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Civil Litigation
A drug and alcohol evidence primer .................................................. 1
By Michael P. Sams

Our duties of care: Liability for injuries
caused by impaired drivers .......................................................... 3
By Suleyken D. Walker

Criminal Justice
What every Massachusetts criminal lawyer
needs to know about impeachment law........................................... 6
By Chris Dearborn

General Practice, Solo & Small Firm
A half-dozen hot tips for starting a solo practice ......................... 12
By Peter Elikann

Immigration Law
Gender asylum: Bringing the law into the 21st century ............. 15
By Marisa A. DeFranco

MAVNI: Nonimmigrant to U.S. citizen
in less than a month ..................................................................... 18
By Richard M. Green

Law Practice Management
Who’s looking inside your business? How hackers intrude ....... 21
By Michelle D. Syc

Property Law
Financially struggling 40B projects may be altered
after construction is complete.......................................................... 23
By Marc J. Goldstein and Krista L. Hawley

Arrested developments: Lobisser v. Sutherland and
special permit lapse analysis in phased condominiums ............. 26
By Thomas O. Moriarty

Variance denials and abuse of discretion:
Guardione v. Longmeadow ......................................................... 29
By Patricia A. Zak

Taxation Law
TARP and the transformation of executive compensation....... 31
By Evelyn A. Haralampu

409A correction procedures ......................................................... 33
By Patricia Ann Metzer

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CORRECTION
Louis Dundin’s article, “Public rights, private harms, and the pub-
lic’s role,” which appeared in Vol. 11, No. 2, should have included the
disclaimer:

This article represents the opinions and legal conclusions of its
author and not necessarily those of the Office of the Attorney General. Opinions
of the Attorney General are formal documents rendered
pursuant to specific statutory authority.
A DRUG AND ALCOHOL EVIDENCE PRIMER

By Michael P. Sams

Introduction

From time to time, the admissibility of an individual’s alcohol or drug consumption is pertinent to the case. This article discusses some of the circumstances in which alcohol and drug evidence arises in civil cases and related admissibility issues.

Admissibility issues

In Massachusetts, evidence of drug or alcohol use is permitted at trial under a wide variety of circumstances. As with all evidence, however, to introduce evidence of the use of drugs and/or alcohol, several criteria of admissibility must be met. First and foremost, the evidence must be relevant. It must have a “rational tendency to prove an issue in the case.” Commonwealth v. Orben, 53 Mass. App. Ct. 700, 704 (2002). The fact that the basis for the opinion is a telephone conversation with a defendant, rather than actual physical observation or a person-to-person conversation, goes to the weight and not to the admissibility of the testimony. Id. Witnesses may testify to the individual’s conduct — e.g., “staggering” and “drunk.” Murphy v. Moore, 314 Mass. 731 (1943). See also, Martin v. Florin, 273 Mass. 13 (1930) (allegedly intoxicated individual permitted to testify concerning the effects of alcohol on him). Doctors may testify to the smell (or lack thereof) of alcohol on the person’s breath. Id.; See also Commonwealth v. Orben, 53 Mass. App. Ct. 700 (2002) (police can testify as to state of apparent intoxication).

Evidence of a plaintiff’s drug or alcohol use also can be admitted into evidence through a plaintiff’s medical records. In Commonwealth v. Beatty, 73 Mass. App. Ct. 1125 (2009), the court found a portion of the defendant’s medical records — which indicated the defendant admitted “he was intoxicated and does not recall any events” — admissible pursuant to G.L. c. 233, §79. That case involved prosecution for operating under the influence of alcohol. The defendant attempted to preclude the admission of the relevant statement on the grounds that it did not “relate to [his] treatment and medical history” as the statute required and because it referenced “the question of liability.” Id. at 1.

The court found, however, that where the defendant was seeking treatment for symptoms including headache and vomiting, information about his recent alcohol consumption was relevant to his medical care, and therefore, that his admission contained in the medical record was admissible. Id. Similarly, in Leonard v. Boston Elevated Railway, 234 Mass. 480 (1920), one of the plaintiff’s medical records contained the words, “odor of alcohol on the breath,” and the court ruled that these records were admissible. If so holding pursuant to G.L. c. 233, §79, the court stated:

... a record which relates directly and mainly to the treatment and medical history of the patient, should be admitted, even though incidentally the facts recorded may have some bearing on the question of liability. Id., at 483.

The court also stated that it was unable, as a matter of law, to say that the words “odor of alcohol on the breath” could not relate to the plaintiff’s medical history. Id., see also, Commonwealth v. Dube, 413 Mass. 570 (1992).

Medical records referencing otherwise relevant information, however, will be precluded where they are unreliable. In Commonwealth v. Johnson, for instance, the records themselves contained a disclaimer regarding the reliability of the subject test. 59 Mass. App. Ct. 164 (2003). The court held that the trial court’s admission of the records regarding the test, therefore, was an error. Id.

Additionally, otherwise admissible records must, where appropriate, be redacted in part. Thus, a trial judge properly ordered deleted from the decedent’s hospital records the fact that the decedent was apparently a recovering alcoholic because this evidence had no relevance to whether the decedent was intoxicated at the time of the accident. Commonwealth v. Shine, 25 Mass. App. Ct. 613 (1988).

Expert testimony concerning pharmacology

Experts are at times called to testify concerning the pharmacology of alcohol, and the expected effects of specific levels of alcohol on an individual, based on some explanation relating to consumption and “burn-off.” Assuming the expert can be qualified, the following summarizes basic pharmacological principles the expert may be called upon to testify.

Alcohol, like all drugs, undergoes four scientific processes in the human body. These four processes take place at the same time until such time as all of the alcohol has been absorbed by the gastrointestinal tract and all of the alcohol has been metabolized. Vijay A. Ramchandani, Ph.D., Alcohol: Neurobiology and Pharmacology, www.projectmainstream.net/newsfiles/Alcohol_Neurobiology_and_Parmacology.htm.
The first process is absorption. Absorption is the process by which alcohol is made available to the fluids of distribution of the body, such as blood, plasma, serum, etc. About 80 percent of orally consumed alcohol is absorbed from the small intestines with the rest absorbed from the stomach. On an empty stomach, more than half of the alcohol consumed will be absorbed within 15 minutes and a maximum blood level will occur in about 20 minutes, with 80 to 90 percent complete absorption occurring within 30 to 60 minutes. The rate of alcohol absorption depends on many factors, including the rate of consumption, how much is consumed, the alcohol’s concentration, the presence of carbonation in the drinks, food in the stomach, and whether the person is taking any medications that can interfere with the gastrointestinal tract. Charles E. Becker, *The Clinical Pharmacology of Alcohol*, Calif. Med. V.113(3), pgs. 37-45 (Sept. 1970); David M. Benjamin, Ph.D., *Understanding the Pharmacology of Ethanol*, www.doctorbenjamin.com.

The second process is distribution. Once alcohol has been absorbed from the gastrointestinal tract into the blood, it is circulated to all areas of the body to which there is blood flow. This process takes time. Charles E. Becker, *The Clinical Pharmacology of Alcohol*.

The third process is metabolism. To ultimately remove alcohol from the body, it must first be inactivated. This is initiated by altering the alcohol’s chemical structure into a substance that is more easily excreted by the body, and is often referred to as detoxification. Alcohol is metabolized in the liver by the enzyme dehydrogenase into acetaldehyde, which causes dilation of blood vessels. It is this dilation that is responsible for hangovers. Vijay A. Ramchandani, Ph.D., *Alcohol: Neurobiology and Pharmacology*.

The acetaldehyde is next metabolized by the enzyme aldehyde dehydrogenase into acetate, which is very similar to vinegar. Measurement of blood serum acetate levels may be an indicator of problem or chronic drinking. Charles E. Becker, *The Clinical Pharmacology of Alcohol*; Vijay A. Ramchandani, Ph.D., *Alcohol: Neurobiology and Pharmacology*.

Certain drugs can inhibit the aldehyde dehydrogenase enzyme responsible for the second step in metabolizing alcohol, and inhibition of this enzyme causes an increase in blood acetaldehyde levels. One of these drugs is antabuse, which is often used to treat alcoholics. People taking antabuse can become very sick from consuming even a small amount of alcohol. Other such drugs include chloral hydrate and oral anti-diabetic drugs such as Diabinese. David M. Benjamin, Ph.D., *Understanding the Pharmacology of Ethanol*.

The fourth and final process is excretion. The kidneys and lungs excrete only 5 to 10 percent of unmetabolized alcohol. The rest must be metabolized before excretion. Determination of the rate of alcohol excretion can be effectively measured once all of the alcohol in a person’s gastrointestinal tract has been absorbed. Once this occurs, blood level determinations should show a decline with time. Alcohol’s effect on a person is greater when his or her blood alcohol level is rising than when it is falling. In most people, the excretion rate ranges from about 0.01 to 0.025 percent per hour. Charles E. Becker, *The Clinical Pharmacology of Alcohol*.

Only air in the deepest portion of the lungs is in equilibrium with blood alcohol. As such, the amount of alcohol in the lungs of a person taking a breathalyzer test is very small. Because this amount varies among individuals, breath tests may overestimate blood alcohol levels. David M. Benjamin, Ph.D., *Understanding the Pharmacology of Ethanol*.

One rule of thumb regarding blood alcohol concentrations is that one mixed drink will produce a peak blood alcohol level of 0.02 percent in a 150-pound man. The level is lower for wine and beer. If a person is eating while consuming alcohol, the peak blood alcohol concentration would be lower and take longer to reach. The average “burnoff” rate of alcohol is 0.017 percent per hour, leading to the old adage that you can consume one drink per hour without getting drunk. Charles E. Becker, *The Clinical Pharmacology of Alcohol*; David M. Benjamin, Ph.D., *Understanding the Pharmacology of Ethanol*.

Based on the burnoff rate, it is possible to estimate a person’s blood alcohol concentration at an earlier time based on a known blood alcohol concentration at a later time. Since the burnoff rate ranges from 0.01 to 0.025 percent per hour, one can generate a range within which a person’s true blood alcohol concentration at a certain earlier time would have fallen. Charles E. Becker, *The Clinical Pharmacology of Alcohol*.

In Commonwealth v. Smith, 35 Mass. App. Ct. 655 (1993), the court discussed the admissibility of expert testimony as to what an individual’s blood alcohol level at the time of an incident must have been. This evidence, known as “retrograde extrapolation evidence,” is based on the rate at which alcohol is metabolized and the individual’s blood alcohol level measured at a specific time following the incident. The court stated that this type of evidence, provided it was admitted via a scientifically acceptable, reliable method, might logically be thought to be of assistance to a jury. *Id.*, see also, Commonwealth v. Cruz, 413 Mass. 686, 698 (1992), and Commonwealth v. Sargent, 24 Mass. App. Ct. 657, 658-659 (1987). The court also noted that a number of other jurisdictions have admitted retrograde extrapolation evidence. *Id.* (citations omitted).

Statutory blood alcohol concentration levels are not scientific standards. Alcohol affects different people in different ways. Two people may consume the same amount of alcohol in the same amount of time and under the same circumstances, and one may show no outward signs of intoxication whatsoever even with a blood alcohol level above the statutory level, while the other may show signs of intoxication with a blood alcohol level well below the statutory level. Charles E. Becker, *The Clinical Pharmacology of Alcohol*.

Regardless of the source of a blood alcohol concentration measurement, there will always be some variability in the procedure used. For this reason, two readings are done for breathalyzers and control standards are used. For breathalyzers, one critical control standard is a blank sample that contains no alcohol, and a second is a positive control standard, or calibration test, which is usually at 0.15 percent or 0.20 percent. A breathalyzer test result which has not been “run against a blank” and which did not include a positive control standard is not scientifically valid. In addition, the chemical solutions used in a breathalyzer must be fresh to be accurate. David M. Benjamin, Ph.D., *Understanding the Pharmacology of Ethanol*.

**Conclusion**

Alcohol and drug evidence is often something that catches a jury’s interest. General admissibility, pharmacology and expert testimony are all matters to consider when assessing the import of such evidence.
Our duties of care: liability for injuries caused by impaired drivers

By Suleyken D. Walker

Injuries and deaths caused by negligent driving are tragically frequent headlines in the news, and drunk driving in particular remains a leading cause of the public’s concern for highway safety. Our Legislature has responded over the years by not only imposing stricter penalties for drunk driving, but also for those who contributed to the fact that the individual was driving while intoxicated. See e.g., M.G.L. c. 90, §12 (penalties for permitting person with ignition interlock restriction to operate motor vehicle without device).

Considering legislative enactments in conjunction with the evolution of common law, it is evident that the public includes non-drivers among those who should be held responsible for the damages caused by intoxicated drivers. In fact, several times over the past year, the courts have addressed critical questions concerning the scope of liability for injuries caused by impaired drivers. As with all common law, the scope of liability has evolved over the years as new questions are presented. This article is an evaluation of the duties of care presently recognized and is intended to serve as a guide for those attorneys who bring or defend claims arising from injuries caused by an impaired driver — generally those who were intoxicated.

I. The duty of care

The nature of the alleged duty of care is a critical factor to consider when evaluating a case involving potential liability for injuries caused by a third party, an impaired driver. In the majority of cases, the duty of reasonable care asserted by plaintiffs is a duty to prevent an already intoxicated individual from having access to alcohol. Consequently, courts have focused on the question of whether the defendant had the ability to control access to alcohol. Consequently, courts have focused on the question of whether the defendant had the ability to control access to the alcoholic beverage.

The following is a discussion of the recognized claims of liability where the duty of care is dependent upon the defendant’s ability to control access to alcohol. Significantly, the meaning of control is construed narrowly. The Supreme Judicial Court distinguishes between control based on the defendant having furnished the alcohol versus simply providing his guest with access to it. A duty exists in the former scenario but not in the latter.

A. Liability arising from defendant’s control of alcohol

1. Commercial establishment: Injuries caused by intoxicated adult

A commercial establishment which provides alcohol to an intoxicated adult customer is liable for injuries caused by the customer if the establishment knew or reasonably should have known that he was intoxicated and nonetheless provided the alcohol. However, the standard is different if the plaintiff was himself the intoxicated driver, in which case the establishment is only liable if it knowingly or intentionally disregarded the obvious risk of serving alcohol to the intoxicated customer.

2. Commercial establishment: Injuries caused by intoxicated minor

A commercial establishment is liable for injuries caused by an intoxicated minor if the establishment negligently provided the minor with alcohol, regardless of whether the proprietor knew or should have known the minor was intoxicated. The establishment’s breach is not its sale of alcohol to an already intoxicated individual, but rather, the sale of alcohol to an individual it knew or reasonably should have known was a minor.

3. Social host: Injuries caused by intoxicated adult

A social host is liable for harm caused by an adult guest if the host knew or should have known that the guest was intoxicated and nevertheless “gave him or permitted him to take an alcoholic beverage.” The duty of care giving rise to possible liability is based upon the host’s ability “to control the liquor supply” and thus does not exist unless “the alcohol being consumed belongs to the host.” The duty therefore includes instances where the host gives the liquor to his guest outside the home.

4. Social host: Injuries caused by an intoxicated minor

Just as with adults, a social host is liable for injuries caused by an intoxicated minor if the social host provided the alcohol and knew or reasonably should have known that the minor was intoxicated. The SJC expressly rejected attempts to import the rule...
applicable to minors in a commercial context (see above) into the social host context, and thus a breach does not occur unless the host knew or should have known of the intoxication.15

5. Employer: Injuries caused by intoxicated employee

An employer is liable for injuries caused by its intoxicated employee only if the employer provided the alcohol to the employee and knew or should have known the employee was intoxicated.16 Just as the concept of “providing” alcohol is construed narrowly and synonymous with “belonging to” in the context of social hosts, employers are protected from liability even if the employer allowed alcohol to be stored on its property and was aware of its consumption by the employee.17 The SJC has rejected respondeat superior liability in instances where the alcohol is consumed during an employer-sponsored social function18, but it has not yet addressed whether alcohol consumed during a business meeting could give rise to such liability. However, a divided panel of the Appeals Court held in favor of the defendant-employer in such a circumstance.19

It is worth noting that in the context of social hosts and employers, the analytical distinction between control based upon the defendant’s ownership of the alcohol and simply providing access to alcohol seems weak. Hosts and employers can control an individual’s access to alcohol on their premises, regardless of whether the host or employer provided it, by ordering the guest or employee to leave the premises. If hosts and/or employers know the alcohol is on the premises, then the more logical question is whether they knew or should have known the individual was intoxicated and — as with commercial establishments — continued to provide access to the alcohol. However, for reasons of public policy, the SJC has thus far adhered to the distinction.20

B. Liability arising from defendant’s corporate or professional status

The following cases concern liability for injuries caused by impaired drivers arising from the nature of the defendant’s corporate or professional status.

