



Impeachment by evidence of prior criminal convictions

By Jason R. Markle



Impeachment of a witness in a civil matter by evidence of prior criminal convictions is permitted in Massachusetts pursuant to G.L.c. 233 §21

and the Massachusetts Guide to Evidence §609. Such impeachment, however, is limited in time and scope in accordance with §21. Furthermore, the use of prior convictions for impeachment purposes is subject to the discretion of the trial judge, who must carefully weigh the probative value of the prior convictions against the danger of unfair prejudice that may result from the admission of such evidence. The use of such impeachment is a powerful tool for civil litigators because, as the SJC has held, "a witness's earlier disregard for the law may suggest to the fact finder similar disregard for the courtroom oath." *Commonwealth v. Harris*, 443 Mass. 714, 720 (2005) (internal quotations omitted).

Generally

Prior convictions of a witness are admissible in evidence to affect his credibility, except as follows:

First, the record of his conviction of a misdemeanor shall not be shown for such purpose after five years from the date on which sentence on said conviction was imposed, unless he has subsequently been convicted of a crime within five years of the time of his testifying.

Second, the record of his conviction of a felony upon

which no sentence was imposed or a sentence was imposed and the execution thereof suspended, or upon which a fine only was imposed, or a sentence to a reformatory prison, jail, or house of correction, shall not be shown for such purpose after ten years from the date of conviction, if no sentence was imposed, or from the date on which sentence on said conviction was imposed, whether

the execution thereof was suspended or not, unless he has subsequently been convicted of a crime within ten years of the time of his testifying. For the purpose of this paragraph, a plea of guilty or a finding or verdict of guilty shall constitute a conviction within the meaning of this section.

Third, the record of his conviction of a felony upon which a state prison sentence was imposed shall not be shown for such purpose after ten years from the date of expiration of the minimum term of imprisonment imposed by the court, unless he has subsequently been convicted of a crime within ten years of the time of his testifying.

Fourth, the record of his conviction for a traffic violation upon which a fine only was imposed shall not be shown for such purpose unless he has been convicted of another crime or crimes within five years

of the time of his testifying.

For the purpose of this section, any period during which the defendant was a fugitive from justice shall be excluded in determining time limitations under the provisions of this section.

G.L.c. 233 §21. Impeachment in this manner dates back at least 148



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years in Massachusetts. See *Commonwealth v. Hall*, 86 Mass. 305, 306 (1862), citing St. 1852, c. 312 §60.

Although most cases which address the issue of impeachment by prior criminal convictions are themselves criminal in nature, such impeachment is permissible in civil matters. See e.g., *Brilliant v. R.W. Granger & Sons, Inc.*, 55 Mass. App. Ct. 542, 545-546 (2002); *Walter v. Bonito*, 367 Mass. 117, 122-23 (1975). Additionally, the trial judge's discretion to admit or exclude prior convictions applies equally to parties and other witnesses alike. *Commonwealth v. Manning*, 47 Mass. App. Ct. 923, 923 (1999).

The "admission of evidence of a prior conviction is subject to the exercise of reviewable discretion by the trial judge." *Commonwealth v. Maguire*, 392 Mass. 466, 470 (1984). A trial judge's admission of prior criminal convictions for the purpose of impeachment, without consideration of his or her discretion, is reversible error. *Commonwealth v. Ruiz*,

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Moving forward, giving back

By Kimberly E. Winter



As I begin my tenure as president of The Massachusetts Academy of Trial Attorneys, I am reminded that I have been involved with

MATA throughout my entire legal career in one capacity or another.

I have watched MATA evolve into a large association with a strong state and federal legislative agenda that strives to keep both consumers and their families safe. MATA's members are unparalleled in their collegiality and commitment to education and the sharing of information that enhances

the practice of all of our members.

Some of my greatest friends and mentors are past presidents of MATA. These leaders encouraged me to be involved with MATA many years ago and I remain grateful for that invaluable advice. It is their hard work and the many achievements of each MATA president through the years that are responsible for MATA's foundation, which we continue to build on today.

