hospital in which the surgeon was operating from any liability. At the time of this demand, the patient was gowned and prepped for surgery. He signed the release. In a subsequent malpractice claim against the surgeon and the hospital, the defendants argued the force of the release. On those facts, the Supreme Court of Utah held, there was sufficient evidence to allow a jury to decide that the surgeon’s refusal to operate without a release was a threat that left the patient with no reasonable alternative to signing the contractual document thrust before him.\(^5\)

The subject of the Cabot opinion is economic duress, of which the elements are: (1) one side involuntarily accepts the terms of another; (2) in circumstances that permitted no alternative; and (3) those circumstances were the result of the coercive acts of the opposite party.\(^6\) Urban Plumbing & Heating Co. v. United States,\(^7\) provides an illustration. There, a government contracting officer without justification declared a contractor in default and said he would terminate the contract unless the contractor signed a supplemental agreement waiving a right to claim extra costs caused by the government’s delay.\(^8\) The contractor faced certain ruinous loss — at that point he was already significantly into the job — unless he submitted to the government’s extortiante demand.\(^9\)

FACTS OF THE CABOT CASE

Both AVX Corporation (“AVX”) and Cabot are large publicly traded companies.\(^10\) AVX makes capacitors for products such as computers, cell phones, pacemakers, and military products. A vital ingredient in those capacitors is tantalum powder. Tantalum is a rare element metal. Cabot mines it in Canada and Australia and, at the times pertinent to the case, Cabot produced about 50 percent of the world’s processed tantalum. Although scarce, the market for tantalum has gone through periods of high demand and high prices, followed by overproduction and falling prices.\(^11\)

Cabot holds a patent on a process for making flake tantalum powder, precisely what AVX needs for a significant line of capacitors that it manufactures.\(^12\) AVX had for years bought tantalum products from Cabot, although Cabot was not a sole supplier. Annually, AVX and Cabot signed a letter of intent that set out AVX’s anticipated needs for tantalum products for the next year and the prices Cabot would charge during that period.\(^13\)

In the late 1990s, Cabot pressed for, and AVX resisted, “take or pay” contracts under which the buyer would be bound to pay for a specified quantity of a product, whether it took delivery or not. As to one of ten products covered in a letter of intent between Cabot and AVX in February, 2000, however, a take or pay clause appeared. Late in 2000, demand for tantalum soared and so, in consequence, did the prices for it. Cabot notified all its customers that it would allocate its limited supply to those who entered into long term contracts.\(^14\)

Some three months of negotiations, during which AVX and Cabot were backstopped by competent counsel, culminated in a memorandum of agreement about the terms of a five-year contract. The prices agreed upon did not exceed the market. AVX demanded

5. Id. at 920-22.
8. Id. at 384-85.
11. Id. at 630-31.
12. Id. at 631.
13. Id.
14. Id. at 632-33.
and received “most favored customer” protection. AVX’s president dispatched an email to a Cabot negotiating partner: “I think we have a fair agreement for both parties … hope you agree.” In January, 2001, the parties executed a detailed written contract, a core provision of which was that AVX would buy a specified quantity of tantalum powder and wire at specified prices. 15

Although it bought $342,809,000 worth of tantalum products from Cabot under the contract, including $6,000,000 of price reductions under the most favored customer provision, AVX in July, 2002, initiated an action in the United States District Court seeking to have the supply contract with Cabot declared void on the ground that AVX had signed it under duress. That action was dismissed for lack of diversity of citizenship. Cabot fired the next shot in March, 2003, with an action in superior court that, among other things, sought a declaration that the supply contract of January, 2001, was enforceable. AVX raised the defense of coercion, namely that Cabot had taken “advantage of its market position in the face of a tantalum shortage which it knew was only temporary to coerce AVX into executing” the supply contract. A judge of the superior court (van Gestel, J.) determined that AVX had not been coerced into the contract, and ordered entry of final judgment in favor of Cabot. 16

In affirming, the SJC took pains to say that economic Darwinism has a lawful place in commerce. A party with strong market position (as Cabot had) that possesses a scarce commodity which its contracting opposite needs, may use its advantage to drive a bargain that the opposite number finds hard, at best, and verging on ruinous, at worst. 17 Exercise of economic leverage is the norm in commerce. What converts economic muscle into economic coercion are acts of the muscular party that create the disadvantaged status of the other party in the first place. For example, had Cabot refused to deliver tantalum to AVX in accordance with the existing January, 2001 contract unless AVX signed a new contract with terms more favorable to Cabot and more onerous to AVX — that would constitute economic duress. Indeed, such a scenario much resembles the facts of Urban Plumbing & Heating Co. v. United States. 18 Economic arm twisting, the authorities appear to agree, is legally tolerable; threatening to break the arm is not.

Assuming a set of facts that make out a case of economic duress in the run up to contract formation, the party subjected to coercion must complain promptly if it proposes to have the contract declared void. 19 Failure to do so constitutes ratification of the contract. Concern for the stability and reliability of contracts underlies the rule. The “weaker party” may not have a “heads I win, tails you lose” option of waiting to see how the arrangement works out and then deciding whether to seek to undo it. 20

The SJC invoked the de facto ratification principle as an alternative ground for judgment in favor of Cabot. AVX had cheerfully operated under the January, 2001, contract for 18 months before complaining of duress in the formation of that contract. Indeed, while the demand for its capacitors was strong, AVX had pressed Cabot for delivery of tantalum products in the quantities, prices, and time intervals provided for in the 2001 contract. AVX also made sure that it received the benefit of the “most favored customer provision” in the supply contract. 21

The Cabot opinion collects authorities and restates when a claim of economic duress lies and places the bar where it belongs — fairly high.

Rudolph Kass

15. Id. at 633–34.
16. Id. at 635–36.
17. Id. at 639; see also VKK Corp. v. Nat’l Football League, 244 F.3d 114, 123 (2nd Cir. 2001).
21. Id. at 645–46.
Criminal Law — Peremptory Challenges — Racial Composition of Jury


INTRODUCTION

[The trial judge must determine whether to draw the reasonable inference that peremptory challenges have been exercised so as to exclude individuals on account of their group affiliation. Although decisions of this nature are always difficult, we are convinced that trial judges, given their extensive experience with jury empanelment, their knowledge of local conditions, and their familiarity with attorneys on both sides, will address these questions with the requisite sensitivity.]

“[A]gain we rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories (sic) from sham excuses belatedly contrived to avoid admitting facts of group discrimination.” So said the Supreme Judicial Court (“SJC”) in the landmark Commonwealth v. Soares decision in 1979.

In 2007, Commonwealth v. Benoit, a murder case, was tried before “a highly experienced trial judge” infinitely familiar with local conditions and the attorneys on both sides, including the highly experienced prosecutor who was the first assistant district attorney. During jury empanelment, the prosecutor used a peremptory challenge on a prospective black juror who made statements that led the prosecutor to believe that this juror might decide the case at bar on issues other than the evidence itself. After hearing the parties on the record and requiring the prosecutor to state his reasons for the challenge, the trial judge upheld the challenge, over defense counsel’s objection, finding on the record that “the Commonwealth’s reasons for challenge is [sic] not race based. That there are race neutral reasons which the Commonwealth has articulated which justify the challenge.” Although the prosecutor’s challenge seemed to be entirely consistent with the prior challenges that he had exercised as to other jurors, a 4-3 majority of the SJC inserted itself into the trial process, and made its own determinations of fact based on a stale, lifeless written record, without the benefit of having been present and without familiarity with the parties or local conditions. In doing so, the court reversed a second-degree murder conviction based upon “credibility determinations on a written record years and miles removed from the trial.” The reversal of this murder conviction on the state of this particular record seems unfair to the prosecution and the trial court, and it once again demonstrates the need for the SJC to adopt a more firm, precise standard for trial courts to follow in addressing the factual and constitutional validity of peremptory challenges. Alternatively, Benoit once again raises the issue as to whether the legislature or the SJC should consider the abolition of peremptory challenges once and for all.

FACTS

The defendant was tried for murder in the first degree. The defendant was black and 17 years old; the victim was white and 18 years old. Because the issue of race was likely to arise as an issue at trial, individual voir dire of prospective jurors was required. The defendant was convicted after trial of murder in the second degree.

The appeal centered on the issues of self-defense and the prosecutor’s peremptory challenges — in particular, his challenge of one of the two black jurors in the venire, who at the time of the relevant individual voir dire, was the sole black juror remaining on the venire. The prosecutor used his peremptory challenges on the following jurors:

Juror 3 informed the trial court that she was a victim of rape committed by her husband; that the case against her husband did not go forward; that she had obtained restraining orders in the past; that she had been the victim of violence; that she “kind of” knew the victim; and that she was a friend of the mother of the victim’s

2. Id. at 491 (quoting People v. Wheeler, 22 Cal. 3d 258, 282 (1978); see also Commonwealth v. Curtiss, 424 Mass. 78, 82 (1997) (quoting Commonwealth v. Fruchtman, 418 Mass. 8, 15, cert. denied, 513 U.S. 951 (1994) (“Sorting out whether a permissible or impermissible reason underlies a peremptory challenge is the function of the trial judge, and we do not substitute our judgment for his if there is support for it on the record.”)).
5. Id. at 180-83.
7. Id. at 226, n. 10 (majority opinion).
8. Id. at 213.
9. Id.
10. Id. at 214.
11. Id. at 213.
12. Id. at 214-17. Curiously, and perhaps disturbingly, the prosecutor on appeal twice attempted to address the issue of the alleged race-based peremptory challenge — the issue on which the SJC ultimately reversed the murder conviction — at the April 9, 2008 oral argument, but was precluded from doing so. Rather, the SJC focused at oral argument on the issue of self-defense, evidence of “prior attack,” and “retreat.” See Oral Argument, Commonwealth v. Benoit, 452 Mass. 212 (2008), available at http://www.suffolk.edu/sjc/archive/2008/SJC_10120.html. While the SJC obviously has great discretion in this regard, the reversal of a second-degree murder conviction without affording the commonwealth the benefit of oral argument on the issue seems unfortunate at best, particularly where an allegation of the commonwealth’s discriminatory motive or action is being reviewed and evaluated.
Juror 31 stated in her questionnaire that her husband, now 55 years of age, “was involved in a matter when he was 17 years old;” that her son was involved in an assault and battery for which he received a continuance without a finding; and that her grandfather was a police officer in Northampton, Massachusetts. The commonwealth exercised a peremptory challenge of this prospective juror.

Juror 41 indicated that she grew up with disabilities — dyslexia and muscle tightness. The commonwealth exercised a peremptory challenge of this prospective juror.

Juror 43 told the court that her son currently worked as a correctional officer at the “jail” in Berkshire County; that “I am not really comfortable being in courtrooms, and I’m just not comfortable. I put myself in courtrooms and I just don’t feel comfortable about being in them;” that the only previous time she had been in the courtroom was when she was previously charged with “an OUI;” that she “did not feel comfortable about a lot of things;” that “I just, myself, am uncomfortable with the issue;” and that although she was uncomfortable with courtrooms, that fact would not affect her being a fair and impartial juror. The commonwealth exercised a peremptory challenge of this prospective juror.