1. Injuries caused by intoxicated customer of private transportation service

A private transportation service owes a duty of reasonable care, in instances where there is a commercial or contractual arrangement for hire, to avoid discharging a passenger if the company knew or should have known the passenger was intoxicated and, upon discharge, likely to drive a vehicle.21 In coming to its decision, the Court noted that private transportation services in the business of transporting persons consuming alcohol are in “a primary position to use care to avoid leaving an intoxicated passenger at a location where it is likely the passenger will drive.”22 This reasoning is similar to that which supported a duty of care in cases in which the alleged breach was the sale of alcohol to an intoxicated individual.23 It should be noted that three justices concurred in the result in Commerce, but believed that the livery service could be liable for permitting the passenger to consume alcohol when it “knew or should have known of the passenger’s intoxication and thereafter permitted him to consume alcohol.”24

2. Liability arising from professional duties of defendant

In Irwin v. Town of Ware, 392 Mass. 745, 762-765 (1980), the SJC held that a police officer is liable for injuries caused by an intoxicated driver whom the officer knew or reasonably should have known was intoxicated but failed to remove from the highway. The SJC’s theory of liability was based upon the “special relationship” between and the plaintiff and the defendant, but this has not proven to be a particularly instructive characterization. Other than Irwin, courts have been reluctant to impose liability based on a “special relationship.”25 Given the poor history of attempted reliance upon a “special relationship,” it is more helpful to consider the significance of the defendant’s professional duties to the court’s decision.

The Court held that statutes granting police officers “privileges and duties” with respect to intoxicated drivers evidenced “a legislative intent to protect both intoxicated persons and other users of the highway” and that the “calamitous consequences” of intoxicated driving were “all too predictable.”26 Thus, the requisite requirements to establish a duty of care under basic common law principles were satisfied: the police officer “reasonably could foresee that he would be expected to take affirmative action to protect the plaintiff and could anticipate harm . . . from his failure to do so.”27

In Coombes v. Florio, 450 Mass. 182, 186-187 (2007), a case concerning a prescription drug, in a plurality opinion, justices Ireland, Spina and Cowen held that a doctor owed a duty of care to a member of the public to warn a patient of the side effects of prescribed medication. The justices found that a physician owed a duty of care to the plaintiff to warn the patient of the dangers of driving (assuming there are some) while taking a prescribed medication. The duty to warn “about the effects of the treatment” was owed to “all those foreseeably put at risk by his failure to warn.”28 Justices Greaney, Marshall and Cordy limited the duty to instances where the doctor had “knowledge of a danger that may be posed to others from a patient’s decision to operate a motor vehicle while under the influence of prescribed medication.”29 The majority of justices however, noted the significance of the defendant’s status as a “medical professional” and the “physician-patient relationship,” in which a duty to warn the patient already existed.30

Considering these two cases together, it is evident that the SJC considers professional duties and responsibilities, whether imposed by statute or common law, as relevant to the question of whether the defendant owed the plaintiff a duty of care.

II. Proximate cause

As noted earlier, this article concerns recognized duties of care which may give rise to liability for injuries caused by an impaired driver. However, the following rule with respect to causation is worth noting: A plaintiff must of course establish that the failure to take reasonable care was the proximate cause of the plaintiff’s injuries. However, to satisfy this requirement, it is not necessary to show that the defendant knew or should have known that the particular driver at fault would drive a motor vehicle.31 The “universal use of automobiles and the frequency of accidents involving drunken drivers are matters of common knowledge.”32 So long as the plaintiff was injured “as a result of being struck by a vehicle improperly operated by the intoxicated patron, due to his intoxication,” the foreseeability necessary to establish proximate cause is evident.33

III. Conclusion

It is of course axiomatic that liability imposed through common law for injuries caused by a third party will evolve over time. Therefore, as our courts address the thorny questions of potential liability for injuries caused by texting, or the influence of medications, it is useful to consider the ancestors to these new questions
of liability. In addition, it is a sad fact that cases involving injuries caused by intoxicated drivers will continue to arise and that these more established rules will apply.

Notes


9. Michnik-Zilberman, 390 Mass. at 10. See also, Tobin v. Norwood Country Club, 422 Mass. at 135 (serving liquor where minors are present is “fraught with foreseeable risk.”)


15. Id. at 295.


18. Mosko, 416 Mass. at 399-400.


22. Id. at 650.

23. Tobin, 422 Mass. at 135 (business supplied the “substance that creates the risk, and it has the experience and opportunity to take steps to minimize it.”)


26. Irwin v. Town of Ware, 392 Mass. at 759 & 762.

27. Id. at 756.

28. Id. at 184.

29. Id. at 196.

30. Id. at 200-201.


32. Id. at 331.

33. Ibid. (emphasis added).
I. Introduction

As a criminal defense lawyer, frequently I have been confronted with disagreement, misinformation, ignorance and occasionally even malice, when I tried to impeach or object to the impeachment of a witness. In at least one case, the resolution of a disputed battle was outcome-determinative. I am very fortunate to have learned evidentiary nuances from some of the best lawyers and judges the commonwealth has to offer. I have found myself fighting the same battles with judges and adversaries over and over again. However, I have also been victimized by my own ignorance of the law. Over the years, I have compiled a list of impeachment issues that seem to repeat themselves in criminal cases.

Impeachment traditionally is thought of as an advocate’s weapon: equal parts art and science. When done properly, impeachment is perhaps the most deadly arrow in the cross examination quiver. However, this article is not about impeachment technique. Nor is it about the constant strategic issues facing litigants: Should I impeach or not? Does it matter if this evidence comes in for all purposes? Should I confront the witness I am trying to impeach? Rather, my intent is to raise common evidentiary issues relating to the rich, often misunderstood and nuanced law that governs impeachment, and to provide the correct answers, or at least an analytical framework for approaching the issues.

II. Hypothetical

Ian Defendant is charged with one count of rape. On New Year’s Eve, Ian went to a party in Boston with his friend Tommy. At the party, Tommy re-introduced Ian to his younger sister Ally Victim. Ally and Ian had met before in passing a couple of times. There were approximately 20 people at the party. The party was thrown by Felicia Complaint. Everyone at the party was over 18, but the majority of the people were under 21. Felicia was 20 at the time of the party. The apartment was owned by Felicia’s parents, who were out of town for the night. Ally was 18 at the time of the party. Marijuana cigarettes were being passed around liberally. Felicia served beer, mixed drinks and “jello” shots.

Ally arrived at the party at around 10 p.m., and Ian arrived about a half an hour later. At about 2 a.m., Felicia kicked everyone out of the party except Ally, Ian and Tommy, whom she was dating at the time. By all accounts, Tommy, Felicia and Ian were buzzed if not drunk. At about 2:30 a.m., Tommy and Felicia went to bed in Felicia’s bedroom. Ally and Ian stayed up to watch TV. At approximately 3:30 a.m., Ally went to sleep in Felicia’s guest room. Ian lay down on the couch to fall asleep.

At around 4:30 a.m., Tommy got up to go to the bathroom and heard a squeaking noise coming from the guest room. When he opened the door, he saw Ian lying on top of Ally. Ally’s pants were down by her ankles. When he entered the room, Tommy saw his sister push Ian off of her and yell: “Get off of me.” Tommy went ballistic. Ally got up and stood between Tommy and Ian. She started crying and said: “I don’t know what was happening, I just woke up, I am not sure what happened.” Tommy yelled at Ian to leave or he would “kill him.” Ian ran out of the house saying “I didn’t do anything.”

As he left the building, Ian passed by Danny the Doorman. Danny later told the police that he saw Ian run out of the building, partially concealing his face with a newspaper.

Tommy woke up Felicia and they started talking to Ally. When they asked her what happened, she said: “I must have been raped, I went to bed drunk and woke up and he was there and his penis was out.”

At about 5 a.m., Felicia’s parents Mr. and Mrs. Complaint unexpectedly came home early from a weekend away. Mrs. Complaint pulled Ally aside to talk to her. Ally was crying and visibly upset. Before she was asked a question, Ally blurted out, “Ian forced me to have sex.”

Tommy called the police. When the police arrived, Detective Dooright, the lead investigator in the case, interviewed Tommy. Tommy told the detective that on the night of the party, Ally had commented that “Ian was kind of creepy and looking at her funny.”

The next morning, Ian was arrested. The following day, Ian was arraigned in the BMC Central Division and charged with rape. Ian was held on $10,000 bail. Polly Defender was assigned to represent Ian. Peter Attorney was the prosecutor.

The morning after the party, Ally refused to go to the hospital. She did provide the police with her underpants and the sheets from the bed. Semen was located on both the underpants and the sheet. The court issued an order for the production of Ian’s DNA, and following DNA testing, Ian’s DNA was determined to be a positive match to the semen left on the sheets.

Two days after the arraignment, Ralph Rat was sharing a cell with Ian and they started talking about their cases. According to

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Ralph, Ian told him that “Ally had been flirting with him all night. She was pretty tipsy. He followed her into the guest room, they started kissing and one thing led to another.” Ralph asked Ian how Ally had responded. According to Ralph, Ian said “She seemed to like it, she did say no once or twice, but her words were slurred and I don’t think she really meant it.” Ralph wrote a letter to the DA’s office about what Ian had said to him. Ralph had a meeting with Detective Dooright and Peter Prosecutor. After the meeting, Peter offered Ralph a deal to testify. Through investigation, Polly learned that Ralph had an open-ended arrangement with the U.S. Attorney’s Office that predated his jail cell conversation with Ian. If Ralph discovered any useful information about any pending criminal cases, his cooperation would be taken into consideration if he pled guilty to his pending charges in federal court.

About a month after the arraignment, a probable cause hearing was held in the BMC. Probable cause was found and the case was bound over to the Suffolk Superior Court for trial. Mrs. Complaint testified at the probable cause hearing. She testified that on that morning at around 5 a.m., Ally had told her that “Ian forced me to have sex.”

Polly filed a motion to suppress the statement made to Ralph, and the judge ruled the statement was obtained in violation of Ian’s right to counsel under the 6th Amendment to the U.S. Constitution and Article 12 of the Massachusetts Declaration of Rights. 8

Polly hired a private investigator to speak to everyone at the party. Paul Drake, the investigator, spoke to Felicia. Felicia said that she was “pretty busy hosting the party, but she did keep a close eye on Ally because she did not want her to get really drunk. She said she saw Ally drink a couple of beers but nothing else. She had no personal knowledge about whether Ally smoked any pot and she is pretty sure that Ally did not do any jello shots.” She believed, “Ally may have been a little buzzed, but she did not seem too bad.”

Mr. Drake also spoke to Felicia’s mother. Mrs. Complaint told him that she “could not really understand what Ally told her that night but candidly she was more concerned about being charged criminally or sued civilly because it happened at her apartment and underage people were drinking.”

Right before trial, Felicia told Peter Prosecutor that she “was watching Ally most of the night and Ally must have had five beers, definitely smoked some pot and [she] saw Ally do at least three Jell-O shots.” During trial preparation, Tommy also told Detective Dooright and Peter Prosecutor that his sister had told him in the past that “Ian was cute” and she wanted to know “if he had a girlfriend.”

The prosecution’s theory is that Ally was too incapacitated to consent. The defense theory is that there was a consensual sexual encounter.

III. Legal issues:

A. Can Ian’s statement to Ralph be used against him at trial?

Against the advice of counsel, Ian insists on testifying at trial. Because the statement to Ralph was suppressed, it is not admissible for all purposes. If it had not been suppressed, the statement would have been admissible as a confession or an admission. In this scenario, the statement is inadmissible in the commonwealth’s case-in-chief. Once Ian takes the stand, however, it is admissible to impeach him even though it was obtained in violation of his 6th Amendment 9 and Article 12 10 rights to counsel.

If the statement had been taken in violation of Ian’s Miranda rights, the answer to the question would be the same. 11 However, if a judge had determined that the statement was involuntary, or the result of excessive coercion by the police, the statement would be inadmissible for all purposes. 12

Because the statement is so damaging, Polly should object, request a limiting instruction and propose a jury instruction that reflects the limited purpose for which the jury can consider the statement. If Polly fails to object to the substantive use of the statement, and seek a limiting instruction, Ian’s statement to Ralph would be admissible for all purposes. The distinction may be important in this case, because if Peter is allowed to argue the statement substantively, Ian’s acknowledgment that Ally said “no” can and will be argued as the truth. 13 The “fact” that the statement was even made is harmful enough, but it would be even more harmful as substantive evidence. Furthermore, any fact that is admissible for all purposes can also be used to defeat an otherwise legitimate motion for a required finding of not guilty. 14

B. Before impeaching Felicia with her prior statement to the private investigator, does Polly have to confront Felicia?

Felicia was very credible on direct examination. She testified consistently with what she told Peter and Detective Dooright right before trial: that Ally drank several beers, did several jello shots and smoked pot. Polly called Mr. Drake to impeach Felicia without having confronted her on cross examination with her prior inconsistent statement. Peter objected, arguing that Polly was required to confront Felicia first.

In Massachusetts, there is no requirement that counsel first confront an adverse witness before impeaching her. 15 For the purpose of impeaching the testimony of an adverse witness, the party “may show that the witness has made prior inconsistent ... statements, either by eliciting such statements upon cross examination of the witness himself or proving them by other witnesses.” 16 Therefore, a lawyer has the strategic option of calling the witness who heard or took the inconsistent statement, “proving up” or completing the impeachment collateral rather than first calling the declarant’s attention to her prior statement. 17 This tactical choice enables the advocate to avoid the possibility of a messy confrontation with a witness whom she believes may either offer a palatable explanation for the inconsistent statement, or who may convincingly flat-out deny ever making the contrary statement. 18 The trial judge always has the discretion to exclude this or any other type of impeachment if it only involves a collateral issue. 19 In this instance, however, the inconsistency is clearly material and Polly would have the absolute right to impeach Felicia, independent of whether she chose to confront the witness first.

C. Can Polly argue Felicia’s prior inconsistent statement substantively?

After losing his argument that Polly could not impeach Felicia without first confronting her with her prior inconsistent statement, Peter neither objects to the impeachment nor seeks a limiting instruction. In her closing, Polly wants to argue the prior inconsistent statement, that Ally only had two beers, substantively. Can she?

The general rule is that “prior inconsistent statements of a witness ... may be used for the limited purpose of impeaching a wit-
ness.” This rule derives from the principle that an out-of-court statement introduced for the exclusive purpose of impeachment is not hearsay. However, when there has been no objection and no request for a limiting instruction, a prior inconsistent statement may be considered as substantive evidence. Therefore, Polly may properly argue the contents of Felicia’s prior statement as a fact or as the truth.

As a general proposition, this distinction may not be terribly meaningful. In fact, the Supreme Judicial Court (“SJC”) has acknowledged as much. This hypothetical highlights one of the rare exceptions to this proposition, a circumstance where the distinction can be significant. If Peter had objected and requested a limiting instruction, Polly would have been confined to attacking Felicia’s credibility by pointing out that she had told different versions. Polly’s ability to argue substantively, that is, as the truth, Felicia’s statement that Ally had only two beers, is a necessary cornerstone of her defense, bolstering the argument that Ally was not incapacitated, but rather that she was both capable of consenting and in fact did consent.

The standard jury instructions used by both the Superior Court and District Court explicitly limit the use of prior statements to the assessment of credibility. Therefore, Polly would want to request a jury instruction accurately reflecting how the evidence could be used.

**D. Can Polly impeach Mrs. Complaint’s prior testimony, even if she does not testify at trial?**

Felicia’s mother successfully invokes her 5th Amendment right against self-incrimination. Peter then convinces the judge in limine that her invocation renders Mrs. Complaint legally unavailable as a witness, and Polly had sufficient opportunity to cross examine her at the probable cause hearing and, therefore, her previous testimony regarding Ally’s allegation that “Ian forced me to have sex,” is admissible at trial. In her case-in-chief, Polly calls Paul Drake to impeach Mrs. Complaint’s statement to the police with the inconsistent statement she gave to the defense investigator. Peter objects, arguing that Polly can’t impeach a witness who did not testify.

A statement of a non-testifying witness, that has been deemed admissible as an exception to the hearsay rule, may be impeached in the same manner as if the witness had actually testified. The rationale is that it would be fundamentally unfair for one side to derive a windfall because an adverse declarant was unavailable and her previous statement constituted an exception to the general evidentiary principle barring hearsay. The statement should be subject to the same rules of impeachment as the declarant would have been subjected to had she testified. “Otherwise, the fact finder [would be presented with] a distorted and incomplete view of the evidence.” Therefore, Polly should be allowed to impeach the declarant’s (Mrs. Complaint) credibility by calling Paul to testify that Mrs. Complaint told him she was not sure what Ally told her and that she, Mrs. Complaint, was concerned about her own liability.