MATA works to represent the rights of consumers everywhere, and in doing so, the organization has become global. It

is my intention in the coming months to include the voices of all of MATA's members statewide and utilize their needs, input and vision

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PRESIDENT'S MESSAGE

Listserve pays for MATA membership

It is easy to find MATA members to extol the importance and value of the listserve in helping to better represent our clients. A few months ago I was wondering whether members considered the listserve alone as justifying in economic terms the cost of MATA membership.

Annual membership dues range from \$50 for lawyers admitted less than a year to \$475 for lawyers who have been practicing for more than 10 years.

When doing contingency fee work it is sometimes challenging to pin down the dollar value of saved time, but it usually means time available to work on another contingency fee case. For purposes of time valuation, I used the Committee for Public Counsel Services' published rates for

attorneys' fees in non-murder cases — \$50 to \$60 per hour. (No, I'm not kidding). Even at this absurd rate, nine hours of time saved by the listserve would pay for the most expensive MATA membership.

With this preface, consider the following:

John Yasi:

"I could legitimately attest to the fact that I must save at least 200 hours of my time and associates time a year by accessing information from the listserve. It may well be more."

Charlie Murray:

"The listserve is invaluable for providing me and other MATA members with practical tips, scholarly

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What are focus groups anyway?

By Paul J. Sceptur and
Carrie R. Frank

Focus groups are basically a form of market research, a technique that has been used by major corporations for many years. Before a new toothpaste is put on the market, before a new car is rolled out, before a studio releases a major new movie, they conduct focus groups of consumers. Trial consultants do the same thing, using “consumers” as surrogate jurors. They use these focus groups to conduct pre-suit and pre-trial research and discovery.

Why do lawyers use focus groups?

Focus groups are extremely useful in many respects. First and foremost, preparing for the focus group itself forces the lawyer to learn the case from the other side. In order to defeat the defense landmines, you need to know what they are. Only by looking at the case from the defense perspective can you identify the landmines and prepare rebuttals to them.

Secondly, it helps us to prepare: prepare for discovery, prepare for settlement discussions and ultimately prepare for trial.

Thirdly, they help identify important issues in the case. We as lawyers often believe that certain issues are important, when in fact they are not. There is “lawyer-proof” and then there is “juror-proof.” Lawyers often overlook issues that we think are unimportant or put undue emphasis on what we think is important — “lawyer-proof” — as opposed to what is important to the jury. We can use focus groups to identify what is and is not important to the jurors who will hear the case. They help identify new ideas, good ideas and bad ideas in the approach of the case. They are also important in helping us establish the theme or themes of the case. Oftentimes, they help identify what we can and will use as exhibits in trial or what jurors think of our witnesses and experts.

We conducted a focus group on a nursing home case. The resident of the nursing home was there because of a broken hip. She developed severe pressure sores and ultimately died. It was alleged that the nurses and aides at the home were not assessing and turning her appropriately. Her daughter, the plaintiff, was with her constantly at the nursing home. Many insights were gathered through the focus group but two stand out.

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Carrie R. Frank is a trial consultant and trial lawyer in Boulder, Colo., with a master's degree in social work. She has helped clients win countless dollars during her career. Visit www.lawcolorado.net and contact her at carrie@kleinfrank.com.



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A strong argument was made against the daughter for not assessing her mother for pressure sores. Obviously, she was not a nurse, yet there were people in the focus group who were very critical of her for, in effect, not performing the services that she had hired the nursing home to do. In fact, there were a few people who felt she should have turned her mother to inspect for sores even though her mother was there for a broken hip! This was an interesting issue that we had not thought about until that time.

The second aspect dealt with a theme. There was a strong plaintiffs' member of the focus group. He gave us many arguments with which we could arm pro-plaintiff jurors but he also gave us a theme. His theme was that just because the daughter was constantly there, didn't mean she was entitled to a lesser level of care. (It also rhymed.) Other jurors gravitated to this theme, and it resonated even with some of the anti-plaintiff members.