Juror 47 had heard about the case from her husband and stated that “there was a lot of stabbing going on;” that “[i]t’s easy to get stressed out over stuff like that;” that, when asked whether she could judge the case based upon what she heard in the courtroom as opposed to what she read in the paper, “[m]aybe, but I really wish I wouldn’t have to do it.” She then mentioned the issue of “stress” for the second time. Asked again if she could judge the case based upon what she read and heard in the courtroom throughout trial, she replied, “I think so.” After the court found her to be “indifferent,” the prosecutor asked the court to inquire as to her work as a teacher’s assistant at the “Kolburne School” and stated further that he was “concerned … Obviously, she doesn’t want to do this because she gets stressed out. My fear is that stressed out factor and how stressed out does she get.” Asked about the stress issue by the trial judge, Juror 47 responded, that she was getting older, didn’t like violence, and that sometimes “people go overboard with violence;” that she would “talk it over with the other jurors and see, should we put, prosecute this person … ;” that she had previously served as a juror in one case involving drugs and in another case involving sexual assault, in which she “got [her]self together, but [she] felt sorry for the girl;” and that in the prior case, the defendant “raped the child … He was living in the home. It was sick.” The prosecutor then used a peremptory challenge on Juror 47. Defense counsel asked the court to “have a moment” and then objected to the challenge. The trial judge asked the commonwealth to respond to the objection. The prosecutor stated as follows:

Your Honor, I would suggest to the Court that this is a proper challenge. It’s not one that I make lightly because I have obviously anticipated this objection may be raised, which is why I asked the Court to make further inquiry. I do have some concerns with her responses in terms of sympathy for parties, understandably based upon her occupation. The fact that she made a reference to a prior case where she said she actually had sympathy for one of the parties, or one of the principals, I should say, in that case, causes me some concern in this respect. I think she even volunteered what her thinking process would be in terms if she would go back to the jury and ask, ‘Should we prosecute this?’ She didn’t finish the sentence, but I think that causes me some hesitation as well as to the question is not, should she prosecute it, obviously, the question is whether or not the facts have been presented and the

The peremptory challenge at issue actually involved Juror 47.
Commonwealth has satisfied its burden. I think those reasons, Your Honor, give the Commonwealth legitimate cause to exercise a peremptory challenge.32

Significantly, defense counsel did not dispute any of the prosecutor’s reasons, and, in fact, acknowledged that Juror 47 had expressed sympathy for a party in a previous case.33

The trial judge felt “constrained” to find that a so-called “pattern” existed because of the challenge of the only African-American juror who was not excused earlier, but was “satisfied that The Commonwealth’s reasons for challenge is not race based. That there are race neutral reasons which The Commonwealth has articulated which justify the challenge. Therefore the objection is overruled.”34

Discussion

In Benoit, the SJC reiterated the seemingly well-known yet inconsistently applied standards concerning alleged race-based peremptory challenges. The use of peremptory challenges to exclude prospective jurors solely because of bias presumed to derive from their membership in discrete community groups is prohibited by both article 12 of the Massachusetts Declaration of Rights and the equal protection clause of the United States Constitution.35 Although there is a presumption of proper use of peremptory challenges, that presumption may be rebutted by a showing that (1) there is a pattern of excluding members of a discrete group; and (2) there is a likelihood they are being excluded from the jury solely by reason of their group membership.36 A peremptory challenge of the only member of a discrete group may establish a prima facie showing of impropriety.37 Sorting out whether a permissible or impermissible reason underlies a peremptory challenge is the function of the trial judge, and the appellate courts will not substitute their judgment for his if there is support for it on the record.38

More specifically, when a claim is made that a party used a peremptory challenge to exclude a member of a protected class, the trial judge is required to make a finding as to whether the requisite prima facie showing of impropriety has been made.39 If the trial judge makes such a finding, the burden shifts to the party who exercised the peremptory challenge to provide a specific, group-neutral reason for the peremptory challenge. General assertions are not enough: the challenging party must offer clear and reasonably specific explanation of the “legitimate” reasons for exercising the challenges.40 After the challenging party makes its proffer, the trial judge must make an independent evaluation of the proffered reasons and determine specifically whether the explanation was “bona fide or a mere sham.”41 The trial judge retains wide discretion to distinguish between bona fide and sham excuses. “The distinction here drawn is between good and bad faith, not good and bad explanations.”42

Massachusetts appellate courts have traditionally deferred to trial counsel’s reasons concerning a juror’s demeanor and reactions.43 More recently, however, the SJC has restricted its definition of acceptable justifications by stating that “[c]hallenges based on subjective data such as juror’s looks or gestures, or a party’s ‘gut’ feeling should rarely be accepted as adequate because such explanations can easily be used as pretexts for discrimination.”44 Ironically, however, the SJC has also recently held that in evaluating the genuineness of a peremptory challenge, “[t]he prosecutor’s own demeanor — the furriness of a glance, the hesitation in giving a response, or the frantic reading of the juror questionnaire before proffering an explanation may provide valuable clues as to whether even a sound reason for challenge is genuine or merely a post hoc justification for an impossibly motivated challenge.”45 In other words, trial judges are instructed to carefully view and evaluate a prosecutor’s (or challenging attorney’s) demeanor, gestures, and hesitation in evaluating the genuineness of his or her statements and actions; yet are instructed to rarely accept peremptory challenges based upon a prospective juror’s demeanor, gestures, and hesitation. Why trial judges are properly stationed to evaluate the legitimacy of the former, but not the latter, seems inconsistent and difficult to comprehend.

To the 4-3 majority in Benoit, the case centered on the issue of whether the prosecutor’s reasons for the challenge were indeed “bona fide” and whether the trial judge’s analysis of these reasons constituted a sufficiently meaningful consideration and independent evaluation thereof.46 The SJC again explained, as it had in Commonwealth...
v. Maldonado five years earlier, why a specific determination by the trial judge on this subject is essential:

“The determination whether an explanation is ‘bona fide’ entails a critical evaluation of both the soundness of the proffered explanation and whether the explanation (no matter how ‘sound’ it might appear) is the actual motivating force behind the challenging party’s decision ... In other words, the judge must decide whether the explanation is both ‘adequate’ and ‘genuine.’ ...”

“An explanation is adequate if it is ‘clear and reasonably specific,’ ‘personal to the juror and not based on the juror’s group affiliation’ (in this case race) ... and related to the particular case being tried .... Challenges based on subjective data such as a juror’s looks or gestures, or a party’s ‘gut’ feeling should rarely be accepted as adequate because such explanations can easily be used as pretexts for discrimination ... An explanation is genuine if it is in fact the reason for the exercise of the challenge. The mere denial of an improper motive is inadequate to establish the genuineness of the explanation ... .

“... On appeal, the appellate court must be able to ascertain that the judge considered both the adequacy and the genuineness of the proffered explanation, and did not conflate the two into a simple consideration of whether the explanation was ‘reasonable’ or ‘group neutral.’ While the soundness of the proffered explanation may be a strong indicator of its genuineness, the two prongs of the analysis are not identical. The appellate court must also be able to ascertain that the consideration afforded to both adequacy and genuineness was itself adequate and proper ... Finally, while appellate courts may be equipped to some extent to assess the adequacy of an explanation, they are particularly ill-equipped to assess its genuineness ... For these important reasons, it is imperative that the record explicitly contain the judge’s separate findings as to both adequacy and genuineness and, if necessary, an explanation of those findings.”

With that standard in mind, the SJC analyzed the prosecutor’s challenges and the trial judge’s findings. The majority first found that the trial judge’s request for an explanation from the prosecutor constituted an implicit finding of a pattern of improper exclusion. The majority then explored the prosecutor’s proffered justification and analyzed whether the trial judge made a “specific determination” or “specific findings, in some form, that the prosecutor’s proffered justification was both adequate and genuine.”

An explanation is genuine if it is in fact the reason for the exercise of the challenge. The mere denial of an improper motive is inadequate to establish the genuineness of the explanation. An explanation that is perfectly reasonable in the abstract must be rejected if the judge does not believe that it reflects the challenging party’s actual thinking.

In Benoit, when asked by the trial court about the challenge of Juror 47, the prosecutor stated:

[T]his is a proper challenge. It’s not one that I make lightly because I have obviously anticipated this objection may be raised, which is why I asked the Court to make further inquiry. I do have some concerns with her responses in terms of sympathy for parties, understandably based upon her occupation. The fact that she made a reference to a prior case where she said she actually had sympathy for one of the parties, or one of the principals ... causes me some concern in this respect ...”

Critically, the prosecutor incorporated into his reasoning the reference to his concerns with the juror’s occupation, her “responses in terms of sympathy for parties,” and her reference to a prior case. These were issues that the prosecutor had previously raised and expressed to the trial judge, along with his explicit concern that “[o]bviously” Juror 47 “doesn’t want to do this because she gets stressed out. My fear is that stressed out factor and how stressed out does she get.”

The trial judge, having observed Juror 47, heard her responses, observed her demeanor and the manner in which she responded to his questions, and hearing the prosecutor’s explanations, unequivocally stated that he was “satisfied that The Commonwealth’s reasons for challenge is [sic] not race based. That there are race neutral reasons which The Commonwealth has articulated which justify the challenge.” In other words, the trial judge found that the explanation was adequate (i.e. “race neutral reasons which justify the challenge”) and genuine (i.e. “not race based”). This should have ended the inquiry on appeal. As noted by Justice Judith Cowin’s strong dissent (with whom Justices John Greaney and Francis Spina joined), there is nothing in the record “that shows the trial judge’s implicit belief in the genuineness of the prosecutor’s stated reasons to be clearly erroneous. The record also supports, as a matter of law, that the stated reasons are reasonable ones, and sufficient to justify the removal of this particular juror.”

Despite the trial judge’s specific determination, the SJC majority found that the record did not permit the court to ascertain that the trial judge gave “meaningful consideration” to adequacy and genuineness; that the trial judge simply stated conclusions; and that the trial judge never clarified to which of the prosecutor’s reasons he was

47. Id. at 219-20 (citations omitted) (quoting Maldonado, 439 Mass. at 464-66).
49. Id. at 221 (citing Maldonado, 439 Mass. at 464-66).
50. Maldonado, 439 Mass. at 465 (citing Commonwealth v. LeClair, 429 Mass. 313, 323 (1999)) (affirming judge’s disallowance of peremptory challenge after he “determined that it was disingenuous”).
52. Benoit, 452 Mass. at 217.
55. Id.
56. Id. at 235 (Cowin, J. dissenting, with whom Greaney and Spina, JJ. join).
referring when he found them to be "race neutral." Accord-
ingly, the SJC majority did not give deference to the trial judge's findings, and considered for itself the adequacy and genuineness of the prosecutor's stated reasons. The SJC majority's failure to defer to the trial judge's findings is surprising and effectively creates a new standard. First, the court ignores the oft-cited language of Soares and its progeny, which reminds appellate courts that "[s]orting out whether a permissible or impermissible reason underlies a peremptory challenge is the function of the trial judge, and we do not substitute our judgment for his if there is support for it on the record." 