**E. Can Polly impeach Ally if Ally says “I don’t remember”?**

On direct, Ally testifies that she was raped and that she saw Ian pull her pants down. On cross examination, Polly confronts Ally with the prior statement she made to Tommy the night of the incident in which she claimed she did not know what happened. Ally responds that she “can’t remember.” Peter objects to the question and asks the judge to instruct the jury to disregard the question because if Ally cannot remember, then there is nothing to impeach.

How should the judge rule?

The answer depends on exactly what Ally is claiming she does not remember. Generally, “there is no inconsistency between a present failure of memory on the witness stand and a past existence of a memory.” However, this principle of law is often misunderstood. The analysis begins with the question: What is it that Ally cannot remember? When a witness is found to have “no present memory as to the substance of a prior statement, its admissibility is precluded.”

In this case, Ally is not claiming a present loss of memory about the incident, because she testified on direct to substantive facts contradicted by her previous statement. As such, she must be alleging either that she does not remember talking to Tommy or she does not remember telling Tommy that she does not know what happened. In either case, Polly may impeach her with her prior inconsistent statement. Of course, the impeachment would have to be completed during Tommy’s testimony.

If, on the other hand, on during direct examination, Peter asked Ally “Did you see Ian do anything to you?” and she answered that she “did not remember,” Ally would have no present memory of the fact being sought or contested. In that scenario, Polly would be barred from impeaching Ally with her prior statement that she did not see anything happen. However, under those circumstances, if the testimony was important to Polly to elicit, she might have one more card to play: she could ask the judge to find that the present loss of memory was feigned. If the judge agreed, then the judge could permit Polly to introduce the prior inconsistent statement.

**F. Can Polly impeach Detective Dooright if he testifies to a fact that was omitted from his police report?**

On direct examination, Detective Dooright testified that when he arrested Ian, Ian laughed and said, “She asked for it.” Polly wants to impeach Dooright with the fact that this statement does not appear in any prior police report.

A witness may be impeached with an omission from an earlier statement if the omission is “inconsistent with a later statement of fact when it would have been natural to include the fact in the initial statement.” Accordingly, Polly would be entitled to cross examine the officer, and highlight how Ian’s admission was not contained in Dooright’s initial police report. Finally, Polly should propose a jury instruction that accurately reflects this principle of law.

**G. Can Peter impeach Danny the Doorman with his prior statement to the police?**

Peter calls Danny the Doorman as a witness. Danny testifies that he saw Ian run from the apartment. When Peter asks Danny if he noticed anything else, Danny says no. Peter is unable to successfully refresh Danny’s memory. Peter then tries to impeach Danny with his prior statement that he saw Ian holding a newspaper up, concealing part of his face. Polly objects, arguing that Peter cannot do that.

A party may not call a witness solely to impeach him with a prior inconsistent statement that is contrary to his current trial testimony. Otherwise, the jury might infer that the question itself, attempting to elicit the contradiction, is entitled to some evidentiary weight.

However, if another probative reason to call the witness exists, then the party may be permitted to call and then impeach its
own witness. In the hypothetical, Polly would want to argue that Peter’s exclusive reason for calling Danny was to impeach him and any other proffered reason is subterfuge. Peter should counter that he had another legitimate reason for putting Danny on the stand: Danny is the only witness who can testify that he saw Ian running from the apartment, a material fact that is admissible as consciousness of guilt evidence.

H. Are there any special rules governing the impeachment of a party’s own witness?

What if Peter was intrigued by Polly’s strategic choice in not confronting Felicia with her prior inconsistent statement and is considering the same tactical decision with Danny? Can he avoid confronting Danny and impeach him extrinsically through Detective Dooright?

Peter does not have the same option that was available to Polly. The difference is that Polly was impeaching an adverse witness. In fact, this precise scenario is controlled by statute, Mass. Gen. Law ch. 233 § 23: “The party who produces a witness ... may also prove that he has made at other times statements inconsistent with his present testimony; but before proof of such inconsistent statements is given, the circumstances thereof sufficient to designate the particular occasion shall be mentioned to the witness, and he shall be asked if he has made such statements, and, if so, shall be allowed to explain them.” Therefore, if the judge accepts Peter’s argument in number 7, that he is not calling Danny just to impeach him, and if he follows the steps prescribed by the statute, Peter may impeach Danny the Dooright with what he previously told Detective Dooright.

I. If Polly successfully impeaches Tommy, may Peter rehabilitate Tommy with his “prior” consistent statement?

On direct examination, Tommy testified that his sister told him that she thought “Ian was very strange and he always stared at her.” Polly impeached Tommy with his prior statement, made to Detective Dooright, that his sister had told him “Ian was cute” and she was curious “if he had a girlfriend.” Peter wants to rehabilitate Tommy with the statement he made to the police the night of the incident: Ally had told him she thought Ian “was creepy and he was always looking at her funny.” Polly objects, arguing the previous statement is inadmissible hearsay.

The law surrounding the admissibility of prior consistent statements is widely misunderstood. Simply because a witness said something consistent with his trial testimony on another occasion does not magically render it admissible. In fact, the general rule “is that a witness’s prior consistent statement is not admissible, even though the witness’s prior inconsistent statement has already been admitted.” Most consistent statements are hearsay. Moreover, the inference of unreliability based on the making of an inconsistent statement does not disappear solely because, at some previous time, a witness said something consistent with his trial testimony.

A prior consistent statement is admissible to rehabilitate a witness in very narrow circumstances, specifically; such a statement can be admitted either 1) to rebut a claim that the witness’s in-court statement is “of a recent contrivance” or 2) if the statement “is the product of a particular inducement or bias.” However, before the prior consistent statement can be admitted, “it must appear that the statement was made before the witness possessed a possible motive to fabricate or before the inducements or bias ... developed.”

The seminal and often disputed question is whether the adverse party is suggesting the declarant’s current testimony is the result of a recent contrivance. Polly would argue that she is not suggesting that Tommy is prevaricating now for the first time, but rather, that he has been lying all along. Furthermore, Tommy’s motive to lie and to corroborate the allegation of rape arose the moment he entered the room and thought Ian was assaulting his sister. Thus, Tommy’s motive to fabricate his testimony existed before he first spoke to the police. If that argument prevails, Polly would not be suggesting that Tommy’s testimony was a recent contrivance, but rather a contrivance that existed before he made the initial consistent statement to the police.

Peter would come at this reasoning by arguing that Polly is suggesting Tommy is lying on the stand for a reason that did not exist when he first spoke to the police and, therefore, the prior consistent statement should be admitted.

If the judge rules in Peter’s favor, Polly should request an appropriate instruction, limiting the jury’s consideration of the prior consistent statement to assessing Tommy’s credibility.

IV. Conclusion

Properly navigating the nuances of impeachment law can be challenging. In the heat of the moment, recognizing some of the subtle issues and advocating effectively is no easy task. Often, knowing the arguments, making proper objections and requesting appropriate instructions from the judge can play an important role in a criminal trial.

Notes

1. Although criminal practitioners are the target audience for this article, most of the legal principles govern civil trials as well.
2. In one case, I have a very vivid memory of fighting with both the judge and my adversary before, during and after closing arguments and before, during and after the jury charge about whether I could argue a critical prior or inconsistent statement as substantive evidence. The answer, like most evidentiary questions, is it depends. It depends on the circumstances; it depends on your knowledge of the law and it depends on your persuasive abilities as an advocate.
3. If cross-examination is “beyond any doubt the greatest legal engine ever invented for the discovery of truth,” then impeachment would, beyond any doubt, be a V-8. See J. Wigmore, Evidence § 1367, p. 32 (J. Chadbourn rev., 1974).
4. Robin Hood would have been a fabulous litigator (a public defender of course) because he had deadly aim and he always had that one special arrow to penetrate deep into the heart of his adversary.
5. Massachusetts has a rich and distinct common law evidentiary tradition. The case law often references the Massachusetts Proposed Rules of Evidence (1980). Those rules, which essentially echo the Federal Rules of Evidence, have never been codified. The SJC “invited parties to cite the rules in their briefs.” Announcement Concerning the Proposed Massachusetts Rules of Evidence (December 30, 1982); Commonwealth v. Daye, 393 Mass. 55, 66 (1984). At times, Massachusetts appellate courts have relied on the value of the proposed Rules “as a comparative standard for the common law evolution of evidentiary law.” Daye, 393 Mass. at 66. Occasionally, the SJC has specifically adopted the principles embodied in individual provisions of the proposed rules. See Daye, 393 Mass. at 75; Commonwealth v. Sineiro, 432 Mass. 735, 742 (2000); see generally Massachusetts Guide to Evidence (2008)(SJC Advisory Committee on Evidence law relies on lan-
guage in Proposed Rules of evidence when it accurately reflects current Massachusetts law).

Some of the answers to my hypothetical questions are unique to Massachusetts law. Where appropriate, I briefly contrast the answer with federal law. However, I offer one important caveat: this article is about litigating in Massachusetts state court, not the Federal District Court or any other jurisdiction, for that matter.

6. The hypothetical is loosely based on an amalgamation of cases I have been involved in. However, that fit is loose and any perceived similarities between real cases and real people and my fact pattern are merely coincidental, at least for the most part.

7. To the extent it may be relevant, the party took place before the passage and effective date of Ballot Question 2, the law decriminalizing possession of an ounce or less of marijuana.

8. See Commonwealth v. Murphy, 448 Mass. 452, 465-72 (2007) (SJC concludes that under both the 6th Amendment and Article 12, a jail house informant who has a general cooperation agreement with the government does not have to target a specific defendant to qualify as an agent of the government).


10. The precise issue clarified by the Supreme Court in Ventris has not been decided by the SJC under Article 12. See generally Commonwealth v. Anderson, 448 Mass. 548, 556-57 (2007) (stating, as a general proposition, the right to counsel provision of Art 12 has been interpreted to afford the accused the same protections as the 6th Amendment). However, because the SJC has interpreted Article 12 to provide greater protection for criminal defendants than its federal counterpart in certain circumstances, Polly should continue to object, citing Article 12, in the hopes that the issue will be decided differently under the Massachusetts Constitution. See e.g. Commonwealth v. Marvedakis, 430 Mass. 848, 858-60 (2000); Murphy, 448 Mass. at 465-68. The substantive argument would essentially mirror the dissent in Ventris.


13. Contra Commonwealth v. Woods, 455 Pa.1, 4-5 (1973) (a statement obtained in violation of a testifying defendant’s constitutional rights is not admissible for impeachment purposes if it corroborates the government’s case).


15. Peter would have been correct in federal court. See Fed. R. Evid.613(b) (requiring counsel to afford the witness the opportunity to explain or deny the statement before any extrinsic evidence of an inconsistent statement may be admitted).


18. Peter would not be precluded from recalling Felicia to explain or deny the inconsistency.


20. Commonwealth v. Jones, 432 Mass. 623, 627 (2000); cf. Advisory Committee Notes to Fed. R. Evid. 801(d) (“Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence”).


23. Commonwealth v.Daye, 393 Mass. 55, 69 (1984) (“juries cannot, and perhaps, should not be expected to discriminate between impeachment and probative use of inconsistent statements”); cf. Commonwealth v. Bregoli, 431 Mass. 265, 278 (2000) (prosecutor’s improper use of limited evidence substantively was clearly error, but because it did not appear to influence the jury, the error was deemed harmless). Most trial lawyers whom I have asked accept this general proposition and frequently make the tactical decision not to object under similar circumstances.

24. There are other circumstances where a prior inconsistent statement may be argued substantively. See e.g., Jones, 432 Mass. at 627 (when a witness adopts the prior statement as true it is admissible for all purposes; accord Fed. R. Evid. 801(d)(2)(B)]. See also Commonwealth v. Le, 444 Mass. 431, 439-41 (2005) (changing the rule, consistent with Fed. R. Evid. 801(d)(1), SJC holds that any prior statement of identification is admissible substantively); Commonwealth v. Daye, 393 Mass. 55, 65-75 (1984) (permitting the probative use of a prior inconsistent grand jury testimony at trial if the statement is uncoerced, based on personal knowledge and the declarant can be cross examined at trial); Commonwealth v. Sineiro, 432 Mass. 735, 741-42 (2000) (allowing prior testimony at a probable cause hearing to be relied on substantively in limited circumstances similar to those enunciated in Daye); Commonwealth v. Fort, 33 Mass. App. Ct. 181, 183 (1992); see generally Fed. R. Evid. 804(b)(1) (authorizing the substantive admissibility of prior testimony if certain criteria, unavailability and the opportunity to cross examine when the testimony was taken, have been met.); Commonwealth v. Leo, 379 Mass. 34, 41-42 (1979 (holding a prior inconsistent statement that constitutes an admission by a party opponent is admissible for all purposes).

25. This hypothetical is one example of when this distinction is important. Another more common example would be a typical domestic violence scenario. A defendant is accused of assaulting his spouse. Initially, the alleged victim tells the police the defendant did hit her. Then she tells a defense investigator that nothing happened. Assuming for argument’s sake the alleged victim’s statement to the police was both non-testimonial under Crawford and the statement qualified as an excused utterance, if she did not testify at trial, the defendant would want to call the investigator to impeach her statement to the police officer. If her inconsistent statement was not objected to, the investigator’s contrary statement could be considered substantively, thus supplying the key to an acquittal or perhaps a successful argument for a Required Finding of Not Guilty. See generally Crawford v. Washington, 541 U.S. 36 (2004); Commonwealth v. Gonsalves, 445 Mass. 1 (2005); Costello, 411 Mass. at 378.

26. See Model Jury Instructions for Use in the District Court, Instruction 3.700 (2009) (“the prior statement is relevant only as to the witness’s credibility, and you may not take it as proof of any fact contained in it”); Model Jury Instructions for the Superior Court, Instruction § 4.10.1 (2003) (“you may not consider the earlier statement as evidence or proof of the truth of any fact contained in the statement”).

The concern is less about crafting a legally correct instruction, which assumes the jury would appreciate the distinction, and more about avoiding an instruction that would explicitly undermine Polly’s defense. Cf. Commonwealth v. Martin, 19 Mass. App. Ct. 177,119 n. 3 (1984) (judge committed error in failing to charge the jury as to the appropriate evidentiary use of prior inconsistent statement; however, the error was harmless).

27. See Sineiro, 432 Mass. at 741-42. This example raises totem pole hearsay and confrontation issues as well. However, Ally’s initial statement to Mrs. Complaint would not offend the 6th Amendment because Ally was available to testify. Further, Ally’s statement could also qualify as an ex-
cited utterance and therefore, qualifying as an exception to hearsay rule.

28. Commonwealth v. Mahar, 430 Mass. 643, 649-50 (2000); Commonwealth v. Sellon, 380 Mass. 220, 224 n. 6 (1980). Accord Fed. R. Evid. 806 ("the credibility of the declarant may be attacked ... by any evidence that which would be admissible for those purposes if declarant had testified as a witness").


31. Id. (emphasis added).

32. "A witness who actually made a statement contradictory to trial testimony cannot escape impeachment by saying he does not remember making the statement." Commonwealth v. Gil, 393 Mass. 204, 220 (1984) (citing Langan v.Pianowski, 307 Mass. 149, 152 (1940)). The loss of memory is functionally treated as if the witness denied making the statement, and therefore is inconsistent with the substance of the prior statement.

Polly also could try refreshing Ally’s memory with the police report that contained Tommy’s statement. If this did not work, Polly would have to impeach her extrinsically through Tommy. If Polly anticipated that Ally was going to say “I don’t remember,” she could skip the confrontation and instead simply introduce the prior statement through Tommy.

33. Sineiro, 432 Mass at 742-45.

34. Pianowski, 307 Mass. at 149 (holding prior inconsistent statement was properly admitted both to impeach and substantively as an admission); Sineiro, 432 Mass. at 745 (finding probable cause testimony admissible for all purposes, in part because the witness’s lack of memory was deemed false by the trial judge).

35. If Polly had no prior knowledge of the statement, an admission being attributed to lan, she should also move to strike the testimony, arguing the late disclosure of automatic discovery warrants the sanction of preclusion. See Mass. R. Crim. P. 14(a)(1) /(A)(i), 14(c)(2).


37. As with every case, Polly should undergo the strategic calculus. In this instance, the omission is critical; however, with a fact of lesser significance, the impeachment might not be worth the candle. Effective impeachment by omission is an art form and, when done properly, is very effective. When it is not, it is fraught with peril. For tips on how to do this well I suggest Larry S. Pozner & Roger J. Dodd, Cross-Examination: Science and Techniques (Michie 2003) and anything written on the topic by Professor James McElhaney.