Why don't lawyers use focus groups?

Here are the top 10 reasons lawyers don't do focus groups.

1) I have all the proof I need

Again, there is lawyer-proof and there is jury-proof, and the lawyer proof that you need to get to the jury and the proof that the jury needs to find in your favor are often very different. If you do not know the difference between jury-proof and lawyer-proof, you will miss critical evidence and testimony in your case. Whatever those holes are in your proof that you have not learned and discussed at trial will be filled in by your real jury. This is called the filling defect. You won't like the answers the jury fills in for you at trial. The only way to learn what that jury proof is, is to talk to a focus group ... or two or three.

2) Focus groups are too expensive

Lawyers say they cannot afford to run focus

groups. You spend money on experts, exhibits and on other aspects of the case, but you won't spend money on what is likely the most critical information gathering project you can do regarding the presentation, framing, sequencing and ultimately the success of your case. Focus groups can be much more cost-effective than you think. If you have a small case, consider working with several other attorneys with similar cases and share the expenses. We are both trial consultants and trial lawyers. Because of that, we are often willing to work on a partial or total contingent fee, which is a cost on the file, not a fee split. This minimizes the upfront cost of the focus groups. If you consider a cost benefit analysis, focus groups are one of the best investments you can make.

3) I know how to talk to a jury

We all went to law school and learned how to think like lawyers. Unfortunately, your typical juror does not think or talk like you do. Your words must resonate with the jury and be remembered. Your analogies must be relatable to the jury. Your themes must make sense. You must be understandable. Will the jury remember and understand “preponderance of the evidence?” Not likely. But will they understand and remember that your burden of proof is that the evidence be “more likely than not?” Or that your damages are the “harms” and “losses” suffered by your client?

These phrases didn't come from lawyers; they came from focus groups. We often use “legalese” or have other technical terms associated with the case. We have found that juries tune out this language, and that will affect on your case. You must find the themes and catch phrases that the jury will remember and the ones that will hit home with their own experiences and beliefs.

Frank Luntz is a Republican consultant. He was instrumental in developing the Contract

with America that Newt Gingrich made famous. He has written a book, “Words That Work,” which is essential reading for any lawyer. He came up with “gaming” instead of “gambling,” “death tax” instead of “estate tax.”

His key point is simple: It's not what you say, it's what people hear. And focus groups tell us what they hear, remember and believe.

(By the way, one of the greatest themes ever came from a focus group. Johnnie Cochran didn't come up with “If it doesn't fit, you must acquit.” That came from a focus group.)

4) I've been doing this for years

You have also been driving a car for years, but you wouldn't buy one without test-driving it or having a mechanic check it out. The focus group is the “test drive” or the “mechanic” for your case. Every case has landmines, things that will blow up your case. The focus group participants let you know what those landmines are. More importantly, they can tell you

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Liquidated damages in a P&S

By Roger T. Manwaring



A real estate purchase and sale agreement almost always provides that if the buyer fails to fulfill his or her obligations, all deposits shall be retained by the seller as liquidated damages and that this shall be the seller's sole and exclu-

sive remedy at law or in equity.

But are the seller's damages always limited to the deposit? What if the deposit is unreasonably small in comparison to the sale price, or the seller's claims against the buyer arise not from the buyer's breach of the sales contract, but from the buyer's intentional wrongdoing or breach of tort duties which exist independently of the P&S? In these circumstances the seller may be entitled to damages exceeding the deposit.

Suppose that the owner of a commercial property enters into negotiations to sell the property to a corporation that currently occupies the property under a lease. The owner is not a sophisticated businessperson, having acquired the property by inheritance and having little other commercial experience.

After the initial lease term expires, the owner/lessor continues to accept the same rent on a month-to-month basis, even though the lease provides that the tenant corporation must pay extra rent if it holds over after expiration of the initial term. He does so because he expects to recoup any lost rent in the proceeds from the eventual sale. The negotiations continue for years and lead to the execution of a P&S which lists a purchase price of \$2.2 million but requires a deposit of only \$1,000. The closing is to

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occur one year from the date of the P&S. In preparation for the sale of the building, the owner/lessor spends \$100,000 on repairs necessary to make the building saleable.