[W]e are convinced that trial judges, given their extensive experience with jury empanelment, their knowledge of local conditions, and their familiarity with attorneys on both sides, will address these questions with the requisite sensitivity 

. . . [W]e rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories (sic) from sham excuses belatedly contrived to avoid admitting facts of group discrimination. 

Second, the court ignores its own reminder in Maldonado that "while appellate courts may be equipped to some extent to assess the adequacy of an explanation, they are particularly ill-equipped to assess its genuineness." In view of the record created by the prosecutor and the trial judge on questions of fact, it is difficult to see how the SJC could have found the trial judge's ruling to be "clearly erroneous." Finally, although the SJC had previously held that a trial judge must determine whether the proffered reason for the challenge was legally adequate and genuine, the SJC had neither previously held, nor required, that a trial judge provide specific subsidiary findings of fact on the adequacy and genuineness of peremptory challenges. "Indeed, Maldonado says as much where it calls for 'findings as to both adequacy and genuineness and, if necessary, an explanation of these findings."

The majority in Benoit found this to be a case where such an explanation was necessary. The majority essentially mandates that trial judges make specific subsidiary findings on the record, and essentially repeat the issues just raised by the challenging party moments earlier. Undoubtedly, the repetition of the prosecutor's concerns and justifications by the trial judge would have created a cleaner record, but such an exercise seems to exalt form over substance. As noted by the dissent, "[t]he prosecutor's reasons are spread verbatim on the record, and I remain unpersuaded that anything meaningful is gained by requiring that the trial judge repeat them."  

In short, based on Juror 47's repeated references to stress, violence, sympathy in a prior case, and "wish" not to serve as a juror, the record seemingly supports the finding that the trial judge saw a hesitant, uncomfortable potential juror who expressed a potential to decide a case on outside influences apart from the courtroom evidence. Nonetheless, despite the trial judge's experience, familiarity with jury empanelment, familiarity with the First Assistant District Attorney, and benefit of observing the proceedings and viewing the reluctance and uncertain demeanor of the prospective juror, the SJC found that no deference to his specific findings was warranted. In so doing, the majority chose "to insinuate [itself] unnecessarily into the process, making credibility determinations on a written record years and miles removed from the trial. Neither Soares nor Maldonado require this."

Having concluded that no deference to the trial judge was warranted, the SJC majority next found that the prosecutor's reasons were illogical and did not qualify as valid, race-neutral reasons. Contrary to the majority's finding, the record strongly supports a finding that the challenge of Juror 47 was adequate and genuine.

The prosecutor expressed concern at Juror 47's repeated expression of "stress;" concern over Juror 47's expression of sympathy for parties in a prior case; and concern related to Juror 47's employment background, which involved working with children with learning disabilities, particularly where — as noted by the prosecutor — there has been a motion to suppress in this case that raised an issue concerning the particular mental abilities of the defendant. Viewed in the context of the prosecutor's other peremptory challenges, the record readily reflects that the challenge of Juror 47 was understandable, reasonable, and genuine. All six peremptory challenges shared common threads: the prosecutor challenged jurors who reasonably may have been perceived to be sympathetic to one party or the other; who gave specific indications that they were uncomfortable acting as a juror; or who demonstrated an inclination or potential to evaluate the case on something other than the facts themselves, such as sympathy, bias, stress, or fear.  Prospective Jurors 31 and 43 had family members who worked in law enforcement.  Prospective Jurors 3, 43, and 63 had prior involvement in the court system as victims or as defendants.  Prospective Juror 31 had family members previously involved in the court system in criminal matters.  Prospective Jurors 43 and 47 explicitly referenced a lack of comfort, stress, and a desire not to serve as jurors in this matter, while prospective Juror 41 expressed a physical history that likewise suggested a potential physical lack of comfort in sitting attentively at a trial.  Finally, 

57. Id at 222 (majority opinion).  
58. Id. at 223.  
60. Soares, 377 Mass. at 490-91 (quoting People v. Wheeler, 22 Cal. 3d 258, 282 (1978)).  
62. See Benoit, 452 Mass. at 231 (Cowin, J. dissenting, with whom Greaney and Spina, J. join).  
63. Id. at 232 (citing Maldonado, 439 Mass. at 466).  
64. Id. (quoting Maldonado, 439 Mass. at 466).  
65. Id. at 222 (majority opinion).  
66. Id. at 233 (Cowin, J. dissenting, with whom Greaney and Spina, J. join).  
68. Benoit, 452 Mass. at 235 (Cowin, J. dissenting, with whom Greaney and Spina, J. join).  
69. Id. at 223-26 (majority opinion).  
71. Id. at 107-09, 142-43, 160-61, 165-67, 171-80.  
72. Id. at 143, 165.  
73. Id. at 53-55, 165-66, 211.  
74. Id. at 142.  
75. Id. at 160.
prospective Jurors 3 (prior victim of violent crime and knowledge of the victim and the victim's family), 43 (expressed lack of comfort in court, lack of comfort with the issue, and prior charge against her in criminal matter), and 47 (expressed sympathy for the victim in a prior case on which she sat as a juror, indicated that she worked at the Kolburne School for children with learning disabilities, and expressed stress related to the facts of the case at hand) expressed a sentiment or past experience in the courtroom or the court system that suggested a potential tendency to weigh the case on something other than the evidence — i.e. emotion, sympathy, or bias.76 In short, the prosecutor acted reasonably and consistently in his approach to jury empanelment.

The SJC majority’s rejection of the genuineness of the prosecutor’s justifications seems flawed in that it considers the prosecutor’s reasoning in a vacuum, ignores the pattern of conduct by the prosecutor, narrows its evaluation of the prosecutor’s challenge to Juror 47 only, and fails to conduct a juror-by-juror analysis akin to the analysis above. Unlike the trial judge, who was able to observe all of the challenges, view the demeanor and responses of all of the prospective jurors, and view the conduct of the attorneys during empanelment, the SJC majority narrowly focused on its subjective view of this one challenge, in isolation, via a stale transcript. Viewed as a whole, none of the peremptory challenges stands out as unreason-able or pretextual. On the contrary, the record reflects the actions

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76. Id. at 53-55, 107-09, 142-43, 160-61, 165-67, 171-80.

77. See Commonwealth v. Smith, 387 Mass. 900, 909-10 (1982) (verdict must be based on evidence and not sympathy); Commonwealth v. Fitzgerald, 376 Mass. 402, 424 (1978) (verdict may not be based on sympathy for victim or irrelevant general considerations); see also Massachusetts Criminal Model Jury Instructions, Function of the Jury, http://www.mass.gov/courts/courtsandjudg-es/courts/districtcourt/jury-instructions/criminal/index.html (“Your function as the jury is to determine the facts of this case. You are the sole and exclusive judges of the facts. You alone determine what evidence to accept, how important any evidence is that you do accept, and what conclusions to draw from all the evidence. You must apply the law as I give it to you to the facts as you determineme to be, in order to decide whether the Commonwealth has proved the defendant guilty of this charge (these charges). You should determine the facts based solely on a fair consideration of the evidence. You are to be completely fair and impartial, and you are not to be swayed by prejudice or by sympathy, by personal likes or dislikes, toward either side. You are not to allow yourselves to be influenced because the offense(s) charged is (are) popular or unpopular with the public. You are not to decide this case based on what you may have read or heard outside of this courtroom. You are not to engage in any guesswork about any unanswered questions that remain in your mind, or to speculate about what the ‘real’ facts might or might not have been.”).

78. See, e.g., Commonwealth v. Beal, 429 Mass. 530, 535 n. 4 (1999) (noting that prosecutors are bound by an ethical duty not to engage in “keeping themselves willfully ignorant of potentially exculpatory conduct” because it will dam-age prosecution’s case); Commonwealth v. Smith, 387 Mass. 900, 905 (1983) (noting, in context of murder case involving gruesome facts, that “prosecutor owed a particular care in discharging his duty to seek justice and not merely a conviction”); Commonwealth v. Tabor, 376 Mass. 811, 817 n. 10 (1978) (in juxtaposing prosecutor’s obligations with private counsel’s, court noted that it is well established that district attorney’s responsibility is to seek justice to protect the innocent as well as to convict the guilty, whereas private attorney has obliga-tion to zealously represent his client and to seek to resolve all questions in favor of his client); Commonwealth v. Lorenzetti, 48 Mass. App. Ct. 37, 45 (1999) (Brown, J. dissenting) (in context of improper closing argument, appellate judge admonished prosecutors “to adhere earnestly to the requisite ethical and professional standards and to make a good faith attempt to cause the trial to be as fair as possible”); Commonwealth v. Amidon, 44 Mass. App. Ct. 338, 339 n. 4, S.C., 428 Mass. 1005 (1998) (in case involving rule 36 delay, court noted that “a prosecutor has the responsibility of a minister of justice and not simply that of an advocate … prosecutors have a duty ‘to seek justice, not merely to convict’”); Commonwealth v. Muse, 35 Mass. App. Ct. 466, 472 (1993) (Brown., con-curring) (noting commonwealth’s responsibility “to strive earnestly to produce as close to an impeccable trial as is possible.”); Commonwealth v. McLeod, 30 Mass. App. Ct. 536, 541 n. 10 (1991) (“the plea for prosecutors (and all parties) to steer clear of unnecessary error and to strive for a fair trial has been made on numerous occasions.”).

79. Benoit, 452 Mass. at 234 (Cowin, J. dissenting, with whom Gready and Spina, JJ. join).

80. Id.; see also Trial Transcript at 108-09, 143, 165, 199-200, 208-09, Commonwealth v. Benoit, 252 Mass. 212 (2008) (No. SJC-10120) (trial transcript reflects that prosecutor struck two jurors who had familial ties to law enforce-ment, and objectively could have had tendency to support commonwealth’s case based upon that predisposition; struck juror who was victim of violent crime herself, and could have been predisposed to support prosecution; did not strike Juror 55 whose husband had been convicted of drug offense and was sentenced to jail; and did not challenge Juror 61 whose daughter was facing charges in juvenile court on drug case).

81. See Benoit, 452 Mass. at 224 (majority opinion) (SJC majority, in criticizing dissent’s analysis, stated that “it is not up to a reviewing court to conjure up a set of possible, theoretically permissible, reasons to support an unexplained or insufficiently explained peremptory challenge.”). In view of the SJC majority’s refusal to defer to the findings of the trial judge, it is arguably the SJC majority that conjures up theoretical race-based notions for the peremptory challenge at issue in Benoit.

Conclusion

The SJC majority’s effort in Benoit to protect the right to a fair jury is laudable in that Massachusetts courts should do everything in their power to eliminate any effort, subtle or explicit, to exclude jurors on the basis of race. There is no question that the right to be tried by a jury drawn from a representative cross-section of the community is crucial because it promotes diversity and impartiality that affords juries a range of human experience to utilize in their
fact-finding and truth-seeking mission; it is “consistent with our democratic heritage,” and is “critical to public confidence in the fairness of the criminal justice system.”82 At the same time, the SJC has cautioned courts against seeking to construct a demographically correct jury.83 As one study on juries and Soares-type peremptory challenges noted:

[In the end, what is at stake is whether we want jurors to understand their task primarily in terms of deliberation or representation. The deliberative ideal is preferable. Jurors recruited randomly from different corners of the community may never be able to practice perfectly the deliberations we ask of them. But we know at least why we cherish the jury when it aspires to act as the common conscience of the community and not just as the register of our irreconcilable divisions.]