38. See Ortiz, 39 Mass. App. Ct. at 72. (overturning conviction because the trial judge declined to give an appropriate jury instruction on the use of prior inconsistent statements in assessing the credibility of an officer who had omitted significant details from his police report).


41. This type of scenario raises a host of other potential concerns, for example: does it necessarily matter if the party calling the witness knew beforehand that its witness was going to deny a critical fact? See Commonwealth v. Kiecolmos, 66 Mass. App. Ct. 114 (2006) (inferring prior knowledge of witness’ intention to dissavow an earlier statement is relevant to the analysis). What if the inconsistent fact contained in the prior statement is highly prejudicial and of limited probative value? What if the prior inconsistent fact satisfied an element of the offense? What if the prior inconsistent fact was an admission by a defendant? Cf. Benoit, 32 Mass. App. Ct. at 117 (eliciting a damaging admission attributed to the defendant as a prior inconsistent statement was reversible error because the witness had no other relevant testimony to offer).

42. Commonwealth v. Rosa, 412 Mass. at 147, 156 (1992). However, a party is not subject to the same formalities if it chooses to elicit evidence of its own witness’ prior record, Commonwealth v. Caldwell, 374 Mass. 308, 312 (1978), or in the case of the commonwealth, an agreement for leniency. Commonwealth v. Griffith, 404 Mass. 256, 265-66 (1989). Cf. generally Fed. R. Evid. 607 ("the credibility of a witness may be attacked by either party, including the party calling the witness").

43. If Peter is allowed to impeach Danny, and Danny still denied making the previous statement, Peter would have to complete the impeachment through the detective. At that time, Polly would want to request an appropriate limiting instruction.

44. Assume Tommy’s statement was admitted by the judge over objection because it was not being offered for the truth of the matter asserted, but rather to show Ally’s state of mind, rebutting the defense of consent.

45. Mechanically, Peter probably would have to re-call Detective Doright in rebuttal to testify about the previous consistent statement.


47. Brookins, 416 Mass. at 102.


49. Healey, 27 Mass. App. Ct. at 35(emphasis added); accord Fed. R. Evid. 801(d)(1)(B). The exception has also been characterized as applying when the other party is suggesting that the inconsistent “statement was the product of some peculiar or transient bias or pressure of some kind ... ” Commonwealth v. Horne, 26 Mass. App. Ct. 996, 998 (1988); cf. Commonwealth v. Rodriguez, 454 Mass 215, 222 and n. 6 (2009) (deciding the substance of a witness’ prior statement and the reason the statement was made were properly admitted to rehabilitate a witness even though the statement was made after any motive to fabricate arose).

50. Trial judges have a wide range of discretion in deciding whether a suggestion of recent contrivance exists. See Brookins, 416 Mass. at 103.

51. This is similar to the argument that the Appeals Court found persuasive in Binienda, Mass. App. Ct. at 499-501.

52. Model Jury Instructions for Use in the District Court, Instruction 3.700 (2009) (In assessing the permissible use of a prior consistent statement that has been admitted into evidence, “the prior statement is relevant only as to to the witness’s credibility, and you may not take it as proof of any fact contained in it.”); accord Gaudette, 56 Mass. App. Ct. at 499.
A HALF-DOZEN HOT TIPS FOR STARTING A SOLO PRACTICE

By Peter Elikann

Nearly a decade ago, the American Bar Association’s Lawyer Statistical Report determined that 89 percent of all lawyers in the United States work in solo or small practices. With the lion’s share of the legal profession comprising firms with one to 10 lawyers, it is surprising that, in the following 10 years, so many people don’t know where to begin or where to turn for training and support when they set out to form their new practice. After all, starting a solo practice or, in fact, any kind of nuts and bolts law firm management is not something generally taught in law school. It is not so much a legal endeavor calling on lawyer skills as it is a small business endeavor for which many of us have no skills.

There are some lawyers who are going out on their own solely because of today’s economic downturn. Through no lack of talent and no fault of their own, they can’t land an appropriate first job or are laid off by the big firm. For those attorneys, they should know there is no shame in being a solo practitioner and they should never be apologetic to clients telling them how they can now be cheaper or explaining that they are because they are to a vacuum of a tanking legal market. Clients have their own problems and aren’t interested in yours. They also don’t want it driven home to them that they should hire you only because you are a self-proclaimed cut-rate discount bargain lawyer.

1. Determine whether a solo practice is for you

As a solo practitioner, you are the boss and master of your own fate. You answer to no one. That’s the good news. It’s also the bad news.

When a solo firm fails, it is usually because one is a bad business person, not because one is a bad lawyer. Do you have the drive to keep a number of balls in the air, because only part of your time will be doing the actual lawyer work, with the rest going to marketing, accounting, keeping equipment running and the office supplied and paid for?

We can all think of superstar lawyers who were part of a big firm or agency or prosecutor’s office who have brilliant legal minds and are well-respected for their lawyering skills only to be a disaster when they tried to put out a shingle and go off on their own.

Perhaps a prosecutor is remarkable in trying a case, but when he leaves the district attorney’s office and starts his own private practice, he just doesn’t have the personality to attract and massage clients or to chase them for bills. Paying bills, scheduling, e-mails, phone calls, appointments, insurance, office supplies, taxes, bar dues, communicating with clerks/coordinators/other lawyers, etc. may just not be their cup of tea.

Are you a procrastinator who, left to your own devices, will not get everything done without someone to answer to or someone to pick up your slack when you don’t complete your to-do list? Time management is the most pervasive specter hovering over the self-employed attorney.

Or do you function better if you’re in control doing things your way? Many lawyers have done poorly as cogs in the wheel of large law firms, but lack the self-confidence to go on since they were not successful at their initial big firm law job. They go out on their own and promptly turn their lack of accomplishment around as they are no longer obsessed with pleasing the boss, but rather are relying on their own judgment and gut instincts. Poor past performance may not be indicative of future victory in another job setting that’s a better fit.

2. Keep overhead down

Your friends, family and business contacts may hire you eventually, but they’ll rarely do so right away. They have to need to hire you, not just want to. Even if you do acquire sufficient clients at the outset, count on it being at least six months before you begin to have a regular income coming in. Contingency fees, hourly billing and pay for contract work such as court-appointed bar advocates on criminal cases may not see actual checks in the mail at the outset. Figure out first how you can survive. Do you have savings set aside? Can your spouse’s income carry you? Are you fresh out of law school and still have a part-time job doing anything?

Then, since monthly overhead is the key back-breaker of every lawyer, find ways to run your practice close to the ground doing things inexpensively or free.

A. Office space

Home offices are so much more accepted by clients today than they ever were, not just for law practices, but for every business or service. With the advent of such things as computers and e-mail, even many corporations came to the realization that they don’t need to maintain office space in a central building, but rather, keep all their employees at home linked electronically.

The key is that, if you are to set up a home office, you must have a presentable looking space with its own entrance, if at all possible. Setting up your laptop and phone in a corner of your bedroom just might not cut it.

Virtual offices come in a variety of arrangements and can give off a real air of professionalism. You can have a remote receptionist; an address in a prestigious building with use of the conference room to meet clients that can be paid for on an hourly basis; mail,
Web sites have become increasingly popular. A consultant could help you with the art of having your Web page stand out and having it placed high enough on the list to attract clients.

But, at this moment in time, we’re riding the cusp of the next generation of media marketing and a great deal of it costs nothing. Professionals are increasing their visibility through social media including Facebook, Twitter, LinkedIn, MyLife, Zoominfo, YouTube and MySpace. Setting up and regularly contributing to your own blog might also draw a following.

A number of organizations such as the Massachusetts Bar Association and the Boston Bar Association have attorney referral services where, for perhaps an extra $100 a year, one can have cases referred to them. The cost of this and the cost of several hundred dollars to join the bar association is negligible when compared to the profit from landing a single case. Civil attorneys have, indeed, landed million dollar cases through the bar associations and criminal defense attorneys can land a $10,000 or $60,000 case.

The most perennial way of marketing oneself — after pushing friends and relatives — is, of course, through personal referrals from previously satisfied clients. But make sure that these clients know that just because you represented them on one kind of case (let’s say a divorce) doesn’t meant that you don’t do other kinds of cases and, if you don’t, you can certainly refer them to another attorney, thus, at the least, gaining a referral fee. This underscores a key marketing device — establishing relationships with other attorneys for mutual referrals. Whether you’re on the referring side or the receiving side, you win.

Volunteer to give talks to business or community groups. Media appearances on television, cable access, being quoted in a newspaper or getting articles published can also draw attention to yourself as you are immediately classified as an “expert” in the mind of a viewer or reader.

4. Mentors and buddies and gaining experience

Solo doesn’t actually mean you always have to be out there winging it on your own. There isn’t a new lawyer who doesn’t have a person or two who will tolerate them calling and asking endless questions. There’s a great deal of necessary knowledge you need to acquire that isn’t available in a book, whether it be getting the lowdown on a particular judge you anticipate appearing before or looking for potential pitfalls in drafting a document that only experience can teach. Identify mentors, use them and then pay them back if need be by doing some legal tasks for them. Although, if truth be told, most lawyers who have been around for a while love to pontificate and show off their experience; if you walk up to a lawyer in a court where you’ve never been, chances are they’d be glad to give advice to a stranger as to the local lay of the land.

The MBA has its own mentoring program where you can call in.

Another great source of free advice is to identify blogs or get on a listserv where you can actually throw a question out there and then sit back as you might get 50 responses giving you the answer. This is true for substantive law questions as well as questions on how to run a solo or small practice. If you go on the Net, you’ll see numerous blogs giving advice to solo practitioners, including myshingle.com or the ABA’s Solosez.

An invaluable resource here in the commonwealth is the Massachusetts Law Office Management Assistance Program, a free confidential consulting service that will meet with you over the
phone or in person to advise on setting up a new practice, maintaining the existing practice or transitioning out of a practice.

For learning how to do things, there is no substitute for sitting in court and watching other attorneys or tagging after a more senior attorney as he or she engages in a deposition or conference. But, for real hands-on work, if you have the time, there are pro bono clinics in almost every area of the law, such as immigration, consumer rights and domestic relations, where they will train you first and then give you real cases to do. In other areas, such as criminal law, you can get on the lists for paid court-appointed work.

It’s also important to have a few colleagues you can call on, perhaps at a moment’s notice, to cover you if you can’t make a simple court date, conference or other event because you have to be elsewhere. It will help you retain cases rather than have to turn them down. It will cost you nothing if you and your colleague simply cover each other as kind of a quid pro quo. However, if you have to pay a minimal fee to someone to cover things for you on an as-needed basis, it is still likely to be very cost effective rather than paying permanent staff.

5. Concentrate on a few areas

Years ago, it was thought that, to survive as a solo practitioner, particularly in a local neighborhood, a lawyer had to do a little bit of everything. Therefore, the generalist could provide cradle-to-grave service for an entire family. As society has become more diverse, the law has become more complex and former backwater areas of the law have zoomed to the forefront. New laws are booming.

Since a growing number of lawyers have specialized, their level of expertise in their chosen fields has increased, and this makes it more difficult for a generalist to compete with them. It’s no different than if one of us had a rash, we’d probably head first to a dermatologist rather than to our family primary care doctor if we had a choice. In the past, a general practitioner might have taken on a client’s son’s drunk driving case, but now even a criminal defense attorney might be wary of such representation as there are lawyers who have an even more limited concentration and handle drunk driving cases almost exclusively. How could a general practitioner who very occasionally represents a person accused of operating under the influence compete with an expert who has a cutting-edge, state-of-the-art knowledge of the increasingly byzantine and scientific aspects to this law?

If you think your small community might not generate enough work for a narrow specialist, remember that with the advent of the Internet through Web sites and networking groups, it’s easier to advertise and make yourself known in all the surrounding communities, also.

Rather than just lapse into an area of law by default because you happen to start out with a few similar cases, one should be proactive and decide first what area you would love, if there is a need for such a lawyer in your community and, perhaps, what areas of law are generally underserved by the profession.

6. Be wary of ethical pitfalls

Not running afoul of the ethical code is a subject that merits a book-length discussion.

But, so many solo practitioners, overwhelmed by trying to do everything, from time to time do unwittingly break the rules.

Most of this could be avoided just by putting systems into place from the opening day of your solo practice. There are software programs to maintain calendars; records management; time-keeping and billing.

The chief problem is that a “solo act” attorney pulled in too many directions might get in trouble with every lawyer’s nemesis — time management. Again, organization at the outset along with systems in place in advance will help an attorney maintain control. The problem of managing one’s time, along with its inherent stresses and strains, are serious enough that it’s worth noting that we have an organization here in Massachusetts for attorneys overwhelmed by the stress — Lawyers Concerned for Lawyers.

In addition to putting systems in place, review the ethical rules in advance for potential pitfalls. You may call the Massachusetts Board of Bar Overseers advice line if questions come up on such things as conflicts or confidentiality, and there are many additional listservs to anonymously contact other lawyers. Generally speaking, your gut instinct will almost always tell you if you’re about to butt heads with an ethical rule.

The two greatest bits of advice to any lawyer wishing to avoid problems with clients are (1) use fee agreements and (2) return phone calls. Client communication is paramount and it always boggles the mind how so many lawyers run afoul of irate clients for failing to do the simple, quick action of merely returning a phone call.
Gender asylum: Bringing the law into the 21st century

By Marisa A. DeFranco

Asylum law provides relief to people fleeing persecution based on race, religion, nationality, membership in a particular social group or political opinion. Not surprisingly, gender is missing from the listed categories. However, over the last decade, immigration law has slowly been evolving to include some types of gender-based persecution under the social group classification, including female genital mutilation (FGM), women who oppose repressive gender-specific codes, forced marriage and domestic violence.

In 1995, legacy INS did issue a memorandum to its asylum officers on how to adjudicate women’s asylum claims, but this memo is insufficient as the government fails to follow it in every case (see infra) and does not have the same effect as binding precedent or law. The interim step for achieving justice for immigrant women is to expand a particular social group to include women, but the highest order of protection would be to establish a sixth category for women. With a definitional category of their own, women would not have to go through the excruciating process of establishing their rights piecemeal, on a case-by-case basis.

Two areas, trafficking and domestic violence, exemplify the need for serious reform and adding women as their own recognized category in asylum law. In the area of human trafficking, current law provides a T visa (not gender specific) for trafficking victims but no redress for those who fear trafficking. Women who fear becoming victims of trafficking should the United States return them to their home countries can try to make the particular social group argument. Though the United Nations High Commissioner for Refugees (UNHCR) takes the position that persons at risk of being trafficked may qualify for refugee status, “Some victims or potential victims of trafficking may fall within the definition of refugee contained in Article 1A(2) of the 1951 Convention and may therefore be entitled to international refugee protection,” the particular social group argument for potential trafficking victims may be a difficult one to win. Thus, you can only benefit from our protection if you’ve already been victimized. This conundrum is analogous to U.S. domestic violence law circa 1980s: don’t bother to press charges against your abuser unless you can show up at the police station with black eyes, lacerations and documentation of previous hospitalizations.

In the area of domestic violence, however, being a victim of violence is still no guarantee of asylum. Matter of R-A-, is the most recent case on record that deals with domestic violence. An immigration judge had granted asylum to a Guatemalan woman, Rodi Alvarado, who suffered years of vicious abuse by her husband. In 1999, the Board of Immigration Appeals (BIA) reversed the judge’s grant of asylum.

Next, Attorney General Janet Reno vacated the BIA’s decision. At the time, final regulations on gender-based claims were pending, and Reno wanted the case to be reviewed once the rules were issued. However, when John Ashcroft became attorney general, he sat on the case and regulations and never took action, and then the Department of Homeland Security (DHS) took jurisdiction, and, again, failed to issue the regulations. Only just last month, after 14 years of waiting, Alvarado finally won asylum — DHS informed the court that she was eligible. However, DHS’ decision applies only to Alvarado and regulations have still not been issued, thus leaving many other women in limbo. These regulations would establish that women may comprise a social group, per se, that being a woman is an immutable characteristic, one that a woman cannot or should not be required to change.

The concept of the immutability of being a woman seems uncomplicated, yet opponents such as the Federation for American Immigration Reform (FAIR) define such an expansion of the definition of social group to include gender-based asylum as “ideological ‘mission creep.’” Not only is FAIR’s assertion biased by restrictive and sexist motives, but it is also plain wrong on the facts.