After the closing date in the P&S is extended for a number of additional years, during which the corporation continues to pay reduced rent, the corporation notifies the owner/lessor that it intends to move elsewhere and will not complete its purchase of the building. The P&S contains a liquidated damages provision limiting the seller's damages if the buyer "fails to fulfill buyer's agreements herein" to the amount of the deposit.

Liquidated damages provisions are usually enforced.

A liquidated damages provision in a P&S will usually be enforced as long as, at the time the contract was executed, actual damages were hard to predict and the amount of liquidated damages was a reasonable prediction of the actual damages which might result from breach of the contract. In *NPS, LLC v. Minihane*, 451 Mass. 417 (2008), the Supreme Judicial Court explained that "Whether a liquidated damages provision in a contract is an unenforceable penalty is a question of law [and] the burden of showing that a liquidated damages provision" *Id.* at 419-20.

A liquidated damages provision "should be enforced, so long as it is not so disproportionate to anticipated damages as to constitute a penalty." *Id.* at 420. To be enforceable, a liquidated damages provision must satisfy two requirements: "first, that at the time of contracting the actual damages flowing from a breach were difficult to ascertain; and second, that the sum agreed on as liquidated damages represents a 'reasonable forecast of damages expected to occur in the event of a breach.'" *Id.* The NPS Court noted that because there is no "bright line" separating a valid liquidated damages provision from which functions as a penalty, the facts of each case must be examined. *Id.*

Is a liquidated damages provision an unenforceable penalty where the deposit is unreasonably small in comparison to the purchase price?

In the hypothetical outlined above, \$1,000 in liquidated damages represents only 0.045 percent of the purchase price, which the seller would have received had the contract been performed. Can the seller argue that the liquidated damages provision is an unenforceable penalty because the amount of the damages specified is unreasonably and

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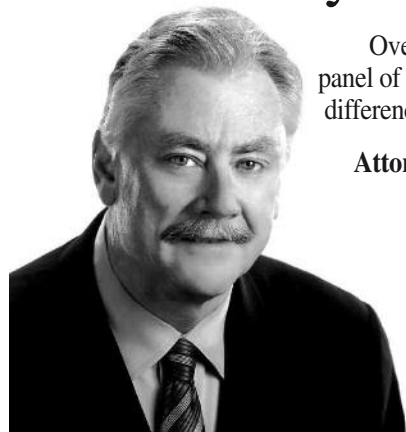
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By Paul D. Dullea

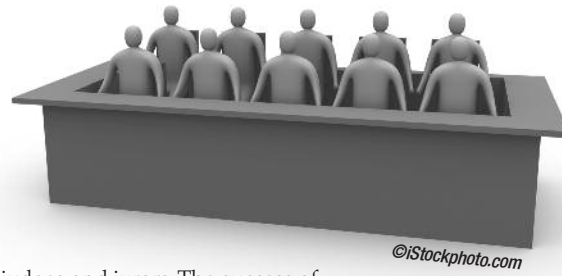


"Tell me and I'll forget;
show me and I may re-
member; involve me and
I'll understand."
Chinese Proverb

I am relatively new to MATA. In my short time, I have been impressed by the caliber and dedication of our members. As an attorney and someone who has spent time in classrooms, I know that lawyers can make effective teachers; with trial lawyers, even more so.

Trial lawyers must research, prepare and present complicated facts and concepts to

Paul Dullea is the executive director of MATA.



judges and jurors. The success of MATA members demonstrates that our lawyers are some of the best teachers around and know how to communicate effectively with courts, lawmakers and citizens.

Although a good attorney can help a juror understand the facts and underlying law of a case, what else do jurors learn from their experience with the court? Do jurors become more

appreciative of our system? Do they leave the courthouse with a better understanding of the importance of the civil justice system and the role that plaintiffs' lawyers have played in developing our body of law? If our neighbors do not end up with a better image of the civil justice system after serving on a jury, what can we do to change that?