The majority decision in Benoit implicitly tends toward favoring the so-called representative ideal of juries rather than the deliberative ideal. This may not be the SJC’s point, but there is a tension between these two ideals that manifests itself in a frustrating and inconsistently applied area of law, as Benoit so clearly demonstrates. On the one hand, Massachusetts appellate courts theoretically give trial judges ample discretion to decide the validity and genuineness of peremptory challenges. On the other, the majority in Benoit seemed all too willing to find ambiguities in the trial judge’s findings or to disregard such findings, in a commendable, but legally inconsistent, effort to craft a more diverse jury. Despite the SJC’s repeated efforts, Massachusetts courts continue to struggle with their ability to satisfy the mandate of Article 12 of the Massachusetts Declaration of Rights. As evidenced by yet another 4-3 decision in this area of law, there is a disconnect in terms of what is expected from trial judges. The majority eschews the notion that some set of “magic words” is necessary to justify an alleged race-based peremptory challenge.85 Yet, the trial judge’s “specific determination”86 that the prosecutor’s justification was both adequate and genuine — i.e. a verbal finding on the record that (1) the commonwealth provided “race neutral reasons which . . . justify the challenge,” and (2) the commonwealth’s reasons were “not race based” — was held to be insufficient.87 The majority stands firm on its holding that subsidiary findings of fact are not necessary; yet it still rejected the trial judge’s determination in this case on the substantial record set out above. The bottom line is that the majority decision in Benoit yet again undercuts the presumption of proper use of peremptory challenges and trial judges’ discretion to sort through permissible and impermissible challenges.

As Chief Justice Margaret Marshall, joined by Justices Greaney and Spina, stated in her concurring opinion in Maldonado:

This case illustrates, once again, the difficulties confronting defense counsel and prosecutors, Massachusetts trial judges and appellate courts, who struggle to give meaning to the constitutional mandate that a jury be drawn from a fair and representative cross-section of the community. . . . “[R]ather than impose on trial judges the impossible task of scrutinizing peremptory challenges for improper motives,” it is time either to abolish them entirely, or to restrict their use substantially.88

Chief Justice Marshall, Justice Greaney, and Justice Spina reaffirmed this view in Benoit.89 Insofar as peremptory challenges are a creature of statute,90 the solution presumably lies in the hands of the legislature, absent a conclusion that the statute is unconstitutional.91 In view of the SJC’s shift away from the tenets of Soares, which afford trial courts broader discretion than that contemplated now under Benoit and Maldonado, the invitation to eliminate peremptory challenges in their entirety looms as a drastic, but perhaps inevitable, solution. Nevertheless, peremptory challenges have long stood as “one of the most important of the rights secured to the accused,”92 and as an important right to the government, which is similarly entitled to a jury not unfairly biased in favor of acquittal.93 Accordingly, the theoretical abrogation or limitation of peremptory challenges raises enormous practical consequences, too varied and substantial to delineate here. In either case, Benoit stands for the proposition that despite years of argument, analysis, and precedent, sorting through alleged race-based peremptory challenges persists as one of the most troubling issues of Massachusetts law.

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83. See, e.g., Commonwealth v. Wood, 389 Mass. 552, 564 (1983) (“despite the commendable efforts and sensitivity of the trial judge, the erroneous denial of the right to exercise a peremptory challenge is reversible error without a showing of prejudice.”); see also Commonwealth v. Curtiss, 424 Mass.78, 83-86 (1997) (Fried, J. dissenting) (“the trial judge, by manipulating what peremptory challenges he will or will not accept, may not seek to construct such a demographically correct jury.”).
85. Benoit, 452 Mass. at 231 (Cowin, J. dissenting, with whom Greaney and Spina, JJ. join).
86. Id. at 221.
87. Id. at 217.
89. 452 Mass. at 226 n. 10.
91. Id. at 235 (Cowin, J. dissenting, with whom Greaney and Spina, JJ. join).
Family Law — Subject Matter and Personal Jurisdiction for Divorce of Absent Spouse

Miller v. Miller, 448 Mass. 320 (2007)

INTRODUCTION

In the recent case of Miller v. Miller, the Supreme Judicial Court ("SJC") answered the reported question of whether the Massachusetts Probate and Family Court had personal jurisdiction over a non-resident husband pursuant to section 3(g) of chapter 223A of the General Laws, the Massachusetts long-arm statute. In doing so, the SJC clarified the law regarding personal jurisdiction in divorce matters when one spouse is domiciled out-of-state. The SJC held that the statute provides personal jurisdiction over an individual who is not domiciled in the commonwealth so long as that individual has committed an "act" in the commonwealth which gives rise to the stated claim for divorce. The SJC further held that a husband and wife conversation that occurs in the commonwealth may constitute such an "act" within the meaning of the statute because "in the marital context, the exchange of words between husband and wife often may be the sole act that leads one or both of them to conclude that the marriage is over." The Miller decision thus comports with the statute's history and intent to broaden the commonwealth’s protection of its domiciliaries by providing personal jurisdiction over a party not domiciled in the commonwealth.

Although personal jurisdiction was the sole reported question, the SJC also considered whether the trial court was correct in determining that it had subject matter jurisdiction over the case, that is, whether the husband committed any act in the commonwealth giving rise to the wife’s claim for divorce. The SJC held it would be a waste of judicial resources to leave the defendant’s question regarding subject matter jurisdiction unresolved.

I. MASSACHUSETTS PERSONAL JURISDICTION LAW

Chapter 223A, section 3(g) of the General Laws addresses personal jurisdiction over non-resident defendants in divorce proceedings. This section of the statute was amended on January 13, 1994. The statute prior thereto read:

A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's

(g) living as one of the parties to a duly and legally executed marriage contract, with the marital domicile of both parties having been within the commonwealth for at least one year within the two years immediately preceding the commencement of the action, notwithstanding the subsequent departure of the defendant in said action from the commonwealth, said action being valid as to all obligations or modifications of alimony, custody, child support or property settlement orders relating to said marriage or former marriage, if the plaintiff continues to reside within the commonwealth.

The amended section reads:

A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person’s

(g) maintaining a domicile in this commonwealth while a party to a personal or marital relationship out of which arises a claim for divorce, alimony, property settlement, parentage of a child, child support or child custody; or the commission of any act giving rise to such a claim.

The prior version of section 3(g) required that the parties’ marital domicile be in Massachusetts for at least one year within the two years prior to the commencement of the divorce action and that the plaintiff reside in Massachusetts. The amended statute is much broader in that it does not include a residency time requirement, but instead requires a person to maintain a domicile in Massachusetts while party to a relationship out of which arises a claim for divorce, alimony or property settlement. In addition, the 1994 amendment added “personal” relationship to the statute’s language, whereas the previous version only included “marital” relationships. Finally, as addressed in Miller, the amended section 3(g) no longer requires that both the husband and wife be domiciled in Massachusetts on the date of the irretrievable breakdown of the marriage. The now much broader statute provides a second independent ground for

2. Id. at 320.
3. Id. at 329.
4. Id. at 331.
5. Id. at 332.
6. Id. at 325.
7. Id.
exercising personal jurisdiction over a non-resident party; when an individual commits an act in the commonwealth which gives rise to his or her spouse’s stated claim.\(^{36}\)

Both Akinci-Unal v. Unal\(^{27}\) and Windsor v. Windsor\(^{18}\) address section 3(g) and are briefly mentioned in Miller as the precedent that led the Miller probate and family court judge to report the case to the Appeals Court.\(^{19}\) The judge determined it was unclear which precedent applied to the facts in Miller.\(^{20}\) In Windsor, the Appeals Court held that the non-resident husband was not subject to personal jurisdiction in the wife’s Massachusetts divorce action, even though the parties had resided in the commonwealth for seven years, from 1959 to 1966, prior to residing in Florida for eleven years, from 1966 to 1977.\(^{21}\) In 1977, the wife left the husband in Florida and subsequently returned to Massachusetts and resided in the commonwealth for approximately 20 years before filing for divorce in 1995.\(^{22}\) The court held that there was no jurisdiction over the husband under section 3(g) because the wife failed to allege, much less establish at the time of the husband’s motion to dismiss for lack of personal jurisdiction,\(^{23}\) any facts or conduct by the husband during the parties’ earlier period of Massachusetts domicile that gave rise to the 1995 divorce.\(^{24}\)

In Akinci-Unal, the Appeals Court held that the trial court had personal jurisdiction over the non-resident husband despite his leaving Massachusetts and obtaining permanent residence in Bahrain, where he obtained a foreign divorce judgment and also another divorce judgment in Turkey.\(^{25}\) The Appeals Court determined that the lower court had jurisdiction pursuant to the long-arm statute because the husband maintained a domicile in the commonwealth while a party to a marital relationship and the wife’s economic claims for alimony and property allocation arose out of the marital relationship.\(^{26}\) The Appeals Court further held that “the claims for alimony and assignment of marital assets arise out of the existence of the marriage; while such claims may be triggered by the marriage’s dissolution, the wife’s rights are not a product of that dissolution but rather of the preceding marital status.”\(^{27}\) The court further rejected the husband’s res judicata defense as there was no previous determination with respect to the wife’s economic claims.\(^{28}\)

II. THE CASE

A. Facts and Procedural History

In Miller, the parties resided in Massachusetts for some time after their 1979 marriage until their 1989 relocation to Arizona.\(^{29}\) Of the four children born to the marriage, two were born in Massachusetts.\(^{30}\) In August 2004, due to the wife’s health issues, the wife and the parties’ four children moved back to Massachusetts after the wife accepted employment in Massachusetts.\(^{31}\)

In February 2005, the wife filed for divorce in Massachusetts pursuant to section 1B of chapter 208 of the General Laws.\(^{32}\) The wife alleged that an irretrievable breakdown of the marriage occurred in November and December 2004.\(^{33}\) The husband filed a motion to dismiss\(^{34}\) alleging a lack of both subject matter jurisdiction and personal jurisdiction.\(^{35}\)

In opposition to the husband’s motion, the wife submitted an affidavit and documents evidencing the husband’s numerous Massachusetts contacts and evidence demonstrating that the parties’ marriage did not break down until December 2004.\(^{36}\) The wife’s affidavit stated that the husband signed various documents enrolling their children in schools in Massachusetts, signed forms to open a Massachusetts joint checking account and opened a Massachusetts safe deposit box jointly with the wife.\(^{37}\) The wife further stated that the husband insured and registered cars in his name in Massachusetts and that when he was in Massachusetts, the parties lived together as a married couple until December 2004.\(^{38}\) The wife also indicated that after she had accepted the Massachusetts employment, the parties took a family trip to Europe.\(^{39}\)