First, only a misogynist could define women’s lives as “ideological ‘mission creep.’” If you were to replace “women” with the Somali Bantu or Serbian Muslims, their arguments would receive the immediate (and warranted) charge of racism. Second, the BIA’s decision in Matter of R-A- only serves to display the majority’s perplexing inability to understand domestic violence, and opponents of gender-based asylum fail to understand that women are targeted for domestic (and other) violence because they are women, a specific group targeted for persecution because of an immutable characteristic. Specious arguments that granting asylum based on gender would “open the floodgates” — and that women don’t meet the definition of a particular social group absent the persecution and therefore don’t meet the test of existing as a group separate and apart from the persecution — are wrong on the facts and inconsistent in the law. In Matter of R-A-, the BIA turned its back on its own precedential history in asylum jurisprudence. In Matter of Acosta, the BIA wrote:

Applying the doctrine of ejusdem generis, we interpret the phrase “persecution on account of membership in a particular social group” to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or

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in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.7

DV victims are not members of a social group solely by virtue of their persecution. The inverse is actually the case: DV victims are persecuted precisely because they are a member of a social group — women. DV victims quite plainly meet both tests of being a “recognized segment of the population” and are “understood to be a societal faction.”

As the BIA demonstrated in Matter of R-A-, unfortunately, restrictionist arguments are not the only obstacle to justice for immigrant women. Moreover, our own government has been hostile to immigrant women. “Courts, however, have admonished government attorneys for failing to adhere to the principles set forth in the 1995 legacy INS memorandum.”8 As recently as 2004, the U.S. government propounded the argument that rape is simply a matter of “forceful” sex, and the Ninth Circuit court chastised it for contributing to this noxious notion: “Furthermore, the DOJ’s argument simply perpetuates the myth that “[r]ape is just forceful sex by men who cannot control themselves.”9 And there’s more: “I was taken aback by the argument that a sexual assault like this one could be attributed to sexual attraction alone.”10 A New York immigration judge “noting that legacy INS’ closing argument, which referred to the domestic violence suffered by the applicant as a mere “family matter,” is a position in direct contravention of its own gender guidelines.”11

Back to those scary “floodgates”: in 1993, Canada was the first country to recognize gender-based persecution with formally issued guidelines. As USCIS itself states on its Web site, the “Immigration and Refugee Board of Canada reports that gender-related claims have actually dropped steadily since a peak of 315 claims in 1995.” Furthermore, approval rates are extremely low — an average of 28 percent at USCIS from 1973-2004, average 28 percent,12 and 22 percent in the courts.13

Finally, once again, critics of gender asylum reveal their complete disrespect for refugee women by referring to them as “collateral consequences.”14 The majority of women refugees seek refuge in countries such Iran, Sudan, Pakistan and Gaza. The United States takes 80,000 refugees — a tiny fraction of the world’s 16 million refugees (which does not include the 26 million IDPs).15 For asylum seekers, the United States has an estimated 49,000 new claims in 2008 (numbers are not subdivided by type), but “[c]ompared to the size of its national population, however, the United States had only one asylum seeker per 1,000 inhabitants, while the average in the European Union countries was 2.4 asylum seekers per 1,000 inhabitants. After the United States, the main countries of destination for asylum seekers in 2008 were Canada (36,900), France (35,200), Italy (31,200) and the United Kingdom (30,500).16

FAIR argues that United States recognition of gender asylum would only serve to give these countries a reason to withdraw from international conventions that aim to defend women’s rights. It posits that withdrawal from such treaties would be a “collateral consequence” of recognizing women as legitimate asylum seekers.

Does FAIR know why the majority of women refugees seek refuge in these countries? Simple geography — they can’t just jump on their private jets and head for America. The fact that they flee to societies as repressive as their own does not discount their membership in a social group. Their flight merely reflects their desperation. We do not and should not base our humanitarian goals of asylum law on what may happen in the future should we recognize gender asylum claims as viable. Using the example of Saudi Arabian withdrawal from conventions is a disingenuous argument. Whether they are in or out, their treatment of refugees — of all its citizens, especially women — is still unacceptable. One thing is clearly certain, though: denying women asylum in the United States is certainly not going to make Saudi Arabia or any other such repressive regime start reflecting on their human rights crimes and suddenly become a beacon of humanitarianism.

Many people innately argue that these countries’ treatment of women is cultural, and it is not our place to question culture. Perhaps, if the international community were to challenge the legitimacy of such states’ treatment of women (in the “How To” guide, see apartheid, not Iraq) — 52 percent of the population on Earth would be able to enjoy life without fear.

We should base our laws on legal precedent and what is fair and just under the Constitution and laws of Congress. It is not a leap of jurisprudence to recognize women as a social group or to extend the five groups to six in order to delineate one for women. The premise at issue in gender asylum laws is basic. By analogy, if a Black South African came to the United States during apartheid, he would have a clear claim of asylum under race (naturally social group, and/or political opinion would also apply, but for purposes of my argument, race is the most analogous). Yet, if a woman came from Afghanistan during Taliban rule, she would have no such protection, even though gender is every bit as immutable as race. Because sexism is one of the last bastions of bigotry, it prevents groups such as FAIR from seeing the two “isms” on the same continuum of hatred and persecution. Women are treated as the mules of the world, and they certainly don’t need facile philosophies, drafted in insular office suites, when they are face to face with U.S. asylum law and a return to their country is tantamount to a death sentence.

Opponents of expanding the social group category to include gender-based claims may have one point. Let’s not expand social group. Although the premise of women as a social group is on strong legal ground and should be the short-term solution, a better answer does exist. The truly equitable solution would be to add gender as a sixth recognizable category in asylum law. Women are targeted and persecuted because they are women, whether the persecution involves attempted murder, torture, domestic violence, FGM, rape or rape as a weapon of war. They deserve the protection of asylum law on the basis of the immutable characteristic of gender, the characteristic for which they are persecuted on the same level of someone who is persecuted on the basis of race or national origin. Recognition of women as their own group has firm grounding in our civil rights law — Title VII recognizes women by prohibiting discrimination on the basis of sex. Our asylum law should mirror our civil rights law and carry forward our commitment to liberty and justice for all.

Notes


10.  Angoucheva v. INS, 106 F.3d 781, 793 n.2 (7th Cir. 1997) (Rovner, J., concurring)


13.  FY 2008 Statistical Year Book, U.S. Department of Justice, EOIR.


MAVNI: Nonimmigrant to U.S. Citizen in Less than a Month

By Richard M. Green

The week of July 20, 2009, Dr. Brown1 made immigration history. Brown entered a field office of the U.S. Citizenship and Immigration Service (USCIS) as a temporary worker nonimmigrant visa holder, and emerged two hours later as a U.S. citizen.2 Brown was the first person to naturalize pursuant to a joint USCIS and Department of Defense (DOD) pilot program called Military Accessions Vital to the National Interest, or MAVNI. In exchange for serving in the U.S. Army Reserve Medical Corps as a dentist, Brown skipped several years of processing time involved in obtaining permanent residency. He also skipped the mandatory five-year residency and physical presence requirements. Brown went straight from nonimmigrant to U.S. citizen in less than a month.3

MAVNI permits nonimmigrants with medical training and/or certain language skills to naturalize upon enlistment in the armed forces without first obtaining permanent resident status (colloquially known as a green card). The purpose of this article is to explain the legal underpinnings, qualifications and risks and benefits of the MAVNI program.

Immigration and Nationality Act (INA) section 329 (8 U.S.C. § 1440), or the wartime military naturalization statute, makes the MAVNI program possible. This statute allows individuals who served or are serving in the U.S. armed forces during a time of war or hostilities to naturalize on an expedited basis using a significantly simpler set of qualifications. Specifically, it allows individuals who served in the U.S. military, air or naval forces during World Wars I and II, the Korean and Vietnam hostilities, and other periods of hostilities as designated by executive order, to naturalize on an expedited and simplified basis. On July 3, 2002, President George W. Bush issued an executive order allowing expedited naturalization pursuant to INA § 329 for non-citizens serving on active duty in the U.S. armed forces from Sept. 11, 2001 to a date to be determined by further executive order.4 Wartime naturalization applicants must serve honorably, and if separated from the service, separated under honorable conditions.5 Additionally, applicants must be either physically present in the United States or onboard a U.S. naval vessel on the day of their enlistment or re-enlistment, or are subsequently admitted to the United States as a permanent resident.

Individuals who do not serve honorably, separate from the service on account of alienage, as a conscientious objector, or refuse to wear the uniform, are excluded from naturalization. Also, citizenship may be revoked if an individual is granted citizenship while serving in the military or naval forces separates from the service under other than honorable conditions.6

When compared against the normal naturalization regime, the wartime naturalization statute is very liberal. The Immigration and Nationality Act normally requires naturalization applicants to be admitted for permanent residence, reside in and be physically present in the United States for five years, possess good moral character, and be at least 18 years old.7 The wartime naturalization statutes specifically waives the age requirement, the requirement that the applicant be admitted for permanent residence, the five-year residency and physical presence requirements, and truncates the good moral character requirement to one year prior to filing.8 Unlike the regular naturalization regime, which requires applicants to possess good moral character,9 naturalization pursuant to the wartime naturalization statute is a defense to deportation.10

The Department of Defense controls access to the wartime naturalization process because DOD controls enlistment into the armed forces. Federal law determines who may and who may not enlist in the armed forces. It limits enlistment to U.S. citizens, Lawful Permanent Residents, and non-citizen U.S. nationals.11 However, the military enlistment statutes permit the armed forces to enlist other non-citizens if the secretary of defense determines that the enlistment is in the national interest.12 On Nov. 28, 2008, the secretary of defense created MAVNI by signing a memorandum stating that was in the national interest to recruit non-citizens into the armed forces.13 By creating MAVNI, the Department of Defense seeks to leverage its access to the very simple and liberal wartime naturalization statute to attract and obtain the services of highly skilled and highly educated nonimmigrants.

On Feb. 23, 2009, the Department of the Army announced that it would recruit two different classes of nonimmigrants: health care workers and individuals with knowledge of certain languages and cultures.14 In order to qualify to enlist under MAVNI, the applicant must be lawfully present in the United States in one of the following nonimmigrant statuses: E, F, H, I, J, K, L, M, O, P, Q, R, S, T, TC, TD, TN, U, V, TPS, or asylee/refugee.15 MAVNI enlistees are required reside in the United States in one of the above listed non-immigrant status for two years prior to the enlistment. Individuals holding “B” visitor status or Visa Waiver status are not eligible to apply for enlistment.

Noncitizens who entered the United States without inspection, have failed to maintain their nonimmigrant status or have departed the United States for any single period of more than 90 days in the last two years are not eligible to enlist.16 Additionally, MAVNI enlistees are required to pass background checks and skill verification just like any other individual desiring to join the Army.17

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Upon enlistment, health care workers such as nurses, physicians, surgeons, dentists and veterinarians are commissioned as officers in the Army Medical Corps, and are obligated to serve either on active duty in the regular Army for three years, or in the Army Reserve for six years. Individuals with knowledge of the following languages and cultures are eligible to enlist: Albanian, Amharic, Arabic, Azerbaijani, Bengali, Burmese, Cambodian-Khmer, Chinese, Czech, Hausa, Hindi, Hungarian, Igbo, Indonesian, Korean, Kurdish, Lao, Malay, Malayalam, Moro, Nepalese, Persian [Dari and Farsi], Polish, Punjabi, Pushu (also known as Pashto), Russian, Sindhi, Sinhalese, Somali, Swahili, Tamil, Turkish, Turkmen, Urdu and Yoruba. Language-skilled MAVNI enlistees are required to serve on active duty in the regular Army for four years.

Once and assuming that the Army accepts the nonimmigrant, and the nonimmigrant has signed the enlistment contract and taken the oath of enlistment, the nonimmigrant becomes eligible to naturalize pursuant to the wartime naturalization statute.

In order to avoid any confusion as to the new soldier’s immigration status, the Army requires the new soldier to file their naturalization application shortly after enlistment. USCIS expedites the adjudication of MAVNI military naturalization applications. USCIS is coordinating the adjudication of the naturalization application and administration of the oath of citizenship concurrently with graduation from the Army’s basic training. Members of the private bar represent health care workers enlisting in the Army reserve. USCIS expedites the adjudication of these cases, including flexible interview scheduling and a same-day oath ceremony.

Nonimmigrant spouses and minor children also benefit from MAVNI. Nonimmigrant spouses and minor children may adjust status to lawful permanent resident as the immediate relative of a U.S. citizen once the MAVNI enlistee naturalizes. As the spouse of a U.S. citizen, the spouse of the MAVNI enlistee may naturalize after three years of permanent residency, so long as the spouse lives in marital union with their U.S. citizen spouse. Under the Child Citizenship Act of 2000, minor children who reside with their U.S. citizen parent are granted U.S. citizenship upon their admission as a lawful permanent resident.

Potential complications arise when the former nonimmigrant and newly minted U.S. citizen was a J-1 nonimmigrant that is subject to the two-year home residency requirement. The J-1 visa program was created to allow individuals to come to the United States to participate in cultural exchange programs. In order to ensure that J-1 nonimmigrants depart the United States at the end of their program, certain individuals who enter the United States as J-1 exchange visitors may not be admitted for permanent residency in the United States until they either reside in their country of birth or last residence for two years or obtain a waiver of the home residency requirement. The Immigration and Nationality Act extends the two-year home residency requirement to the spouse and minor children that accompany the J-1 exchange visitor. While the two-year home residency requirement will not prevent the grant of citizenship under the wartime naturalization statute, it may prevent the spouse and minor children from adjusting status or receiving an immigrant visa. Spouses and minor children of J-1 MAVNI enlistees may be inadmissible, and may require a waiver of the two-year home residency requirement even though the principal J-1 visa holder does not require a waiver.

Potential MAVNI enlistees should also examine the costs and benefits of enlisting in the U.S. Army. MAVNI may be an alternative path to immigrate for an employment-based immigrant who is otherwise stuck as a nonimmigrant for a period of years or decades waiting for an immigrant visa to become available. Service in the U.S. Army would release an individual from the perceived servitude of temporary worker nonimmigrant status and grant the permanent right of abode in the United States and unrestricted access to the U.S. labor market.

Service in the military during a time of war is not without personal risks. Conservative talk radio host Rush Limbaugh often states that the purpose of the armed forces is to kill people and break things. Service in the Army in a theater of war involves shooting people and being shot at. A language specialist enlissee may find themselves in the unenviable position of being sent back to live among his or her former countrymen, this time wearing the uniform of and working on behalf of an armed force that is perceived as an occupier and/or the enemy. An Army Reserve health care professional could be called up to active duty and sent to a combat theater for several years. The health care professional may be forced to leave a lucrative practice to serve in the U.S. Army for a fraction of the pay the individual received in civilian life. Additionally, although Army health care professionals do not normally accompany troops on combat operations, Army physicians have died in the Iraqi theater of war. Finally, MAVNI enlistees are not truly free from the immigration system upon naturalization. U.S. citizenship can be revoked if the enlissee fails to serve honorably and is discharged under other than honorable conditions.

Brown’s naturalization application was adjudicated in less than a month. By agreeing to serve in the U.S. military, Brown saved roughly seven years of immigration processing time. The U.S. Army is using its access to favorable naturalization statutes to attract talent needed to effect its mission. Although limited in scope to individuals with medical and language skills, to the right candidate, MAVNI may make a reasonable alternative to employment-based immigration.

Notes
1. Dr. Brown is a pseudonym used at the request of the Army to protect the applicant’s family members in Brown’s native country.
3. Id.
9. The statute directs the executive department in which the applicant served to determine the status of service and to provide the applicant with evidence of such service. USCIS requires military naturalization applicants to submit a duly authenticated form N-426 as evidence of military or naval service.
10. INA § 329(c), 8 USC § 1440(c) (2006).
12. 8 C.F.R. § 329.2(d) (2009).
tion of good moral character.

14. United States ex rel. Walther v. Dist. Director of Immigration & Naturalization, 175 F.2d 693 (2nd Cir. 1949); Petition of Warhol, 84 F.Supp. 543 (D.C. Minn. 1949); but see Duenas v. U.S., 330 F.2d 726 (9th Cir. 1964) (holding that a noncitizen that has a final order of deportation was not permitted to naturalize pursuant to INA § 329).


18. Id.

19. Id. at 2. Individuals that have been granted asylum or refugee status are eligible. Individuals with a pending asylum application are not eligible.

20. Id.

21. Id. at 2-3.


25. From the author’s experience and unlike the normal naturalization process where CIS mail the applicant and counsel an appointment notice with a fixed date and time to appear in a CIS field office, the local CIS field office contacts MAVNI naturalization applicants and/or counsel via telephone or e-mail and asks when they would like to appear.

26. INA § 201(b), 8 USC § 1151(b) (2006) and INA § 245, 8 USC §1255 (2006 & Supp. I 2008). Derivative family members will lose their nonimmigrant status upon the naturalization of the principal nonimmigrant. However there is no requirement that a nonimmigrant derivative spouse and minor child maintain nonimmigrant status to adjust because they are now the immediate relative of a U.S. citizen. INA §245 (c), 8 USC §1255 (c) (2006).