Jury duty is the only opportunity lawyers have to show most people the importance of our legal system and involve them in the system. It is a rare opportunity to reshape attitudes that have been bombarded by well-funded attacks on the civil justice system. Imagine the shock jurors experience when they see that plaintiffs' attorneys do not fit the stereotypes that critics of the tort system promulgate through multimillion dollar campaigns and

"think tanks." To see a MATA member advocating for an injured individual who would otherwise be all alone in the process is a powerful image.

Trial attorneys are their own best ambassadors. Demonstrating dedication to individual clients and protecting the public interest should speak for itself. However, we know this is not enough when tortfeasor-rights groups work around the clock, spending millions trying to undo a system that has served Americans well for over 200 years. For that reason, MATA members will continue to show their best in Massachusetts courtrooms and through community education efforts.

MATA gives us the collective voice to help the public understand the importance of our civil justice system — case by case, juror by juror, and person by person.

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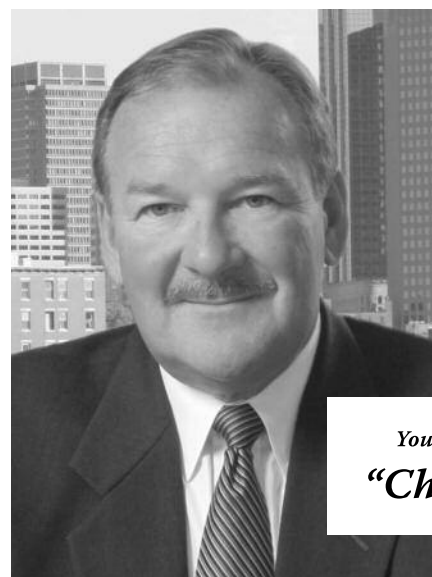
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Listserve pays for MATA membership

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memoranda, forms, and critiques on judges, mediators, arbitrators and opposing counsel. Although it is difficult to calculate time savings in hours, I estimate it is in the area of 20 to 30 hours annually for me."

Lloyd Rosenberg:

"In a given year, 25 to 50 hours. The value is \$7,000 - \$14,000 based upon my current hourly rate."

Steve Coren:

"I estimate the listserve saves me over 50 hours of research and phone per year. It is truly a great resource."

Owen McGowen:

"I find the resource very valuable and would estimate it saves me at a minimum 15-20 hours per year."

It is clear that for those using the listserve it can offset the costs of membership so as to effectively render free all of the other benefits of MATA membership. Moreover, if the saved time is used well, listserve participation makes MATA membership directly profitable.

Of course, we were reminded by Scott Goldberg and Michael Poulos that the most important time savings may be when we are under the gun in a trial and need some quick feedback without spending hours of original research.

Tom Bond sums up the combination of tangible/intangible benefits he derives from MATA listserve as follows:

1) Expert witness information — includes information about experts to hire as well as cross examination material for defense experts

2) Judge information — judge's practices concerning voir dire, pet peeves, and other valuable information

3) Defense counsel information — Are they obstreperous, cooperative, have a track record?

4) Pleadings — sample complaints, interrogatories, document requests, memoranda

5) Case evaluation — access to the best

plaintiff's lawyers in the commonwealth with whom you can consult as to their thoughts concerning case merits and value

6) Resources — I have loaned and borrowed projectors, screens, skeletons, charts and graphs.

7) Court information — Which county is best for which kind of case? Federal or state venue, and the advantages of each?

The value of this listserve is inestimable. In light of that, any plaintiff's lawyer in this commonwealth who belongs is really doing a service to his or her clients.

Upcoming event

December

- 9 MATA Holiday Celebration
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MATA Guardians

The following firms have committed to giving a percentage of their fees to a MATA reserve fund to ensure the longevity of the organization and continued ability for MATA to preserve the rights of your clients and succeed in obtaining its mission of keeping Massachusetts families safe. The goal of the Guardians is one year's budget in reserve.