The wife detailed two conversations between the parties that occurred while the husband was visiting her in Massachusetts in November and December 2004.\(^{40}\) She indicated that it was after these conversations that she “fully understood that [the] marriage had suffered an irretrievable breakdown.”\(^{41}\) The wife reported that in November 2004, the husband was upset with her for “wrongfully assuming the mantle of the family authority and decision-maker, and that her actions were ‘violating God’s will.’”\(^{42}\) The wife also indicated in her affidavit that in December 2004, when she asked

16. Id.
19. Miller, 448 Mass. at 324.
20. Id.
22. Id.
26. Id. at 216.
27. Id.
28. Id. at 213.
30. Id.
31. Id.
32. MASS. GEN. LAWS ch. 208, § 1B (2006). This section authorizes an action for divorce based on an irretrievable breakdown of the marriage.
33. Id. at 321-32.
34. The motion was filed pursuant to Mass. R. Dom. Rel. P. 12(b)(6).
35. Miller, 448 Mass. at 322.
36. Id.
37. Id.
38. Id.
39. Id.
40. Id.
41. Id. at 323.
42. Id.
her husband how he could disregard her medical needs when criticizing her, he told her that they were “irrelevant.”43 Furthermore, two third-parties provided affidavits that supported the wife’s claim that the marriage had broken down after her move to Massachusetts.44 One of the third-party affiants indicated that between June and December 2004, the husband stated to her that he was looking for a job in the area and that he hoped to join his family by the Fall of 2004.45

In May 2005, the probate and family court, after a non-evidentiary hearing on the husband’s motion to dismiss, held that the court had subject matter jurisdiction pursuant to General Laws chapter 208, section 446 “because the wife determined that the marriage was irretrievably broken down while she was domiciled in Massachusetts."47 The trial court relied on the wife’s affidavit, which claimed her November 2004 and December 2004 conversations with the husband led her to conclude that the marriage was over.48 In addressing whether the court had personal jurisdiction over the husband, the judge in Miller, after changing her initial findings three times between August 2005 and November 2005, reported the case to the Appeals Court,49 stating that she was “unable to determine” which Appeals Court precedent, Akinci-Unal v. Unal50 or Windsor v. Windsor,51 applied.52 The SJC ultimately transferred the case sua sponte from the Appeals Court.53

B. The Supreme Judicial Court Decision

Although the personal jurisdiction issue is the sole reported question in Miller, the SJC also addressed subject matter jurisdiction.54 The SJC relied on well established Massachusetts case law in determining that it would be a waste of judicial resources to ignore the husband’s request to review this issue, particularly given that the court has both the power and obligation to resolve subject matter jurisdiction issues when they arise.55

1. Subject matter jurisdiction analysis

The SJC held that pursuant to chapter 208, sections 4 and 5 of the General Laws, the trial court judge did not err in finding subject matter jurisdiction.56 Section 5 provides that a divorce may be granted if: (1) the plaintiff is domiciled in Massachusetts at the commencement of the action; (2) the plaintiff did not come to the commonwealth for the purpose of obtaining a divorce, and (3) the cause for the divorce occurred in the commonwealth.57 In Miller, the parties agreed that the wife was domiciled in the commonwealth when she commenced the action and that she did not come to the commonwealth for the purpose of obtaining a divorce.58 However, the husband contended that the marriage broke down when the wife decided to move from Arizona and that the judge relied on inadmissible marital conversations to find the facts necessary to show that the marriage broke down in Massachusetts rather than in Arizona.59

The SJC did not directly address the admissibility of marital conversations. Rather, it held that it was proper to consider the content of these conversations in Miller because the husband had not filed a motion to strike the portion of the wife’s affidavit that referenced their conversations.60 The SJC further held there was sufficient evidence that the conversations led to the wife’s determination that the marriage irretrievably broke down and that, in any event, additional and sufficient unchallenged evidence existed to prove the same that was not included in the wife’s affidavit.61 Such uncontroverted evidence included the family trip to Europe after the wife decided to move to Massachusetts, the parties holding themselves out as husband and wife during the husband’s visits to Massachusetts, and third-party affiant statements indicating that the husband intended to move to Massachusetts and join his family.62

In rejecting the husband’s argument that the marriage broke down at the time the wife left Arizona and that a less subjective test in determining when a marriage is irretrievably broken is appropriate, the SJC held that “there is no requirement that husbands and wives occupy the same home; indeed, as the facts of this case demonstrate, personal or professional circumstances may make it impossible for spouses to do so.”63

43. Id.
44. Id. at 322-23.
45. Id. at 323.
46. Chapter 208, sections 4 and 5 address Massachusetts subject matter jurisdiction in divorce proceedings. Section 4 provides:

A divorce shall not, except as provided in the following section, be adjudged if the parties have never lived together as husband and wife in this commonwealth; nor for a cause which occurred in another jurisdiction, unless before such cause occurred the parties had lived together as husband and wife in this commonwealth, and one of them lived in this commonwealth at the time when the cause occurred.


If the plaintiff has lived in this commonwealth for one year last preceding the commencement of the action if the cause occurred without the commonwealth, or if the plaintiff is domiciled within the commonwealth at the time of the commencement of the action and the cause occurred within the commonwealth, a divorce may be adjudged for any cause allowed by law, unless it appears that the plaintiff has removed into this commonwealth for the purpose of obtaining a divorce.

47. Miller, 448 Mass. at 323.
48. Id.
2. Personal jurisdiction analysis

The SJC held that in order for the court to exercise personal jurisdiction over the husband, the wife first must satisfy the terms of the long-arm statute, by a preponderance of the evidence, and the constitutional requirements of due process. The burden is on the party asserting jurisdiction (here, the wife) to prove jurisdictional facts. The court looked at the following parts of the long-arm statute in assessing whether the requirements were met:

A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person’s maintaining a domicile in this commonwealth while a party to a personal or marital relationship out of which arises a claim for divorce, alimony, property settlement, or both of them to conclude that the marriage is over.

As explained by the court, the statute sets out “two independent grounds for exercising personal jurisdiction over a party, one involving maintaining a marital domicile and one involving the commission of any act that gives rise to the stated claim for divorce.” In making this determination, the SJC considered the plain language of the statute, including the semicolon after the phrase mentioning domicile, followed by the word “or.” Since the court determined there was no reason to treat the word “or” other than as disjunctive, it held that the statute does not require both parties to be domiciled in Massachusetts at the time the “act” occurred in order for jurisdiction to attach.

The SJC did not address the marital domicile issue but instead analyzed whether an “act” occurred in Massachusetts giving rise to an irretrievable breakdown of the marriage. The SJC rejected the husband’s assertion that the wife’s leaving Arizona was the event that gave rise to the divorce, and therefore, no “act” within the meaning of the statute occurred in Massachusetts. Rather, the court held that the conversations between the parties as referenced in the wife’s affidavit satisfied the “act” requirement because words can constitute an act within the meaning of the statute “if they are of the nature that could cause the irretrievable breakdown of a marriage.” The SJC explained that in a marital context, “an exchange of words between husband and wife often may be the sole act that leads one or both of them to conclude that the marriage is over.”

Moreover, the SJC held that the wife, in establishing personal jurisdiction over the husband, met her burden to show that the constitutional requirements of due process were met. Federal due process, in the context of application of a long-arm statute, requires that there be at least a minimum level of contacts between the non-resident defendant and the forum state reflecting that the defendant has purposefully conducted activities within that state, thus invoking the benefits and protection of its laws. The SJC agreed with the probate and family court judge that the husband had the required minimum contacts with Massachusetts, and in making such determination relied on allegations in the wife’s affidavit as well as other evidence. The wife’s affidavit stated that the parties presented themselves and transacted their family and personal business as a married couple until December 2004, that the husband signed forms to open a joint checking account and a joint safe deposit box, registered and insured two family automobiles in Massachusetts under his name and interviewed for at least one job in Massachusetts.

The SJC was not persuaded by the husband’s argument that there was no “act” within the meaning of the statute that occurred in Massachusetts and that the requirements of due process were not met. The husband argued that his contacts with the commonwealth were incidental to the move because he merely acquiesced in the children’s move when the wife left for Massachusetts against his will. As for due process, the husband argued that it was not satisfied because the parties lived in Arizona for approximately 15 years, and the “heft” of the marriage was thus in Arizona. The SJC held that “although the heft of a marriage may be a useful concept in a court’s analysis of personal jurisdiction in certain circumstances, it is not a deciding factor in determining whether the evidence is sufficient to demonstrate that the requirements of the statute and due process have been met.”

III. Analysis of the SJC Decision in Miller

In analyzing whether the court had personal jurisdiction over the non-resident husband, the Miller court addressed that portion of the long-arm statute that was revised in 1994. Unlike the court in Akinci-Unal and Windsor that analyzed the first portion of the long-arm statute regarding marital domicile, the Miller court evaluated the second clause of the statute, which addresses if an “act” in the commonwealth within the meaning of the statute gives rise to personal jurisdiction under a divorce action. As such, the probate
and family court judge did not need to determine which case, Windsor or Akinci-Unal, controlled as to the application of the long-arm statute in the context of Miller, as neither one did. Windsor and Akinci-Unal considered whether the out-of-state defendant/spouse maintained a marital domicile while a party to a marital relationship, out of which arose the plaintiff-spouse’s claim for divorce. Neither decision considered the alternative requirement of an “act” committed within the commonwealth.

The Miller decision interpreted the long-arm statute broadly in ruling that a private conversation between husband and wife in and of itself may constitute an “act” within the meaning of the statute. This decision is consistent with Massachusetts precedent that “in the effort to effectuate [the commonwealth’s] legitimate desire to protect its citizens, the Massachusetts’ long-arm statute is to be construed broadly.” Courts have further held that “as long as constitutional limits are not crossed the court should interpret a long arm-statute to effectuate a state’s legitimate desire to protect its citizens.” For example, the United States District Court for the District of Massachusetts has held that in a business transaction, a defendant need not be physically present in a state to even transact business in the state.

In Cherin v. Cherin, the first Appeals Court decision to address the Miller court’s interpretation of section 3(g) of General Laws chapter 223A, the court also interpreted the long-arm statute broadly. The Cherin court held that the trial court had personal jurisdiction over the non-resident husband under the long-arm statute where he committed acts in the commonwealth that gave rise to the wife’s claim for divorce. Of specific note is that the Cherin court considered the parties’ private verbal exchange as a further aspect of the “act” in and of itself.

However, the SJC’s decision in Miller to consider the specific details of marital conversations to determine whether or not a certain conversation gave rise to the claim for divorce may open the floodgates to increased litigation because parties often interpret words differently, particularly in a heated exchange. A future court decision may address what discretion the court has in determining whether specific words are required, or whether the act of conversation alone is enough. Although the Miller decision notes that words have been used as legal import in other contexts, the cases the court relies on did not address conversations between husband and wife, but rather circumstances in which words themselves were the essence of the dispute. Thus, Twin Fires Investment, LLC v. Morgan Stanley Dean Witter & Co., involved a dispute regarding an oral agreement and Eyal v. Helen Broadcasting Corp., dealt with a defamation claim.