27. INA § 319(a), 8 USC § 1430(a) (2006).


30. INA § 212(e), 8 USC § 1182(e) (2006).

31. The act states, “[n]o person admitted under section 101(a)(15)(J)” that is subject to the two year foreign residency requirement shall be permitted to receive an immigrant visa. This statute includes spouses and minor children of J-1 visa holders who are admitted pursuant to INA § 101(a)(15)(J).


34. Bruce Falconer, Military Translators at War, Mother Jones, Mar. 23, 2009 (describing the personal harm that has befallen civilian Iraqi translators working for the U.S. Army).


37. INA § 329(c), 8 USC § 1440(c) (2006).
Confidentiality is one of the keystones of the legal profession. It is critical that the information contained in a firm’s digital files and documents are protected. Additionally, with the onslaught of identity theft, Massachusetts has enacted revised ID theft regulations which will become effective March 1, 2010. The new language aims to support the state’s commitment to balancing consumer protection with the needs of small business. The updates take into consideration the size of a business and the amount of personal information it handles when creating a data security plan. This risk-based approach to protecting data however, does not relieve any business, including law firms, of the obligation it has to protecting the personal information of those it serves. Actually, it may encourage more firms, especially smaller ones, to re-examine their data protection plans.

Most companies recognize basic security as part of the cost of doing business. However, leaving your information systems exposed is a lot like leaving your front door unlocked 24/7. Even very small firms can attract unwanted attention from those with the skills to infiltrate their information systems, including servers, applications and operating systems. And, chances are, if they’ve been there, you may not even know it without the help of a forensic expert.

Because many organizations are unaware of the risk of computer attacks, technology security tends to be an afterthought in both small and large companies. Information technology (IT) professionals feel great pressure to maximize functionality and speed, and security controls are often credited for slowing the processes. However, when the proper security devices and procedures are built into IT systems on the front end, they can become seamless and efficient while also providing far greater protection from hackers and other security risks.

As a Certified Ethical Hacker and Certified Information Systems Auditor, I am trained to hack into my clients’ systems, just as an unauthorized hacker would. An ethical hacker is an individual who is employed with or by an organization and who can be trusted to undertake an attempt to break into networks and/or computer systems to discover and address vulnerabilities in corporate, governmental and institutional information systems. Hacking is a felony in the United States and most other countries. When it is done by request and under a contract between an ethical hacker and an organization, it is legal. Ethical hackers help municipalities and other government bodies, businesses as well as nonprofit organizations, to become more secure.

Who’s a hacker?

Hackers come in many forms, and their intent to harm can vary, as well. So-called “black-hat hackers” break into Web interface applications to gain access to servers to steal information or vandalize systems. But malicious behavior can also come from people you know by name, for instance, disgruntled employees. These individuals can cause public relations problems, such as defacing your Web site, or getting access to credit cards and Social Security numbers. Hackers target all types of organizations, including professional firms, private and public companies, government, and nonprofit institutions — so all need to take security precautions. The good news is that many of these precautions are neither difficult nor expensive to implement.

Common weaknesses

Fortunately, some of the most common security weaknesses require little to no cost to address. Using proper password complexity to secure data is a perfect example. Lack of proper passwords or weak passwords are considered “low hanging fruit” among hackers. By trying a brute force automated attack software that attempts 150 passwords per second, a five character password can be cracked in less than 24 hours.

Default password settings in hardware can also represent an open window to hackers.

Often, the passwords associated with the hardware aren’t changed after purchase, so the manufacturer’s default password is the only protection against intrusion. For example, if your firm installs a Cisco router and the password isn’t reset, a hacker can easily infiltrate your network because manufacturers’ default passwords are available to anyone on the Internet.

Poor access controls are also a common weakness within computer networks. Creating policies and procedures to manage access to the network and specific applications is essential to network security. Many organizations fail to eliminate “phantom users,” such as former employees, from their systems, leaving the door open to individuals who may wish to cause embarrassment or damage. We encourage clients to implement User ID Auditing to ensure that the right people are on the system at any given time, with the right credentials and the appropriate security access.

Trends in hacking

Another trend in hacking should be of particular concern to smaller businesses, municipalities and educational institutions. Hackers who want to steal information or create damage at a high
visibility target, like a major corporation, need to do so under the cloak of anonymity to avoid being caught and prosecuted. To do that, they hack first into smaller, more vulnerable organizations and harvest that site's credentials — IP numbers and other identifying information — and take on that identity when hacking the primary target. This represents a problem for the smaller organization because the larger company can argue that a lack of proper security allowed the fraud to be committed.

**Protecting your virtual assets**

A vulnerability assessment is an effective way to protect your organization against hackers and malicious intruders. In a vulnerability assessment, a Certified Ethical Hacker attempts to break into an organization's systems and identify areas of weakness. This results in an analysis and specific recommendations for implementing security technologies as well as policies and procedures to control and monitor access to the system. After six months, a follow-up benchmark analysis is conducted to ensure that all recommendations were implemented and working properly. The service offers a high return on investment, not to mention peace of mind.

**Facts and figures**

**Passwords protect (but only if you use them)**

- No passwords: Everyone in the organization should have a password of more than seven characters. They should be alphanumeric and difficult to guess. (No family names.)
- Change passwords regularly. Passwords should be changed across the organization every 60 days.
- Hardware passwords. System administrators need to apply these same password standards to hardware, such as routers, printers, servers and other access-protected hardware.

**244,794,916**

Total number of records containing sensitive personal information involved in security breaches in the United States since January 2005.

*source: Privacy Rights Clearinghouse, Dataloss*

**$182.00**

It is estimated that the average cost of a data breach is $182.00 per record.

*source: Privacy Rights Clearinghouse*

**In a recent Verizon business study:**

- 73 percent of data breaches resulted from external sources, such as hackers.
- 66 percent of data breaches involved data the victim didn't know was on the system.
FINANCIALLY STRUGGLING 40B PROJECTS MAY BE ALTERED AFTER CONSTRUCTION IS COMPLETE

By Marc J. Goldstein and Krista L. Hawley

In a decision that may offer some relief for developers of financially struggling affordable housing projects permitted and constructed under G.L. c. 40B, §§ 20-23 (“Chapter 40B”) prior to the market slow down, the Housing Appeals Committee (“HAC”) has confirmed that it will approve changes to a comprehensive permit issued pursuant to Chapter 40B even after a project has been constructed and is operational. In 511 Washington Street LLC v. Hanover Board of Appeals, Permit Session Case No. 38149 (April 2, 2009), the Land Court affirmed a ruling of the HAC that a developer was entitled to lift an age restriction on an affordable housing project where the project as a “55 plus” rental community was operating consistently in the red due to a high vacancy rate.

Significantly, in its analysis of whether the developer was entitled to this project change, the HAC acknowledged that developers can and do make mistakes in the planning and execution of these projects and did not base its decision on whether the project’s financial difficulties were the fault of the developer for originally choosing to permit the project with the age restriction or other alleged missteps in the conception and marketing of the project. The critical issue in the case was whether the project, in its current condition, was economic pursuant to 760 CMR 56.07(2), not who was to blame.

The age-restricted rental project

On March 29, 2002, 511 Washington Street LLC (the “developer”) applied to the Hanover Board of Appeals (the “board”) for a comprehensive permit pursuant to Chapter 40B to construct a project located on 3.88 acres in Hanover consisting of 74 age-restricted rental apartment units, including 19 affordable units. The board granted the comprehensive permit for the project, called North Pointe, on Jan. 21, 2003, which was subsequently amended in 2004 to allow the developer to change its subsidizing entity to the New England Fund. Condition 6 of the comprehensive permit memorialized the age restriction, requiring that at least one person who is age 55 or older occupy each unit. The project was constructed in 2004 and was marketed in early 2005.

The developer hired a professional real estate marketing company that included on-site staff at the project and extensive advertising and marketing efforts. Despite high traffic through the project by prospective renters over the course of several months, the project’s market-rate units remained largely unrented. For example, in August 2005, only 30 of the project’s 74 units were rented, and of the 30 rented, only 11 were market-rate units. The vacancy rate for market-rate units was 80 percent (11 of 55 market-rate units rented). As a rental project providing heat and hot water as part of the base rent for the units, the fixed costs — particularly those that were rapidly escalating as energy costs skyrocketed — and carrying costs pushed the project to the brink of financial ruin. At one point, the developer estimated it was losing as much as $50,000 per month.

Faced with this unsustainable financial reality, the developer sought to change the project in two different ways to increase demand, either by changing from rental apartments to for-sale condominiums or by lifting the age restriction on the rental project. Either of these changes required an amendment of the comprehensive permit by the board.

The notices of project change

The regulations implementing Chapter 40B provide a procedure for making changes to a proposed project. 310 CMR 56.07(4). Although the regulations do not directly address a change after permitting is complete, by practice, review of such proposed changes begins with the filing of a notice of project change (“NPC”) with the local reviewing board, with appeals again going to the HAC. Generally, NPCs are filed prior to the completion of a project to allow developers to incorporate adjustments or alterations that arise during the planning and construction phases. In this case, however, the developer sought to amend a comprehensive permit for a project that had been completed and operational — albeit not successfully — for months.
The developer first filed an NPC with the board in August 2005 to convert the project from age-restricted apartments to age-restricted condominiums. The board denied that NPC, and the developer appealed that decision to the HAC. While that decision was pending, the developer filed an alternative NPC to lift the age restriction on the project but to leave it as a rental development. The board also denied that NPC in December 2006, and the developer appealed that decision to the HAC.

The HAC appeal

The HAC’s rejections of the board’s collateral arguments

Although both appeals were consolidated before the HAC, ultimately the developer only pursued lifting the age restriction (leaving the project as rental apartments) through the hearing. The developer argued that the failure to grant the NPC rendered the project uneconomic under the burden-shifting standards of 760 CMR 56.07(1)(c) discussed below. However, before addressing these substantive standards, the board raised two threshold questions. The board argued that because the developer had not challenged the condition imposing the age restriction at the time the comprehensive permit was originally granted, it had waived its right to do so in an appeal of the NPC to the HAC. Second, the board alleged that because the developer proposed the project with an age restriction, the age restriction was not “imposed” by the board within the meaning of 760 CMR 56.07(1)(c), notwithstanding that in the permit itself that the “Project shall be subject to an age-restriction ....”. However, the HAC dismissed these arguments, concluding that “our regulations clearly permit the developer to petition for changes without regard to whether the permit conditions or design parameters were imposed by the board, negotiated, or proposed by the developer.” *Slip Op. at 6.*

The board also attempted to dodge the HAC’s substantive standards by arguing that the developer itself was responsible for the project’s economic difficulties and that the HAC should not rescue the project and absolve the developer of its missteps by lifting the age restriction. The board claimed that the project’s difficulties were a result of the developer’s own choices, from the initial formulation of the project as an age-restricted development and a failure to adequately examine the market, to rents that were set too high and an insubstantial amount of time devoted to marketing the units. Essentially, the board argued the developer should be left to lie in the bed it made, regardless of the economic viability of the project, or, at the very least, should be forced to try for a significantly longer period of time to lease the units.

The HAC disagreed, concluding that where there is no allegation of fraud or other misconduct, which were not present here, a developer should not be prohibited from making changes to a project that has become uneconomic unless the board establishes there are countervailing local concerns in accordance with 760 CMR 56.07(2). *Id.* at 9.

The HAC acknowledged that the developer in this case bore some responsibility for the project’s financial difficulties but concluded that was irrelevant, noting that in nearly every unsuccessful or struggling project, a combination of factors, including miscalculations by the developer, unforeseen construction difficulties, changing market conditions and overly restrictive permit conditions may be at play. *Id.* at 8-9. Such miscalculations, the HAC concluded, are “normal risks” associated with development as much as those market risks that are entirely outside a developer’s control.

The board’s denial of the NPC makes the project uneconomic

Having rejected the board’s collateral arguments, the HAC addressed the age-restriction condition under its familiar burden-shifting analysis of 760 CMR 56.07(2). An applicant seeking to lift a condition imposed by a board — in this case, through the board’s refusal to lift a condition — must demonstrate that the challenged condition renders the project uneconomic. 760 CMR 56.07(2)(a)(3). If the applicant satisfies its burden, the burden shifts to the board to prove first that there is a valid health, safety, environmental, design, open space or other local concern which supports such conditions, and then, that such concern outweighs the regional housing need. 760 CMR 56.07(2)(b)(3).

The developer presented the expert testimony of its real estate finance and development consultant regarding the return on total cost (“ROTC”) for the project and comparing the return on the project with the age restriction to the return from a 10-year Treasury note. Under guidelines published by the Massachusetts Housing Partnership (“MHP”), a projected ROTC of at least 2.5 to 3.5 percent above the current yield on a 10-year Treasury note is required to fairly compensate capital investors for the risks associated with permitting, construction and operations. In this case, the developer’s expert testified that while the MHP guidelines indicated a rate of 7.5 to 8.5 percent return would be economic, the project ROTC would be lower, ranging from 5.44 to 6.71 percent. Under the MHP guidelines, therefore, the project would be considered uneconomic, the developer argued.

The board challenged the economic analysis on a number of fronts, including rent levels and vacancy rates. However, even after these adjustments, the board’s expert still calculated a ROTC of 6.6 percent, outside the MHP range. The board’s expert then made the novel argument that, in fact, the acceptable return on the project should be lower than suggested in the MHP guidelines because the developer had already weathered permitting and construction risk, which the board’s expert argued reduced the range by 1 percent to just 1.5 to 2.5 percent above Treasury yields. The HAC rejected this assertion, concluding that “[t]here is no indication in the MHP guidelines that pre- and post-construction risks are to be allocated within the overall risk of developing affordable housing. ... The developer in this case should not be penalized simply because the risk that has materialized materialized after construction was completed.” *Slip Op. at 14.* Therefore, the HAC concluded that the project was uneconomic where the ROTC was below that indicated in the MHP guidelines.

Having found the project was uneconomic and that the board failed to raise countervailing local concerns that would favor the condition, the HAC issued a decision directing the board to lift the age restriction on the project. HAC Decision No. 06-05 (Jan. 22, 2008). The board appealed to Superior Court pursuant to G.L. c. 30A, § 14, and the case was transferred to the Permit Session of the Land Court at the request of the developer.

Land Court appeal

At the Land Court, the board sought a stay of the HAC’s order pending the appeal, which was analyzed as a request for a prelimi-
nary injunction and ultimately denied by Judge Grossman. In both its motion seeking a stay and its cross-motion for judgment on the pleadings, the board sought to distinguish this case from the deferential standard applicable to administrative appeals under G.L. c. 30A, § 14, in which an agency decision may be overturned only if it is unsupported by substantial evidence, arbitrary and capricious, or otherwise based on an error of law. The board attempted to frame the questions raised in the appeal as solely legal ones subject to de novo review in which the HAC was entitled to no deference. The court rejected the board’s view and adopted the well-established standard of review of agency action under G.L. c. 30A, § 14, where the court accords deference to an agency’s findings of fact and interpretation of its own regulations. Under this deferential standard, the Land Court affirmed the ruling of the HAC in its entirety. Board of Appeals of The Town of Hanover v. Housing Appeals Committee, Land Court Permit Session Case No. 381349 (HMG), Slip Op. at 10, 20.

Although the board again argued that the developer could not pursue its claim because it had not challenged the age-restriction condition in the original comprehensive permit and the board had not “imposed” the condition, the Land Court agreed with the HAC that the genesis of the age-restriction condition was not relevant to whether it could be lifted through an NPC. The Land Court was similarly unpersuaded that the HAC had erred in dismissing the board’s contention that the developer was at fault for the economic condition of the project and, therefore, without a remedy at the HAC. The Land Court agreed with the HAC that the sole question before it was whether the project was economic, regardless of what missteps the developer may have made that contributed to the current financial state of the project. Id. at 12.

As to whether the project was “economic,” the court concluded the HAC’s application of the MHP guidelines was within its express statutory authority and deferred to the HAC’s reasonable interpretation of its own standards. Id. at 13-14. Further finding that there was virtually no testimony or other evidence of local or regional housing needs to support imposition of the age restriction, the court ruled the board failed to meet its burden. The court affirmed the decision of the HAC lifting the age restriction.