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MATA holds 18th annual golf tournament

MATA hosted its 18th Annual Golf Tournament on Flag Day, June 14, at The Wollaston Golf Club in Milton.

A portion of the proceeds from this event were donated to USO-New England, which works with the national USO offices to assist the military and their families.

We were fortunate to have a jacket with the USO logo generously donated as a tournament gift by the Boston law office of Crowe & Mulvey. Tournament players included the captain and first officer U.S.S. Constitution as well as a number of representatives from the U.S. Marines, Navy, Army and Air Force.

On every level, the 2010 tournament was one of the most successful MATA has ever hosted. The attendees and golfers at the awards dinner were entertained by Dave Russo, a local professional comedian and a finalist on the E! Channel reality series "The Entertainer," as well as the recipient of the Best New Comic Award at the Boston Comedy Festival. We thank Dave for donating his time to both the USO and MATA.



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MATA celebrates 20th annual meeting

MATA held its 20th Annual Meeting and Dinner at The Newton Marriott in Newton on May 19.

The 2010 MATA award recipients represented a prestigious group that included MATA past President Douglas K. Sheff, who received the President's Award for Excellence in Advocacy; David M. Biggs, assistant clerk magistrate for Plymouth Superior Court, who was presented with the award for Excellence in Courtroom Management; and Superior Court Judge Janet L. Sanders, who received the Judicial Excellence Award.

MATA also presented longtime member and former MATA governor Albert J. Marcotte with the Lifetime Achievement Award and recognized Michael Mone Jr. with the Courageous Advocacy Award.

In addition, MATA honored MATA past President Anthony Tarricone with a special Outstanding Leadership Award, while outgoing MATA President Chris A. Milne presented incoming President Kimberly E. Winter with the traditional MATA President's Gavel to close the award presentations.



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- TrialSmith

Moving forward, giving back

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to continue to grow our organization in all directions.

To that end, I have begun speaking to various bar associations in all parts of Massachusetts and will continue to do so during the coming year. I want MATA members to know they belong to an inclusive organization that recognizes the different needs and areas of interest to individual members, and we will work to meet those needs and interests.

As we move forward I would also like to continue our great tradition of giving back to our community. In past years, MATA has do-

nated to a number of charities, including The Inn-Between, a crisis home for women and children, The Italian Home for Children and The Home for Little Wanderers. For the past 20 years, MATA has made large contributions of toys to the U.S. Marines' "Toys for Tots" program during every holiday season. A committee of young lawyers that I chaired began the original "Toys for Tots" program for MATA and I am thrilled that it has continued each year. It speaks to the commitment of MATA members and their belief in helping others.

Last year MATA began what I believe is an important tradition in giving a percentage of

the profits from two MATA events to worthwhile charities. The MATA Annual Holiday Celebration donated some of the event proceeds to a group that provides much-needed medical care for people in the remote villages of Nicaragua.

The MATA 2010 Golf Tournament donated some of its proceeds to the New England U.S.O., which helps families of people currently serving in the military. I believe both events were enhanced by the decision to donate some of the proceeds to a charity and I think it is essential for MATA to continue to do so.

I am proud that we as trial lawyers believe in

giving back — in all aspects of life. As MATA moves forward I think we must continue to view giving back a part of who we are and what we do every day. As trial lawyers we work to keep people safe, help those who have suffered harm and give consumers a voice in the courthouse.

As an organization, I believe that it is critical that we continue defining who we are by both looking forward to the future and giving back to those in need. I am proud that my colleagues have honored me by electing me to be the president of MATA. I look forward to working with the MATA leadership, staff, members, other bar associations and our com-

Liquidated damages in a P&S

Continued from page 3

disproportionately low in comparison with the damages which the parties should have anticipated the seller would suffer (the loss of the payment of the sale price)?