The Miller court also leaves to a future case how to determine whether a communication without specific words is an “act” sufficient within the meaning of the statute where neither the specifics of the conversation nor alternative facts are available. In prior cases, the SJC has determined there to be sufficient evidence of an irretrievable breakdown when a party “subjectively decides that [the] marriage is over and there is no hope of reconciliation.” Based on the facts in Miller, the court is correct in its interpretation and rejection of the defendant-husband’s theory that the wife did not establish minimum contacts under the statute and in accordance with due process.

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85. Id. at 330 and n.11.
86. Id. at 330 n.11.
87. Id.
88. Id. at 320-33.
93. Id.
94. Id. at 289. The husband was not domiciled in Massachusetts at the time of the divorce. Id. at 291. The parties were married in 1967 in Massachusetts, moved to Miami in 1977 and then moved to Virginia in 1985 where they purchased a home and resided together until 1997 when the wife moved back to Massachusetts with the parties’ daughter. Id. at 289.
95. Id. at 289.
96. Id. at 292-93.
100. Id. (citing Caffyn v. Caffyn, 441 Mass. 487, 495 (2004)).
Even in the dry, clinical terms of a legal memorandum, waterboarding sounds pretty grim:

[The individual is bound securely to an inclined bench . . . . The individual’s feet are generally elevated. A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, air flow is slightly restricted for 20 to 40 seconds due to the presence of the cloth. This causes an increase in carbon dioxide level in the individual’s blood. This increase in the carbon dioxide level simulates [sic] increased effort to breathe. This effort plus the cloth produced the perception of ‘suffocation and incipient panic,’ i.e. the perception of drowning.]

First-person accounts leave no doubt that waterboarding is torture. First this from Abu Zubaydah, an al Qaeda operative about whom the legal memorandum was written:

I was then dragged from the small box, unable to walk properly, and put on what looked like a hospital bed, and strapped down very tightly with belts. A black cloth was then placed over my face and the interrogators used a mineral water bottle to pour water on the cloth so that I could not breathe. After a few minutes the cloth was removed and the bed was rotated into an upright position. The pressure of the straps on my wounds was very painful. I vomited.

The bed was then again lowered to the horizontal position and the same torture carried out again with a black cloth over my face and water poured on from a bottle. On this occasion my head was in a more backward, downwards position and the water was poured on for a longer time. I struggle against the straps, trying to breathe, but it was hopeless.

If the source lacks credibility, then consider this from a volunteer who underwent the procedure so he could broadcast its impact:

You feel that you are drowning because you are drowning — or rather being drowned, albeit slowly and under controlled conditions and at the mercy (or otherwise) of those who are applying the pressure . . . . This was rapidly brought home to me when, on top of the hood, which still admitted a few flashes of random and worrying strobe light to my vision, three layers of enveloping towel were added. In this pregnant darkness, head downward, I waited for a while until I abruptly felt a slow cascade of water going up my nose. Determined to resist if only for the honor of my Navy ancestors who had so often been in peril on the sea, I held my breath for a while and then had to exhale and — as you might expect — inhale in turn. The inhalation brought the damp cloths tight against my nostrils, as if a huge, wet paw had been suddenly and annihilatingly clamped over my face. Unable to determine whether I was breathing in or out, and flooded more with sheer panic than with mere water, I triggered the prearranged signal and felt the unbelievable relief of being pulled upright and having the soaking and stifling layers pulled off me.

The legal memorandum describing weatherboarding was written because Central Intelligence Agency officials had asked the Justice Department’s Office of Legal Counsel to opine on the legality of ten interrogation techniques they wanted to use to extract information from Zubaydah. The techniques included slapping, banging Zubaydah into artificial walls while holding a collar around his neck, confining him in a box with insects and waterboarding. The memorandum approved all the desired techniques notwithstanding its conclusion that waterboarding constitutes a threat of imminent death [for it] creates in the subject the uncontrollable physiological sensation that the subject is drowning . . . . From the vantage point of any reasonable person undergoing this procedure in such circumstances, he would feel as if he is drowning at the very moment of the procedure due to the uncontrollable physiological sensation he is experiencing.

In approving the techniques despite federal statutes that implemented a global treaty banning torture, the memorandum relied heavily on companion memoranda, the now infamous “torture memorandum,” and issued the same day that defined “torture” in a highly restricted manner. Eventually, Jack Goldsmith, who is now the Henry L. Shattuck Professor of Law at Harvard Law School, but who headed the Office of Legal Counsel of the Department of Justice from the Fall of 2003 to mid-Summer 2004, came to examine the torture memorandum and another of similar tenor issued several months later. He concluded that both were deeply flawed: sloppily reasoned, overbroad, and incautious in asserting extraordinary constitutional authorities on behalf of the President and that “some of our most important counterterrorism policies rested on severely damaged legal foundations.” Ultimately, he arranged for withdrawal of the flawed opinions, left the Office of Legal Counsel and wrote The Terror Presidency to describe his experience and the forces

2. See Scott Shane, Illusions Fueled Rough Handling of Qaeda Figure, N.Y. Times, April 18, 2009, at A1.
5. Ironically, it appears that the CIA officials who sought the opinion were not the interrogators, who felt that they had obtained from Zubaydah all he had to offer by using far more benign techniques, but supervisors far removed from the interrogation scene who felt he had more to offer. See Shane, supra note 2, at A1.
7. Id. at 15.
11. Goldsmith, supra note 8, at 10; see also id. at 142-51.
that, among other things, produced the opinions he withdrew.

Goldsmith’s 220 pages of fluid narrative cover a lot of ground, much of which provides an insider’s view of the personal and institutional interplay between decision-makers and their legal advisors. As it turns out, Goldsmith’s account of how those “deeply flawed” opinions came to be is the story of that interplay, a story with several interwoven strands: the “staggering responsibilities” facing a president in an age of asymmetrical warfare where terror is a common tactic; the fear that led members of the administration “to stretch the law to its limits in order to give the President the powers he thought necessary to prevent a second 9/11”;12 the men who made the decisions; and an attitude toward the rule and the institutions of law that, unchecked, poses an existential threat to both.

There is no doubt that the responsibilities and the fear were very real. As the commander in chief and chief executive, the President commands the armed forces and heads the vast federal law-enforcement apparatus. He is responsibility for using those tools, and others produced by international treaties, agreements and cooperative efforts, to protect as best he can the safety of the people of the United States, the security of the buildings where they live and work and the integrity of the infrastructure on which they depend. The loss of life, physical destruction and emotional aftermath of September 11, 2001, evidenced both the magnitude and the complexity of that responsibility.

According to Goldsmith, the magnitude and the complexity of the task combined to produce the fear. Every morning, the President received a “threat matrix” listing threats directed at the United States during the previous 24 hours.13 The document, sometimes a dozen pages long, summarized each new threat, its possible target, its likelihood and what had been done to meet it.14 It is hard, Goldsmith says, “to overstate the impact that the incessant waves of reports have on the judgment of people inside the executive branch who are responsible for protecting American lives.”15 As former Secretary of State and head of the Office of Intelligence Policy and Review, James A. Baker put it, reading the matrix every day is “like being stuck in a room listening to loud Led Zeppelin music.” After a while, one begins to “suffer from ‘sensory overload’ and become ‘paranoid’ about the threat.”16 Added to that din was constant, pervasive, unrelenting uncertainty. Baker had a metaphor for that, too. It was, he said, like trying to play goalie in the dark. The enemy won if it scored a single goal but the goalie could never see the ball, the players were invisible and “the sidelines are blurry … and constantly shifting, as are the rules of the game itself.”17

In place to deal with the threats was the team the President had assembled, albeit in calmer times. There were, first of all, Vice President Dick Cheney and Counsel to the Vice President, David Addington. Cheney had been Chief of Staff to President Gerald Ford in the aftermath of Watergate, a time he described as the “nadir of the modern presidency in terms of authority and legitimacy.” He would spend the rest of his career “trying to restore the presidency to what he believed was its rightful place.”18 Addington had worked for the Central Intelligence Agency during the 1980s when he came to view congressional restrictions on presidential power as inconsistent with execution of presidential responsibility.19

In 1987, Cheney and Addington collaborated on the Minority Report of the Congressional Committees Investigating the Iran-Contra Affair, an affair in which proceeds of arms sales to Iran were channeled to Nicaraguan Contras so as to circumvent a congressional ban on funding the Contras. The majority concluded that the funding program amounted to presidential disrespect for the proper congressional role in oversight of foreign policy, but the minority report, researched by Addington, who was then a minority staff counsel, said that the congressional restrictions were invalid limitations on presidential control of foreign affairs and national security, areas from which the Constitution all but excluded congressional involvement.20

Cheney went on to become secretary of defense under the first President Bush. In that role, Cheney’s expansive view of presidential power led him, with the assistance of Addington, whom Cheney had hired as his general counsel, to advise the President that he had the power to invade Iraq without congressional authorization and to proffer similar views in congressional testimony.

Under the second President Bush, Cheney was a powerful vice-president and the office of the vice president’s legal counsel became deeply integrated with the Office of Counsel to the President. As a consequence, Addington became an omnipresent force at meetings where important legal policies were discussed and formulated.21 As such, he was a relentless defender of presidential power, constantly interrogating all who suggested cooperation between the Congress and the President about whether the President had the power act alone and whether, if congressional cooperation were sought, the Congress might act in a way that would jeopardize American lives.22 At least as portrayed by Goldsmith, Addington’s equation of limitations on presidential authority in the area of national security and likely loss of American lives was forceful and unvarying.23

As Goldsmith saw it,[Addington] and, [Goldsmith] presumed, his boss viewed power as the absence of constraint. These men believed that the President would be best equipped to identify and defeat the uncertain, shifting, and lethal new enemy by eliminating all hurdles to the exercise of his power. They had no sense of trading consent for power. It seemed never to occur to them that it might be possible to increase the President’s strength and effectiveness by accepting small limits on his prerogatives in order to secure more significant support from Congress, the courts, our allies. They believed cooperation and compromise signaled weakness and emboldened the enemies of America and the executive branch. When it came to terrorism, they viewed every encounter outside the innermost core of most trusted advisers as a zero-sum game that if they didn’t win they would necessarily lose.24

Others on the team included Alberto Gonzales, who was Counsel to the President, Attorney General John Ashcroft and Assistant Attorney General John Yoo. Gonzales, however, customarily deferred to Addington and, in the one instance when Goldsmith observed Gonzales and Addington give the President conflicting advice, the President sided with Addington.25 Ashcroft, who was Goldsmith’s boss, plays a relatively small but crucial role in Goldsmith’s account: he approved Goldsmith’s recommendation that the torture memos be withdrawn.26

12. Id. at 11.
13. Id. at 71.
14. Id. at 71-72.
15. Id. at 72.
16. Id.
17. Id. at 73.
18. Id. at 86.
19. Id.
20. Id. at 86-87.
The torture memos had been drafted by John Yoo, now a profes-
sor of law at The University of California, Berkeley, School of Law,
but then, almost serendipitously, an Assistant Attorney General in the
Office of Legal Counsel. Yoo was a prominent academic and presi-
dential scholar, known for drafting legal arguments supporting the
President’s legal authority to use military power without congressional
authorization. Indeed, Goldsmith tells us, Yoo thought that Article II
of the Constitution vested in the President “all of the military powers
possessed by the King of England [at the time the Constitution was
adopted] save those expressly given to Congress.”28

In the torture memos, Yoo concluded, among other things, that 18
U.S.C. §§ 2340 and 2340A, criminal statutes that implemented an inter-
national treaty by banning torture, “violated the President’s constitu-
tional commander-in-chief powers, and thus did not bind executive branch of-
for example, the torture of an international treaty by banning torture, “violated the President’s constitutional

Pervasive fear of terrorist attacks and a broadly expansive view of ex-
ecutive power combined, in Goldsmith’s view, with still another fear, fear
of law itself, to produce opinions so deeply and fundamentally flawed in
so sensitive an area. Goldsmith’s explanation of the role played by fear
of law is one of the book’s most fascinating and troubling components.