Notes
1. The Department of Housing and Community Development promulgated renumbered and issued new regulations governing comprehensive permits effective February 22, 2008 at 760 CMR 56.00. These replaced prior regulations at 760 CMR 31.00. Although the project at issue in this case was permitted under the now-superseded regulations at 760 CMR 31.00, this article cites to the current regulations for ease of reference.
**Arrested developments: Lobisser v. Sutherland and special permit lapse analysis in phased condominiums**

By Thomas O. Moriarty

On June 22, 2009, the Massachusetts Supreme Judicial Court (“SJC”) issued a decision analyzing the lapse provision of G.L. c. 40A, §9 in the context of a special permit for a phased condominium project. In Lobisser v. Sutherland, 454 Mass. 123 (2009), the SJC confirmed, in connection with a special permit authorizing the construction of a phased condominium, it is sufficient that substantial use or construction of the condominium project as a whole commence or begin within the applicable lapse period. More specifically, the SJC rejected the notion that each phase of a condominium project is subject to a separate lapse analysis. In addition, the SJC found that while a special permit may be subject to a condition imposing an outside time limit for construction, such limitation must be contained in express language in the special permit.

**Facts**

Crystal Springs Condominium (the “condominium”) is presently a 41-unit residential condominium located in Bellingham created by the recording of a master deed on March 31, 1987. The condominium’s original declarant sought and obtained a special permit in December of 1985 authorizing the phased construction of 84 townhouse condominiums subject to certain conditions. The conditions of the special permit which were most relevant to the SJC’s decision are as follows:

3. Plans shall be submitted under Section 1420 Site Plan Review, in annual phases, at a scale of 1” = 40’. Drawings for the primary access drive and its drainage and utilities shall meet the Street Plan and Profile drawing requirements of the Bellingham Subdivision Regulations. Drawings shall be consistent with recommendations of the Water department and Police Department, as specified in their letters attached to this decision, except that the looping of water to Debra Lane will be required only if easements can be obtained without cost to the applicant.

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5. Building permits shall not authorize construction of more than the following cumulative totals of dwelling units:

- Prior to January 1, 1987: 21 units; to begin at South Main Street;
- Prior to January 1, 1988: 42 units;
- Prior to January 1, 1989: 63 units;
- Prior to January 1, 1990: 84 units.

The special permit does not, by its own terms, place a time limit on the construction either in totality, or for each phase.

In connection with the construction of Phase I in 1986, the original developer built and/or installed several common elements designed to serve the entire development. The elements constructed and or installed in connection with the construction of Phase I in 1986 included, without limitation, the entranceway and site drive.

The building inspector for the Town of Bellingham issued the first occupancy permit in connection with a building at the condominium on March 20, 1987.

The condominium was created on March 31, 1987, when the condominium’s original developer caused the master deed to be recorded with the Norfolk County Registry of Deeds, thereby submitting the subject premises to the provisions of G.L. c. 183A. The condominium as so established included 21 townhouse condominium units in five buildings. The original developer reserved in the master deed the right, but not the obligation, to add three additional phases, to include 63 additional units (the “development rights”).

On or about Jan. 20, 1987, the original developer submitted Phase II plans under Town of Bellingham Zoning By-law Section 1420 for approval, pursuant to the requirements of the special permit decision at section 3. Substantial steps toward the construction of infrastructure directly related to Phase II obviously did not commence until after Jan. 20, 1987. On Sept. 29, 1987, the declarant amended the master deed to include Phase II as part of the condominium, which phase consisted of an additional 20 units. After the submission of Phase II, the condominium contained 41 units in 10 buildings.

Phases III and IV have not been submitted to the condominium. The original developer’s reserved development rights expired on March 30, 1994.

After an extended delay, on or about Oct. 4, 2005, the association, with the consent of at least 75 percent of the unit owners, revived the rights to develop additional units at the condominium.

On Sept. 7, 2005, the association entered into a written agreement with Lobisser agreeing to transfer the development rights to Lobisser, contingent upon the planning board’s grant of the special permit modification and the development plan approval.
Lapse under G.L. c. 40A, §9

The central issue considered by the SJC was whether the lapse provision in G.L. c. 40A, §9 subjected each phase in a phased condominium project to a separate lapse analysis. The Trial Court had held the special permit lapsed with regard to the final phases of the project because, *inter alia*, neither substantial use commenced nor was construction begun with regard to those final phases. The Trial Court held that with regard to a phased condominium, in order to avoid lapse with regard to any particular phase, use or construction must be undertaken with regard to each specific phase or presumably within the lapse period. G.L. c. 40A, §9 provides, in relevant part, as follows:

Zoning ordinances or by-laws shall provide that a special permit granted under this section shall lapse within a specified period of time, not more than two years ... from the grant thereof, if a substantial use thereof has not sooner commenced except for good cause or, in the case of permit for construction, if construction has not begun by such date except for good cause.

Section 1550 of the Bellingham Zoning By-law established a one-year lapse period. The SJC, relying on the clear language of G.L. c. 40A, §9, held that the statute did not require substantial use or construction of each phase of the project to commence or begin within one year. The SJC noted that not only was there nothing in the statute which imposed such requirement, but that reading the statute in such manner “would make no sense.” The SJC expressed its ultimate holding in clear and concise terms, as follows:

Here, where construction of the project began within one year of special permit approval and where the special permit contains no time limit, there is no basis to conclude that the special permit has lapsed.

454 Mass. at 132.

The SJC’s rejection of a multiple and separate lapse analysis under G.L. c. 40A, §9 was critical to preserve the viability and utility of condominium phasing in the commonwealth. The Land Court’s decision would have forced a condominium declarant to bear the risk of substantial use and construction had occurred in *Bernstein*, it was not a statutory prerequisite given that, at least in the context of G.L. c. 40A, §9, “or” really means “or.”

Outside time limits

The SJC also addressed the question of whether outside time limits for completion of construction could be imposed in a special permit. The SJC considered the issue because the planning board argued that the condition of the special permit which limited the number of units which could be constructed each year constituted an outside time limitation on construction. The Trial Court also noted the purported five-year deadline in support of its conclusion that “the time period within which to fully exercise development rights under the special permit has long since passed.” The SJC rejected the planning board’s contention, and the Trial Court’s reliance on time or use.” While arguably *dicta* in the decision, it is a clear and unequivocal interpretation of G.L. c. 40A, §9 on this point and eliminates any doubt as to whether construction deadlines can be properly imposed as a condition in a special permit.

Practical implications

There are practical implications to the SJC’s decision which go beyond avoiding the disastrous consequences of the Trial Court’s order, as follows:

1. Where a special permit granting authority wishes to impose an outside time limit on completion of construction, the limitation should be included by express language and a special permit granting authority should not rely on a condition limiting the number of units, which may be added over time;

2. An applicant should ensure the conditions of a special permit which purport to limit the number of units that can be added over a specified time period cannot be read to impose an outside deadline on construction. While the SJC found the language of the special permit in *Lobisser* did not set a construction deadline, the lack of clarity opened the door for such argument.

3. An applicant should preserve evidence as to the date upon which substantial use commenced or construction began. Municipal records are generally helpful in demonstrating that construction did not begin before “x” date or that construction was completed by

“Or” really means “or”

The SJC also took the opportunity to clarify that either the commencement of substantial use or beginning construction is sufficient to avoid lapse. The SJC appears to have addressed the use of the conjunctive in G.L. c. 40A, §9 to clarify the holding in *Bernstein v. Chief Bldg. Inspector and Bldg. Comm’r of Falmouth*, 52 Mass.App.Ct. 422 (2001), a case with strikingly similar facts. In *Bernstein*, the Appeals Court held:

Where a developer anticipates completing work in stages, has begun construction within two years, and a “substantial use” has commenced, authority to complete the project continues absent express language to the contrary in the permit. (emphasis added.)

52 Mass.App.Ct. at 427. The SJC observed that while both substantial use and construction had occurred in *Bernstein*, it was not a statutory prerequisite given that, at least in the context of G.L. c. 40A, §9, “or” really means “or.”
“y” date, but that information might not be sufficient to demonstrate commencement of use or construction within the lapse period.

4. An applicant should always distinguish between a reserved phasing right under the condominium master deed and a special permit condition which requires phased submission of condominium units. It is not clear that the original developer ensured the planning board understood the distinction and the conflation of the concepts appears to have fueled certain of the planning board’s arguments in this case.

5. A special permit condition which limits the number of dwelling units which can be submitted over time could give rise to these issues in contexts not involving phased condominium development. An applicant would be wise to ensure that no such condition could be viewed as imposing a construction deadline regardless of the form of ownership of the contemplated project.

Conclusion

The SJC’s decision in Lobisser confirmed that to avoid the lapse of a special permit for a phased condominium, the declarant need only commence use or begin construction within the applicable lapse period. The decision also clarifies that a special permit can contain a deadline for construction. While the decision answers those questions with clarity, it nevertheless reminds the practitioner that the importance of precision in a special permit, and the conditions contained therein, cannot be overstated.
Variance denials and abuse of discretion: 
Guardione v. Longmeadow

By Patricia A. Zak

In the summer of 2004, Anthony Guardione built a low dry-stone wall that wrapped around two sides of his property, located on a busy corner. Everyone loved it except the building inspector, who promptly notified Guardione that the wall violated the town zoning bylaw because it was located within the "primary setback." The inspector suggested that Guardione remove the wall or apply for a variance. Unsurprisingly, Guardione took his case to the zoning board of appeals, where his arguments were met without sympathy and his request denied, the board specifically noting that it found no hardship. Guardione filed an appeal pro se in Superior Court. (He retained counsel a few weeks before the scheduled trial date.)

The governing statute, Chapter 40A, section 10, provides that a variance may be granted only upon certain findings; first, that, owing to circumstances relating to soil conditions, shape or topography of the land or structures ("topography of structures" being very much an undefined term) and specific to the locus, literal enforcement of the zoning bylaw would create hardship; secondly, that relief could be granted without detriment to the public good or derogation from the purpose of the bylaw. Attempting to meet these standards, Guardione proffered the facts that his lot was an odd shape, with the house, built long before zoning, located quite close to the back line, and his options further circumscribed by the presence of a shared driveway. The wall, he argued, was intended to partially enclose a level area of lawn adjacent to the house as a recreational ground for children and adults, so that they would not inadvertently run into the street. Replicating this area would require Guardione to clear and grade a "natural" area presently overgrown with trees and brush. At trial, Guardione presented evidence that this work would cost $10,000.

The town had altered its zoning bylaw in 2003, amending a pertinent article in the general definitions section and adding an article solely devoted to "fences." (The definition of "fences" in the new article was broad enough to include walls.) The apparent intent, at least as stated by the ZBA in its denial of Guardione's application, was to "eliminate fencing of any kind forward of primary setbacks." Guardione's wall ran in an L-shape in front of his house, along the edges of the property bordered by the adjacent streets. The 2003 fences article certainly forbade the construction of "any fence" forward of the "primary setback." The article, however, neither defined "primary setback" nor referred to any other spot in the bylaw where the definition was to be found. The town relied on the 2003 definition article, which laid out "primary setback line" as "[t]he line running parallel ... to the street line which includes that part of the building nearest to such street line. In the case of a corner lot, the primary setback requirement shall be observed from all bordering streets." The applicable setback, therefore, moved according to the placement of the house, disadvantaging Guardione, whose house was lopsidedly set on the back lot line. Under this definition, nearly all of his land was forward of the "primary setback," including the area where the wall lay.

However, had one gone to the bylaw article pertaining to "Front Yards and Structure Set-backs" — and one did — logically enough seeking information on setback requirements, one would have found another and contradictory definition. The setback article simply provided that no "structure" (a term that included walls and fences) could be built nearer than 40 feet from the street line. A portion of the setback article specifically referred to the "primary setback line." This article had also been amended in 2003, but not so as to eliminate "fences" from the "structures" governed by the section. The parties had stipulated before trial that Guardione's wall was set back 40 feet or more from each of the bordering streets, and this fact was never challenged. If the setback article rather than the 2003 definition article applied, then why had Guardione ever needed a variance at all?

The bench trial was, predictably, almost entirely devoted to establishing the "uniqueness" of Guardione's property. The town waived any claims that the wall was detrimental to the public good or that its continuance derogated from the purposes of the bylaw in the face of evidence that most of Guardione's neighbors had similar structures and that the two-foot-high wall posed no visual obstacle to traffic. Interestingly, the judge admitted several ZBA decisions granting variances for fences under the 2003 articles for the limited purpose of showing arbitrariness. In these cases, the board, acting under the 2003 articles, had allowed fences for homeowners' recreational uses (a swimming pool, an enclosure for children and dogs) with no showing whatsoever of the required factors. To the disappointment of counsel, the judge did not make any findings regarding these decisions.

The issue regarding interpretation of the term "primary setback" was not fully raised until closing arguments. (Counsel mentioned that she had such an argument to make before closing plaintiff's case in order to avoid waiver; the judge chose to defer it to closing.) The pitch was then made, surprisingly without objection from the town, by which it was clearly unexpected.
Conventional wisdom holds that a board cannot go wrong in denying a variance. The appeal standard is so stringent, calling for a finding of a basis on a “legally untenable ground” or that the decision was “unreasonable, whimsical, capricious or arbitrary,” *Gulf Oil Corp. v. Board of Appeals of Framingham*, 355 Mass. 275 (1969), that no one involved in this case could find more than one Massachusetts appellate decision ordering a board to reverse itself and issue a variance (*Lapenas v. Zoning Board of Appeals of Brockton*, 352 Mass. 530 (1967)); and in that case, the circumstances — including but not limited to the fact that the subject properties straddled the border between two towns — were so unusual that it is difficult for even the most hardened litigator to argue its application beyond its own facts. See also the very interesting recent Land Court decision in *Scalli v. Winberg* (Essex Land Court No. 335745–KCL, 2009), where the judge found that the Rockport ZBA denied a variance in an apparent fit of pique caused by the owner’s resistance to the board’s illegal demand that he create a public easement across the property.

It was therefore a pleasant surprise when Judge Josephson found that Guardione had shown the necessary factors justifying grant of his application and that the board’s denial was not reasonable. (The actual order was that the denial was “vacated” and that judgment would enter for the plaintiff, a ruling that did not give Guardione his variance but which certainly seemed to bar the town from taking enforcement action.) The judge made no specific findings on the bylaw argument (memo: next time, give her a brief), but by finding that the wall lay within the “primary setback,” she seemed to reject it.

The town noticed its appeal, whereupon Guardione cross-appealed. At oral argument, with Judge Duffy leading the questioning, it was quickly apparent that the panel’s primary interest was in the bylaw anomaly. And, indeed, the decision rendered in *Guardione v. Town of Longmeadow*, 07-P-1780 dismissed the entire issue of the board’s decision with a curt “we discern no error in the board’s conclusion that the plaintiff failed to satisfy the conditions needed to obtain a variance.” As there is no further mention of this issue, the decision provides no guidance on the petitioner’s burden; as the board is not required to make specific findings to support the denial of a variance, the ZBA’s pronouncement that it found no hardship is in the nature of dicta, and no “rule” that a $10,000 expenditure does not constitute a hardship within the meaning of Chapter 40A should be extrapolated.

The Appeals Court did, however, find that no variance was necessary and that the wall could be constructed as of right, based on Guardione’s argument that the setback article, with its 40-foot setback requirement, governed. Writing for the panel, Judge Duffy noted that the board’s interpretation of the bylaw is not dispositive, but is subject to the court’s review as to whether the board had used the proper standards to ascertain the meaning of the law, citing *Britton v. Zoning Board of Appeals of Gloucester*, 59 Mass. App.Ct. 68, 73 (2003). The judge then set himself the task of reconciling the Longmeadow bylaw “so as not to render any portion of it meaningless,” *Adamowicz v. Ipswich*, 395 Mass. 757, 760 (1985), no easy job in light of the town’s concession that the bylaw was less than clear.

With considerable agility, the judge based his conclusion on a distinction between the terms “primary setback” — the exact language used in the setback article — and “primary setback line” — as used in the 2003 definition article. Because the 2003 fences article used the term “primary setback” and not the term “primary setback line,” it was held that the “plain language” of the bylaw made “fences” and other “structures” subject to the 40-foot setback required by the setback article. Thus the two seemingly contradictory terms both survive, although if “structures” are governed by the setback article’s “primary setback,” it is unclear what remains to be ruled by the 2003 definition article’s “primary setback line.” Perhaps in reference to this conundrum, the discussion concludes with the somewhat plaintive statement that “[w]e have endeavored to achieve a sensible result, with all parts and words in the bylaw made operative to the extent that task was possible.”

Presumably, Longmeadow will clean up its bylaw and this decision will have no lasting precedential value, even for Longmeadow zoning issues. The simple moral is that, in zoning cases, you read the bylaw (however difficult, unpleasant and even dangerous that may be) rather than relying on the letter from the building inspector or the decision of the ZBA or planning board.