The answer is not entirely clear. The 1st U.S. Circuit Court of Appeals recently indicated that under Massachusetts law, a liquidated damages provision can be challenged as an unenforceable penalty on the ground that it underestimates actual damages. In *Kunelius v. Town of Stow*, 2009 WL 3720925 (1st Cir. 2009), the deposit was about 2 percent of the purchase price. The court noted that it was far less than the 5 percent, which Massachusetts courts have held to be reasonable as a matter of law. 2009 WL 3720925, *12.

While acknowledging that the weight of authority rejected such an argument, the court noted that both the SJC in *Kelly v. Marx*, 428 Mass. 877 (1999), and the Massachusetts Appeals Court in *Howard v. Wee*, 61 Mass. App. Ct. 912 (2004), had left open the possibility that a liquidated damages provision could be set aside for underestimating actual damages. 2009 WL 3720925, *12. Although the *Kunelius* court ultimately held that the argument had been waived in the case before it, it clearly believed that the argument was a viable one. 2009 WL 3720925, *12.

The *Kunelius* court acknowledged that the Appeals Court in *Howard* held that a deposit of \$1,000 on a purchase price of \$480,000 (2.08 percent) was reasonable and a liquidated damages provision was, therefore, enforceable. According to the court in *Kunelius*, however, the *Howard* Court had stressed that the deposit in that case was only meant to cover a period of 11 days. In *Howard*, although the court held \$1,000 in liquidated damages was not "unreasonably low under the circumstances," it appeared to accept the possibility that, under appropriate circumstances, liquidated damages could be so low as to be unenforceable under *Kelly*.

In the hypothetical situation outlined above, the deposit was intended to cover a period of up to one year. Further, the \$1,000 deposit in this case represented a far smaller percentage (0.045) of the sale price than the deposit in

Howard. It would be difficult to argue that this deposit was a "reasonable forecast of damages expected to occur in the event of a breach."

Thus, the seller may have a viable argument that the liquidated damages provision is unenforceable and that he is entitled to recover actual damages on all of his claims. But see *NASCO, Inc. v. Public Storage, Inc.*, 1995 WL 337072 (D. Mass. 5/20/95) (holding that a liquidated damages provision can only be a penalty when it is an overestimate of actual damages, not when the liquidated damages are too low).

If the liquidated damages provision in the P&S is not a penalty, it may still be unconscionable and therefore unenforceable.

Even if a liquidated damages provision is not a penalty, it may still be unconscionable under the circumstances. In *NASCO*, the U.S. District Court for the District of Massachusetts adopted the opinion of a U.S. Magistrate who noted, that "Under Massachusetts law, unconscionability may be raised as a defense to the enforcement of a contract or any of its clauses ... If the contract involves the sale of goods, the unconscionability provision of the [UCC] will apply directly; if it does not, the same provision will apply by analogy." 1995 WL 337072, *4. The comment to §2-718 of the UCC, concerning liquidated damages, provides,

a term fixing unreasonably large liquidated damages is expressly made void as a penalty. An unreasonably small amount would be subject to similar criticism and might be stricken under the section on unconscionable contracts or clauses [UCC 2-302] (Emphasis added).

The *NASCO* court, reviewing Massachusetts case law and the Massachusetts UCC, outlined factors relevant to a determination of unconscionability. "The principle is one of prevention of oppression and unfair surprise ... and not of disturbance of allocation of risks because of superior bargaining power." 1995 WL 337072, *4. After noting that "Unconscionability is to be determined as a matter of law" (*Id.*) and "is to be determined as of the time of the making of the contract," (*Id.*) the court listed factors affecting whether a con-

tract is unfair or oppressive:

In determining whether a practice is unfair or oppressive, the court may take into account a myriad of factors, such as the commercial sophistication of the party claiming unconscionability; whether such party was represented by counsel; whether the clause was obscure or buried in fine print, or, conversely, whether it was out on the table and the subject of active negotiation; the frequency with which clauses of the type challenged are used in analogous situations; whether the relationship between the parties was arms length or quasi-fiduciary; whether there was a gross disparity between the value of the consideration given and received; and whether the party seeking to enforce the challenged provision took unfair advantage of the other party's weakness, vulnerability, or dependency, or used unfair or improper means to place the other party in such position.