As Goldsmith sees it, “never in the history of the United States
had lawyers had such an extraordinary influence over war policies as
they did after 9/11.”35 Their influence was an outgrowth of legal con-
straints that caused decision-makers deep concern on two fronts, one
philosophical and one personal. The philosophical concern centered
on the manner in which an expanding system of legal constraints,

some international, like The United Nations International Cov-

authorities, particularly international affairs involving use of force,
from heads of state to judges and judicial institutions, in the process
permitting terrorist and other organizations engaged in asymmetrical
warfare to add “lawfare” to their strategy and tactics. “Lawfare,” a
term coined elsewhere but adopted by many in the Bush administra-
tion, including Secretary of Defense Donald Rumsfeld, is “the strat-

denial scholar, known for drafting legal arguments supporting the

the personal concern had to do with the vague terms in which
many of the international and domestic laws were written, vague terms
that inevitably gave rise to uncertainties about the legality of a range of
actions the administration viewed as essential to combat the terrorist
threat. Among other things,

[i] these uncertainties made Gonzales worry that a

the provisions of Article I, § 8, cl. 14 of the Constitution authorizing Congress to “make Rules
for the Government and Regulation of the land and naval Forces.”

30.  Goldsmith, supra note 8, at 145, 146.
31.  Id. at 148.
32.  Id. at 149.
33.  Id. at 150.
34.  Id. at 151.
35.  Id. at 129-30.
39.  Goldsmith, supra note 8, at 58.
40.  Id. at 59. In 2005, the Defense Department observed that the strength of the United
States "would continue to be challenged by those who employ a strategy of the weak using
international fora, judicial processes, and terrorism." Id. at 53. To some in the administra-
tion, including Donald Rumsfeld, "the weak 'enemy' using asymmetrical legal weapons"
included "our very differently motivated European and South American allies." Id. at 59.
That was essentially the view espoused by Robert Kagan in a July, 2002 article that report-
edly had considerable sway inside the administration. See Robert Kagan, Power & Weakness,
policyreview/3413521.html.
41.  Goldsmith, supra note 8, at 67.
prosecutor unfriendly to the administration would use the criminal law to punish Bush administration officials who acted aggressively to prevent the next attack … . And although Gonzales didn’t worry about the Ashcroft Justice Department bringing a case, he did worry about a Justice Department in a subsequent administration of a different party prosecuting officials for wartime decisions with which they disagreed.42

The same concern existed with respect to the possibility of international prosecutions by those who disagreed with American actions. For many in the Bush administration, Henry Kissinger’s international difficulties heightened the concern and increased the worry. In 2001, Kissinger abruptly left France where he had gone to give a speech after receiving a summons from a French judge who sought his testimony as part of an investigation into French deaths caused by Operation Condor, an effort by South American death squads to kill Marxist opponents of political leaders. In March of the following year, Kissenger cancelled a speech in Brazil after becoming aware of efforts to have prosecutors detain and question him about the same operation. A month later, a Spanish judge who had tried to prosecute former Chilean dictator Augusto Pinochet for his role in Operation Condor sought permission from London police to question Kissinger about what he knew. When that request was rejected, a human rights activist sought arrest warrants in London for what he asserted were Kissinger’s “war crimes” in Vietnam, Laos and Cambodia.43

Goldsmith argues that vague domestic and international laws permitting retroactive discipline in new political environments created a highly risk-averse approach to key elements of national defense and intelligence, a risk-averse approach criticized by, among others, the 9/11 Commission. Ultimately, that is why opinions of the Office of Legal Counsel were so crucial. “More than any other agency in the government,” Goldsmith says, the [Office] could provide the legal cover needed to overcome the law-induced bureaucratic risk-aversion … . [The Office] speaks for the Justice Department, and it is the Justice Department that prosecutes violations of criminal law. If [the Office] interprets a law to allow a proposed action, then the Justice Department won’t prosecute those who rely on the … ruling. Even independent counsels would have trouble going after someone who reasonably relied on one. This is true even if [the Office] turns out to be wrong according to a court. One consequence of [the Office’s] authority to interpret the law is the power to bestow on government officials what is effectively an advance pardon for action taken at the edges of vague criminal laws. This is the flip side of [the Office’s] power to say ‘no,’ and to put the brake on governmental operations. It is one of the most momentous and dangerous powers in the government: the power to dispense get-out-of-jail-free cards.44

In sum, in a “post-Watergate hyper-legalization of warfare, and the attendant proliferation of criminal investigators … [the President had to do what he had to do to protect the country. And the lawyers had to find some way to make what he did legal].49 Couple that imperative with an expansive view of presidential power, delegate the task to someone like Yoo, who shared those views and who could be counted upon to produce agreeable answers, withdraw supervision and critical analysis, and you wind up with the torture memos.46

That is not a pretty picture. But it is not a picture painted by a doctrinal dissident. Goldsmith supported the decision to use Guantánamo Bay as a facility to hold enemy combatants,47 shared the view that the Geneva Convention did not apply to groups that, like the Taliban, “did not wear uniforms, carry arms openly, or follow other traditional wartime requirements,”48 had no doubt about the legality of holding enemy combatants without charge or trial,49 opposed United States participation in the International Criminal Court50 and shared with others in the administration a concern about what he perceived as a proliferation of laws restricting the President’s ability to meet the threat of terrorism, created a risk-averse bureaucracy and threatened the interests of the United States.51 For Goldsmith, the problem was not doctrine but the way the administration attempted to achieve sound objectives. “On issue after issue,” he says, “the administration had powerful legal arguments but ultimately made mistakes on important questions of policy. It got policies wrong, ironically, because it was excessively legalistic, because it often substituted legal analysis for political judgment, and because it was too committed to expanding the President’s constitutional powers.”52

Goldsmith’s discussion and insights are important, for the threat of terrorism will be with us for a long time. However great that threat, we clearly cannot abandon the rule of law. At the same time, we cannot ignore the unduly constricting self-restraint that vague laws, particularly vague criminal laws, inevitably produce. But crafting laws that clearly and without ill-defined boundaries prohibit undesirable behavior is what good lawyers are supposed to do. In carrying out that task, a useful starting point would be to recognize that laws restraining governmental action are not manifestations of weakness but embody instead the self-restraint of a strong and confident sovereign. Goldsmith, with a nod to Arthur Schlesinger, rightly suggests that we can only get to the right starting point by selecting “leaders with a commitment to the consent of the governed who have checks and balances stitched into their breasts.”53 In the end, only leaders like those will prevent creation of policies designed to save us from our enemies by creating in them “the perception of suffocation and incipient panic,” i.e. the perception of drowning54 instead of by showing them the rule of law’s truly majestic power.

James F. McHugh III

42. Id. at 68.
43. Id. at 54-58.
44. Id. at 96-97. The tradition continues with President Obama’s announcement on April 16, 2009, that officials would not be prosecuted for water-boarding. See Mark Mazzetti and Scott Shane, Memo Spells Out Brutal C.I.A. Mode of Interrogation, Obama Says Agency Operatives Won’t Be Tried for Methods Now Prohibited, N.Y. TIMES, April 17, 2009, at A1, A10.
45. GOLDSMITH, supra note 8, at 81.
46. Id. at 169-71.
47. Id. at 108. For a variety of reasons, though, he now believes that the facility should be closed. See Jack Goldsmith, The Laws in Wartime, SLATE, April 2, 2008, available at (http://www.slate.com/toolbar.aspx?action=print&id=2187870)
48. GOLDSMITH, supra note 8, at 110, 118-19.
49. Id. at 102.
51. GOLDSMITH, supra note 8, at 60.
52. Id. at 102.
53. Id. at 216.
54. Bybee Memorandum, supra note 1, at 4.
Lizzie Borden, by Karen Elizabeth Chaney (Commonwealth Editions 2006), 82 pages.

The 1892 murder case against Lizzie Borden, arguably the forerunner of subsequent celebrity trials that have so captured the fascination of the American public, is indelibly etched in the fabric of our national folklore. However, even though it has remained in the public consciousness through nursery rhymes, plays, operas, television shows and films, few people really know either the specific details of the Lizzie Borden case or the profound lesson in jurisprudence that it reveals.

It was approximately 11:15 on the hot, humid morning of August 4, 1892, when 32-year-old spinster Lizzie Borden entered her family home at 92 Second Street in the “Flats” section of Fall River, Massachusetts.1 There she found — at least according to her version of the facts — her father, 70-year-old Andrew Borden, in the sitting room with his hands on his chest, his feet touching the floor, and his head, resting on a pillow, beaten beyond recognition.2 In an upstairs bedroom, the blood-splattered body of her step-mother, 64-year-old Abby, would be found by a maid minutes later. Abby had suffered 18 distinct wounds to her head caused by a heavy object such as a hatchet.3

Almost from the beginning, suspicion focused on Lizzie, in large part because she did not show the hysteria expected of a young woman faced with such horrors. Sexism played itself out in other ways, as well. A reporter for the Fall River Daily Globe quoted a police officer who stated that, in his experience, “no one but a crazed woman would commit such a deed as by which Mr. Borden went into eternity.”4 It was also believed that a man would have hit much more forcefully and crushed rather than just cut the victims.

When a friend suggested to young Lizzie that her inexpressive impassivity seemed to agitate people, she replied, “What would they have me do? Howl? Go into hysterics?”5 Even months later, when the impassivity seemed to agitate people, she replied, “What would they more forcefully and crushed rather than just cut the victims.

concluded that Lizzie herself was a “puzzle psychologic.”6 The reporter noted that her reaction of quiet dignity was unlike that of an

ordinary woman who would express more emotion. The reporter concluded that Lizzie herself was a “puzzle psychologic.”7

The case against Lizzie Borden was always circumstantial, and certainly far from air-tight. Her father, who had amassed substantial wealth both through investments in real estate and from Fall River’s renowned cotton textile trade, was a cold and unscrupulous businessman who had a large number of enemies. It was said that, at the beginning of his business career, when he worked as an agent for Crane’s Patent Casket Burial Cases, if a coffin proved too small for the deceased, he would simply cut the feet off the corpse and cram the pared-down carcass inside.8 Andrew’s other enemies included members of families he had evicted from his properties over the years, and competitors who had come up short in negotiations with the hard-nosed businessman.8 A frugal man, he resided with his family in the less fashionable “Flats,” near pool halls, tenements and shops. By contrast, others of his station lived in large Victorian homes in Fall River’s more affluent “Hill” neighborhood.9 The Flats was home to vagrants and others who, perhaps, might be tempted by an opportunistic crime. Yet, from the outset, the police focused almost exclusively on Lizzie due to a number of strongly inculpatory facts.