Somewhat troubling is the reinforcement of the commonly-held belief that variance denials are bomb-proof. We are no forwarder in understanding what constitutes abuse of discretion in this context. No one is “entitled” to a variance, *Bottomly v. Board of Appeals of Yarmouth*, 354 Mass. 474, 476 (1968); even when a board finds that the mandatory factors exist, it still must apply its discretion, mindful of the law’s exhortation to grant variances sparingly. Still, in the nature of things, there must be times when these largely amateur boards abuse their discretion. This case and the recent Rockport decision suggest that local ZBAs have to go pretty far in order to do so.

* A footnote: in June 2008, counsel and her husband bought a house on a corner in Longmeadow, and put up a fence, in the back yard. Hundreds of feet from the road, really.
TARP AND THE TRANSFORMATION OF EXECUTIVE COMPENSATION

By Evelyn A. Haralampu

The current economic crisis has triggered heightened public and governmental scrutiny of financial institutions with a view toward exposing and regulating the practices and behaviors that triggered the near collapse of the world banking system. For businesses that are receiving U.S. government funding, executive compensation is subject to particular public scrutiny and growing legal regulation. However, the current climate has caused most American businesses to rethink executive compensation and its effectiveness in achieving organizational goals.

Executive compensation under TARP

Corporate recipients of federal funds under the Troubled Asset Relief Program (“TARP”) are subject to stringent laws affecting executive compensation. For example, no golden parachute may be paid to the top five most highly compensated unless the payment is for services already performed or benefits accrued. Bonuses, retention awards and incentive compensation (other than restricted stock meeting certain requirements) are prohibited for covered executives. TARP recipients are required to establish limits on compensation to discourage inappropriate risk taking, and to claw back any bonus, retention or incentive award to the top-paid 25 if financial statements are materially inaccurate. In addition, each TARP recipient is required to establish a compensation committee of independent directors, establish company-wide policies limiting excessive perquisites, and solicit nonbinding “say-on-pay” shareholder votes to approve executive compensation. The tax deduction on the deductibility of executive pay under Code §162(m) is also limited to $500,000 for TARP recipients (as compared to $1 million for non-TARP public companies) with no exception for performance-based compensation.

These rules became law under the Emergency Economic Stabilization Act of 2008 (“EESA”) and are widely viewed as an impetus for more changes in executive compensation of public companies.

Changes in practice

In the context of collapsing equity values, many features of executive compensation are now being redesigned as a matter of practice. Equity compensation, tax gross-ups and severance packages for terminated executives in public companies are now particularly subject to cutbacks and restructuring. Providing executives with extra cash to pay excise taxes on golden parachutes, once a negotiable point, for example, is now a nonstarter. Double triggers (that is, requirements of both a change in control of the public corporation plus the loss of the executive’s job) are now becoming standard pre-conditions for executive exit packages in public companies.

Stock options, once a staple of executive compensation, are now on the wane, in part because they subject executives to too little downside risk and are thought to encourage too much inappropriate risk taking by management to the detriment of the corporation. Instead, equity compensation is being redesigned to give executives a greater stake in both the long-term fortunes and misfortunes of the corporation, and to reduce the amount of risk that short-term equity compensation encourages executives to take.

As a result, performance-based, restricted shares are increasingly replacing stock options. In addition, under many new equity programs, vesting is triggered only if the company has both increased value for its shareholders and performed well against its peers.

Perquisites, such as country club memberships, company cars and use of a private aircraft are subject to curtailment as well.

Similarly, long-term income and retirement programs for executives of public corporations are being re-examined. Under particular scrutiny are defined benefit retirement pay packages to executives and death benefits to their families. These benefits are expensive to fund and subject the corporation to market risk. They also attract criticism, particularly if other employees’ retirement benefits are subject to market risks.

Also under scrutiny is the process by which public companies determine executive compensation. It has been common, for example, for boards of directors of public companies to be populated by former CEOs and other insiders who have been lenient in setting and increasing executive compensation. Congress, institutional shareholders and public watchdog organizations have recently been reviewing these practices with a view toward instituting structural changes that add greater independence to the bodies overseeing executive compensation. By replacing ex-CEOs and other insiders with independent directors, and by requiring outside executive compensation consultants on compensation committees, it is expected that a greater balance of interests will inform the process of setting executive compensation.

Possible law changes

At this writing, bills are now percolating in Congress which are directed at regulating executive compensation of all public companies. For example, one bill would require nonbinding shareholder approval of executive compensation packages (“say-on-pay”). Other proposals of executive compensation in public companies are aimed at further limiting the deductibility of executive compensation; re-
quiring clawbacks of compensation for misstatements in financial reporting and other executive malfeasance; requiring an independent outsider as chairman of the board of directors; requiring the annual election of directors; instituting risk committees on boards to monitor the behavior of management, and prescribing by law the permitted ratio of executive pay to the median pay of workers.

The current economic crisis has already proven itself a watershed event. It is sure to be the triggering event of a host of new regulations including changes designed to curb real and perceived abuses affecting many executive compensation programs.
409A correction procedures

By Patricia Ann Metzer

Code section 409A deals with the tax treatment of deferred compensation plans. Failure to take heed of its provisions can be disastrous. Essentially an employee’s entire deferred compensation account can become subject to immediate taxation at penalty rates, and employers can find themselves out of compliance with the code’s reporting and withholding requirements. A notice issued by the Internal Revenue Service in 2008 (Notice 2008-115) describes the implications of a plan’s becoming 409A noncompliant, and regulations on the subject (Treas. Reg. § 1.409A-4) have been proposed.

Employers must now tell employees about any deferred compensation currently subject to tax under code section 409A. Box 12 on Form W-2 (code Z) shows all compensation deferred under a noncompliant plan for the current year and all prior years to the extent not forfeitable and not previously included in gross income. The reportable amount is:

A plus B, minus C, where:

A = Total non-forfeitable amount deferred under the plan at the end of the current calendar year,

B = All amounts of deferred compensation paid or made available to the employee during that year, and

C = Deferred amounts that were included in the employee’s income in a prior year.

Code Z alerts the IRS to the applicability of the additional 20 percent tax and the premium interest tax (to compensate for the time value of money) imposed on noncompliant 409A deferred compensation.

Valuing an employee’s deferred compensation benefits at the end of a calendar year can be a big problem. In addressing this matter, the IRS has turned to guidance already developed under other code provisions. Notice 2008-115 breaks deferred compensation arrangements down into four groups, each with its own set of valuation principles: Account balance plans, non-account balance plans, stock rights and other deferred amounts. The proposed regulations provide more specific guidance.

An employee who receives a Form W-2 with an amount in box 12 coded Z will not be very happy. IRS guidelines obligate him to determine the amount reportable as income under code section 409A. He must also compute the two additional code section 409A taxes—the computation of which is addressed in the proposed regulations.

The bottom line is that 409A mistakes can be costly and, worse still, they can be made unwittingly. Scrivener’s errors can cause plan documents to be 409A noncompliant. Operational mistakes can have the same result. The IRS, knowing the likelihood of unwitting 409A footfalls, published correction procedures in 2008 dealing with operational failures (Notice 2008-113). The important thing to keep in mind is that, if a mistake can be fixed, an employee’s deferred compensation plan (including plans aggregated with it under 409A’s plan aggregation rules) will be free from ongoing 409A taint. The proposed regulations also reflect the IRS’s philosophy that corrected mistakes wipe the slate clean.

The operational correction procedures reflect the IRS’s determination that correcting early is better than correcting later. If mistakes are caught in time, employees can avoid current taxation, the additional 20 percent tax and the premium interest tax. Other mistakes, if caught a little later, may result only in a regular tax plus the additional 20 percent tax on the erroneous amount. For the moment, catching a mistake beyond the last day of an employee’s second taxable year after a failure occurs is too late.

Optimal results can be achieved if a mistake is fixed in the year of failure. Also, special rules favor failures involving small amounts, not greater than the annual limitation on employee elective deferrals to 401(k) plans. At the opposite end of the spectrum are insiders, with respect to whom mistakes can be corrected in a generally less favorable manner. Insiders are officers or directors, or those who have more than a 10 percent beneficial ownership interest in any class of their employer’s equity securities, determined applying SEC rules.

What is surprising about the IRS’s notice is how it defines operational failures. Most of the failures addressed are logical. Those that fall into an easily understood category are:

- Paying currently an amount that an employee has elected to defer.
- Paying currently a plan benefit due in a later taxable year.
- Paying deferred compensation more than 30 days in advance of a due date falling within the same year.
- Paying benefits to a “specified employee” during the six month period after his separation from service.
- Paying currently a “specified employee” during the six month period after his separation from service.
- Fixing the exercise price of a stock right at below the fair market value of the underlying stock on the date of the right is granted.

What is not intuitive is the IRS’s conclusion that an employer’s erroneous deferral of current compensation is an operational failure. Why is the failure to pay current compensation not simply a breach of contract, rather than a unilateral decision to provide non-elective deferred compensation?
Taxpayers choosing to use the correction procedures have the burden of showing that they are eligible for the relief provided. According to the IRS:

- The operational failure must be both inadvertent and unintentional.
- The employer must take commercially reasonable steps to avoid a recurrence.
- It is not possible to correct an erroneous payment made by an employer who experiences a substantial financial downturn in the year of payment, forewarning a significant risk that it will be unable to pay deferrals when due.
- An employee may not correct an operational failure in a year after that in which it occurs if, for the year of the occurrence, his return is under examination “with respect to the plan.”

The procedures also include extensive reporting requirements, applicable to both employers and employees. Taxpayers claiming relief must demonstrate that those notice requirements have been met.

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The correction concepts can best be understood by considering the various ways in which two different types of operational failure can be corrected. Each example below assumes that the employee participates only in a deferred bonus plan.

**Example one: Erroneous overpayment**

In the first example, assume that “M” timely defers 50 percent of his 2009 bonus (50 percent of $100,000). On July 1, 2009, his employer pays him $90,000 by mistake and credits $10,000 to his deferred compensation account, resulting in an overpayment of $40,000. What correction procedures are available to M and his employer?

**Case 1:** M is not an insider. If, by Dec. 31, 2009, M repays $40,000 to his employer who credits $40,000 to his deferred compensation account, the erroneous payment will be treated as a non-event. If repayment by then would create for M an immediate and heavy financial need, up to a 24-month deferral, with interest, is permitted.

**Case 2:** M is an insider. To achieve the case 1 result, M must, by Dec. 31, 2009, repay $40,000 with interest for the period the erroneous payment was outstanding, at a rate no less than the short-term applicable federal rate, based on annual compounding, for the month in which the erroneous payment was made. M’s employer is taxed on the interest income. No interest will be due if the overpayment does not exceed the defined small amount ($16,500 for 2009).

**Case 3:** M is not an insider. The overpayment is discovered in 2010. M will not incur additional taxes if, by Dec. 31, 2010, he repays the entire $40,000 with interest computed as noted in case 2. M’s Form W-2 for 2009 will show the $40,000 payment. M may, however, reduce his 2010 adjusted gross income by the $40,000 repayment. If repayment would cause M an immediate and heavy financial need, M can take advantage of the deferred payment provisions described in case 1.

**Case 4:** The facts are the same as in case 3, except that M is an insider and the overpayment is not discovered until 2010 or 2011. If M repays $40,000, with interest computed as noted in case 2 by Dec. 31, 2011 (the last day of the second year following the year of the failure), the additional 20 percent tax under section 409A, but not the premium interest tax, will be imposed only on the $40,000. M must receive from his employer a 2009 Form W-2 or form W-2c showing wages of $40,000 and the same amount in box 12 marked with a code Z. M cannot reduce his adjusted gross income by the $40,000 repayment.

**Case 5:** The facts are the same as in case 4, with two differences. M is not an insider and the operational failure is not discovered until 2011. Here, the correction method is as described in case 4 with one exception. Because M is not an insider, he is not required to pay interest to his employer on the $40,000 overpayment.

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Three elements are common to these correction procedures. The IRS agrees that an employee need not repay an overpayment in cash; instead, other compensation due the employee before the mandatory repayment date may be reduced. Also, an employee’s deferred compensation account balance can be adjusted for earnings or losses back to the date the overpayment should have been credited to the account, so long as the adjustment occurs by the prescribed repayment date. In no event, however, can an employee be made whole for the amount repaid.

One other correction method is available for overpayments of current compensation that do not exceed the current year’s small amount ($16,500 in 2009). The recipient of a small amount may keep it. The *quid pro quo* is twofold. He will be taxed in the year of receipt. Second, the additional 20 percent tax under section 409A (but not the premium interest tax) will be imposed in the year of receipt only on the overpayment. When this procedure is used, the employer must issue a form W-2 or form W-2c for the year of payment, reporting the payment in box 12 using code Z, and the employee must file a return for that year, reporting the overpayment and the additional 20 percent tax. He must do so no later than the end of his second taxable year after that in which the failure occurred.

**Example two: Excess deferral**

The converse example involves an employer who erroneously defers current compensation (deemed by the IRS to involve an operational failure). Assume that “N” timely defers 50 percent of his 2009 bonus (50 percent of $100,000). By mistake, on July 1, 2009, his employer pays him $10,000 and credits $90,000 to his deferred compensation account, resulting in an over-deferral of $40,000.

**Case 6:** N is not an insider. If N’s employer pays him $40,000 by Dec. 31, 2009, that amount will be shown as current compensation on his 2009 form W-2, and the additional taxes described in code section 409A will not be imposed. To compensate N for the late payment, N’s employer could pay him interest by the end of 2009 to reflect the time value of money. N’s account balance must be reduced no later than Dec. 31, 2009, to reflect the $40,000 payment. By the same date, N’s “remaining account balance” can (but need not) be reduced by any amount earned on the $40,000 while it was credited to his account, or adjusted for losses. Per an IRS example, an adjustment for earnings means a forfeiture of earnings. The intent of the loss-adjustment provision is not, however, clear. If N’s account consists of an initial deposit of $90,000 (the 2009 deferral), which, because of investment performance, falls by 60 percent to $36,000 on Dec. 31, 2009, what are the employer’s options under the IRS notice?

**Case 7:** The facts are the same as in case 6, except that N is an insider. The same-year correction procedure is, with one excep-
tion, identical to that described in case 6. The account balance of an insider must be reduced by any earnings on the $40,000 erroneous deferral.

**Case 8:** N is not an insider. The operational failure is not discovered until 2010. If N’s employer pays him $40,000 by Dec. 31, 2010, N will realize income of $40,000 in 2010, but he will not be subject to the additional 20 percent tax or the premium interest tax under section 409A. N cannot receive interest from his employer to reflect the time value of money. N’s account balance must be reduced by the end of 2010 to reflect the $40,000 payment. In addition, his “remaining account balance” must be adjusted for earnings (and may be adjusted for losses) retroactive to the date the $40,000 was incorrectly credited to his account. Per the IRS notice, this adjustment must be made by the last day of N’s taxable year in which the error occurred (2009 — not 2010 — in the example).

**Case 9:** N is an insider, and the operational failure is not discovered until 2010 or 2011. N must receive $40,000 from his employer by Dec. 31, 2011. His employer must issue a 2009 form W-2 or form W-2c, showing 2009 wages of $40,000 and $40,000 in box 12, with a code Z. By issuing this form, N’s employer will avoid penalties or liability for failure to withhold on the amount deferred. N, on the other hand, will be subject only to the additional 20 percent tax under code section 409A, not the premium interest tax, imposed only on the $40,000 excess deferral. N’s employer cannot pay N interest for the use of the $40,000. Further, N’s “remaining account balance” must be adjusted for earnings (and may be adjusted for losses) retroactive to the date the excess deferral was incorrectly credited to his account. This adjustment must be made by the last day of the year in which N is paid the excess deferral.

**Case 10:** The facts are the same as in case 9, except that N is not an insider and the operational failure is not discovered until 2011. Under these circumstances, the correction procedures are identical to those described in case 9.

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One other correction procedure is available when an employee’s excess deferral does not exceed the small amount for the year in which the operational failure occurs ($16,500 in 2009). Then, the employer may pay the excess deferral to the employee by the end of the employee’s second taxable year following that in which the failure occurred, and report it on a form W-2 for the year of payment — as current wages and in box 12, using code Z. The employee will be required to include the payment in income for the year in which he receives it, when he will also be subject to the additional 20 percent tax imposed only on the payment received. The premium interest tax will not apply, nor will his employer be subject to penalties or liabilities for failure to withhold. Earning on the excess deferral through the date of payment must be forfeited or added to the payment, and losses allocable to the excess deferral must be permanently disregarded or subtracted from the payment made to the employee.

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Both examples illustrate the complexity of, and the planning opportunities presented by, the correction procedures in the IRS’s 2008 notice. In any case involving an operational failure, it will behoove the parties to study carefully the available options and their impact. An employer must also determine its future reporting obligations should it or its employee choose not to engage in one of the permitted correction procedures.

*This article was completed before the issuance of IRS Notice 2010-6 dealing with plan document failures.*