Two days before the murders, on the evening of Tuesday, August 2, 1892, Andrew, Abby and Lizzie became nauseated after their usual meager dinner of milk and baker’s bread. After vomiting throughout the night, all were still feeling ill the next morning.10 Lizzie’s stepmother Abby went for a doctor against the fervent objections of her miserly husband who exclaimed, “Well, my money shan’t pay for it.”11

This mystery illness was suggestive since, on that same morning of Tuesday, August 2, a woman had entered a local pharmacy asking for ten cents worth of prussic acid ostensibly to be used to clean a seal cape. The pharmacist knew that this poisonous compound could not be used for cleaning and refused to sell it without a prescription.12 Afterwards, someone told the pharmacist that this woman was Andrew Borden’s daughter.13 Other area pharmacists also reported that, around the same time, a woman fitting Lizzie’s description tried to purchase prussic acid from them, as well.14 That night, Lizzie herself told a close friend that she believed they had all been poisoned and that, furthermore, she had an intuition that something terrible was about to happen.15

The following morning, Thursday, August 4, 1892, at approximately 10:30 a.m., the Borden’s 25-year-old kitchen maid, Bridget “Maggie” Sullivan, opened the front door for Andrew, who had been out running some early errands.16 He then lay down on the couch to rest.17 Lizzie, who had been in the house all morning, claimed that she had then gone to the adjacent barn for about 15 minutes, returned and discovered her father’s mutilated body.18 She shouted for Maggie, who was washing windows outside of the house.19 Maggie entered the house and saw Andrew’s lifeless body. A short time later, Maggie discovered Abby Borden’s body in an upstairs bedroom.20 Neither a murder weapon nor any blood-soaked clothing was ever found.21

Lizzie was charged with the murders based primarily on the following evidence: she had had an uneasy relationship with her stepmother; her alibi of being in the barn was unconfirmed; she had been alone in the house with her parents for a short time (i.e. while

2. Id. at 7-8.
3. Id. at 8.
4. Id. at 9.
5. Id. at 33.
6. Id. at 61.
7. Id. at 21-23.
8. Id at 13.
9. Id. at 1, 23-25.
10. Id. at 2-3.
11. Id. at 2.
12. Id.
13. Id.
14. Id.
15. Id.
16. Id. at 4-6.
17. Id.
18. Id. at 5-6.
19. Id.
20. Id.
21. Id. at 49.
Maggie was outside washing the windows); and she was suspected of trying to buy prussic acid poison (although no prussic acid was later found in the bodies of her parents). As the case progressed, Lizzie’s aloof shyness and stoic manner was a constant subject of public comment and speculation. She had not screamed or fainted at the sight of her father’s bloody body, but rather calmly called Maggie into the house and asked her to contact a doctor. She spoke to the first police officer to arrive at the crime scene in “the most calm and collected manner.” That officer later wrote that Lizzie Borden never expressed any sign of sorrow or grief, no lamentation of the heart, no comment on the horror of the crime, and no expression of a wish that the criminal be caught. … I don’t like that girl. Under the circumstances she does not act in a manner to suit me; it is strange, to say the least.

Fueling this sinister profile of Lizzie was an article that appeared in the Boston Globe two months after the deaths under the headline, Lizzie Had a Secret. Mr. Borden Discovers It, Then a Quarrel. The article related that Lizzie had had an affair with her uncle, implicating her in a previous robbery of the Borden household, and revealed that she had had a poor relationship with her stepmother. It also noted that, at the time of the murders, an eyewitness had heard cries from the house, and had seen Lizzie Borden in a rubber cleaner’s cap. According to the story, Lizzie had slammed a window shut when she saw the eyewitness. The article also reported that another witness had had supper with the Bordens the night before, and had overheard Lizzie and her father in a terrible argument over the fact that she had just gotten pregnant. Finally, the article reported that Lizzie had offered Maggie a bribe to procure her silence.

The article appeared to offer concrete proof of Lizzie’s guilt. Then, within hours of its publication, the story was determined to be a hoax; none of the witnesses could be found, none of the details confirmed. Although the Globe printed a front-page retrac¬tion the next day, serious and irremediable damage had been done to Lizzie’s reputation.

However, in the face of the negative public opinion and substantial incriminatory circumstantial evidence, a number of facts supported Lizzie’s innocence. Although a hatchet head had been found in the basement of the Borden home, not a trace of blood could be found on the blade. Moreover, it bore no signs of having been recently washed. In the end, the prosecution did not even mention the discovery of the hatchet head at trial. Further, Lizzie’s alibi that she had been in the barn for 15 minutes was confirmed by an eyewitness. In addition, the prosecution’s assertion that the barn would have been too hot for Lizzie to have remained inside for a quarter hour was rebutted by two young men who testified that they had rested inside the same barn that morning because it was the coolest place they could find. Likewise, the prosecution’s theory that Lizzie had had an “exclusive opportunity” to commit the murders was convincingly undercut by testimony that there was significant foot traffic in the area around the Borden house that morning.

But most devastating to the prosecution’s case was the timeline: As Chaney argues:

How could she have possibly murdered her stepmother, changed her clothes, gone into the cellar to wash off the blood and then returned upstairs? [And if] she had changed … Maggie would have noticed it. Then after she killed her father, she would have [had] to change [again], wash off the blood down in the cellar, wash off the hatchet, break the handle … all … within fifteen minutes.

As a prosecution expert conceded at trial, “there was no blood anywhere on anything.”

Apart from the sensational evidence adduced by both sides, perhaps the most interesting feature of the Lizzie Borden case is the similarity that it bears celebrity trials of today. There was a false confession made by someone the police dismissed as a crackpot. There was unsolicited assistance from spiritualists and “trance mediums.” The day after the murders, when Lizzie’s uncle, John Morse, walked from the Borden house to the post office, he attracted a crowd of some 2,000. Feminists and suffragettes rallied to Lizzie’s cause, culminating in a boisterous meeting of the Women’s Christian Temperance Union at Boston’s Tremont Temple to petition the governor for bail.

And, of course, both sides were represented by teams of celebrity lawyers. Former Massachusetts Governor George Robinson and future Bristol County District Attorney Andrew Jennings represented Lizzie. The case was prosecuted by William Henry Moody, who later became a congressman, Secretary of the Navy, and Attorney General of the United States before attaining a seat on the United States Supreme Court. He was assisted by future Massachusetts Attorney General Hosea Knowlton.

Adding to the carnival quality of the proceedings was the fact that the jury was exceedingly quick to reach a decision. After closing arguments and jury instructions, the jury returned a not guilty verdict after just one hour. Jurors admitted later that they had made up their minds before closing arguments. Indeed, they actually reached

22. Id. at 19.
23. Id. at 26.
24. Id. at 26-27.
25. Id. at 29-31.
26. Id. at 31-32.
27. Id.
28. Id.
29. Id. at 37.
30. Id. at 33.
31. Id. at 49.
32. Id. at 50.
33. Id. at 50-51.
34. Id. at 50.
35. Id. at 56.
36. Id. at 49.
37. Id. at 21.
38. Id. at 22.
39. Id. at 11.
40. Id. at 11-12.
41. Id. at 34, 66.
42. Id. at 66.
43. Id.
44. Id.
a decision just 35 minutes into deliberations, and then simply waited until an hour had passed before announcing the outcome purely for the sake of appearances.\textsuperscript{45}

The court proceedings, at least to the modern eye (and ear), seem more suited to the stage than a courtroom. For example, during his closing argument, prosecutor Knowlton warned the jury that if they did their duty rather than give in to mercy, someday they would be standing in front of the Lord on Judgment Day and they would hear him utter, “Well done, good and faithful servant,” and that they could then “enter into the reward” of “eternal life.”\textsuperscript{46} For his part, Judge Dewey also sounded a strongly religious theme in his jury charge, praising Lizzie’s Christian character. He arguably showed bias in her favor when he criticized the investigative work of the police and denigrated the prosecution’s exclusive opportunity theory.\textsuperscript{47}

This slim volume, with no footnotes, is far from a comprehensive account of the Lizzie Borden story — and it does not purport to be. Rather it is a broad overview that traces only the most important details, often with little context or explanation. For example, it notes that Judge Dewey disallowed the evidence concerning the suspicion that Lizzie attempted to buy prussic acid in the days before the murders. Yet it neglects to offer any rationale for the judge’s decision.\textsuperscript{48}

Similarly, the book fails to explore the question of why, once Lizzie was acquitted, no other suspect was ever charged. Other historians of the Borden case have propounded a wide variety of theories regarding potential alternative suspects.\textsuperscript{49} Possible culprits suggested by other authors include Maggie, the maid; the uncle, John Morse; and Lizzie’s sister Emma. Further, there was a farmhand who killed a woman with an ax at a Fall River farm the same year as the Borden slayings. There was also a strange man seen loitering around the Borden’s house on the day of the murders. And Andrew Borden’s disgruntled tenants and business enemies were apparently a numerous and bellicose lot. Finally, there is only a fleeting reference in the book to Andrew’s mentally disabled son, upon whom significant suspicion has settled over the years.\textsuperscript{50}

Perhaps most surprising is the fact that this book expresses no clear opinion as to the guilt or innocence of Lizzie Borden, in sharp contrast with many other treatments of the case. Without question, Chaney appears to support, at least tacitly, the view that the jury arrived at the correct verdict — at least to the extent that the evidence may not be said to have established Lizzie’s guilt beyond a reasonable doubt. There was doubtless some reason to suspect that Lizzie may have committed the murders. But despite the existence of circumstantial evidence against her, Chaney appears to take the reasonable (and certainly very lawyerly) view that the evidence simply did not meet the high standard of proof required for conviction in a criminal trial.\textsuperscript{51} In this way, Chaney’s book is a tribute to the theory that underpins the American justice system; i.e. the fundamental requirement that, even if public opinion and “gut instinct” seem to favor a guilty verdict, the law requires proof beyond a reasonable doubt. For all its sensationalism, the trial of Lizzie Borden represents, perhaps, the American legal system at its best. For a quick take on a seminal moment in American legal history, and an effective vindication of the value of due process, Chaney’s book is highly recommended.

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\textsuperscript{45.} Id. at 59.
\textsuperscript{46.} Id.
\textsuperscript{47.} Id.
\textsuperscript{48.} Id. at 21, 62.
\textsuperscript{49.} See, e.g., Arnold Brown, Lizzie Borden (1992); William Masterton, Lizzie Didn’t Do It (2000).
\textsuperscript{50.} Id. at 48, 59, 62.
\textsuperscript{51.} See In re Winship, 397 U.S. 358 passim (1970).