1995 WL 337072, *4-5. (Emphasis added). See also: *Waters v. Min. Ltd.*, 412 Mass. 64 (1992), *Zapatha v. Dairy Mart, Inc.*, 381 Mass. 284 (1980); *NaviSite, Inc. v. Cloonan*, 2005 WL 1528903, *8-9 (Mass. Super. 5/11/05); *Sosik v. Albin Marine, Inc.*, 16 Mass. L. Rptr. 398, 2003 WL 21500516, *7 (Mass. Super. 2003).

As the foregoing quotation indicates, whether a liquidated damages provision is unconscionable will depend on the unique facts of each case.

In our hypothetical, the seller was not a sophisticated business person and it might be argued that the type of liquidated damages clause appearing in the P&S is not frequently used. Although its language is common, the extremely small amount of the liquidated damages provided is unusual. Similarly, the seller might argue that there was "a gross disparity between the value of the consideration given and received," in that the \$1,000 deposit is grossly insufficient as liquidated damages given that the sale was to be for \$2.2 million and the deposit and was not to occur for up to one year. If the seller was not represented by counsel (when negotiating the P&S, that would further support a

finding of unconscionability, as would a finding that the parties never discussed or negotiated the liquidated damages provision.

Even if a liquidated damages provision is enforceable, it arguably does not preclude the seller from bringing suit for breach of a tort or statutory duty owed by the buyer to the seller independent of the P&S contract.

Even if a liquidated damages provision is valid and enforceable, it arguably does not bar all claims by the seller against the non-performing buyer. A seller can reasonably argue that the liquidated damages provision limits only the recovery of damages on claims arising from the buyer's breach of the contractual duty to perform. The seller could further argue that a liquidated damages provision does not preclude or limit claims based on breaches of duties owed by the buyer (the corporation in our hypothetical) to the seller independent of the contract.

Under such an interpretation, the seller in our hypothetical could sue the corporation for fraudulent misrepresentations, breach of fiduciary duty, other tortious conduct, or a tort-based violation of 93A (breach of a statutory duty), so long as the elements of those claims were otherwise established.

The conclusion that a liquidated damages provision governs only contract-based claims is supported by the language of the provision itself where, as in the hypothetical, the provision purports to apply if the buyer "fails to fulfill buyer's agreements herein." Such language indicates that the liquidated damages provision applies only to claims arising from breach of contractual duties.

Massachusetts cases imply such a limitation. In two cases a party has moved to apply a liquidated damages provision only to a breach of contract claim and not to tort and 93A claims asserted in the same case. In each case, the court has done so. In one case (*NASCO*, 1995 WL 337072) the court entered partial summary judgment leaving the tort and 93A claims standing. In the other, the court applied the liquidated damages provision only to the contract claim and disposed of other claims on

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What are focus groups anyway?

Continued from page 2
the fixes to them.

Your client has one day in court and you have one chance to present the best case for them. Wouldn't it be better if you test-drive it first? Aren't we at our best when we have the chance to practice? A focus group lets you experiment with your presentation sequence, your analogies, your themes, your sequencing, and see if your exhibits say what you want them to.

Focus groups let you get a "dry run" on your case. Focus groups give you the chance to lose without a real jury so that you can find your landmines and fix them before they come to light in the jury room. Wouldn't you rather hear about a problem with your case while you still have the chance to fix it?

5) The case will probably settle
Let's face it: Most cases end in settlements. Attorneys often believe that they don't need to conduct focus groups because the case will settle. But doing focus groups two weeks before trial is probably two weeks too late. It is equally as important to learn about your case to prepare for settlement conferences as it is for trial. It is imperative to learn the catch phrases that jurors use to describe your case so that you can incorporate them into your deposition questions. And how about learning what a jury really thinks of the opposing side's case and explaining that at a settlement conference? You will always have the upper hand when you truly understand what a jury thinks of the entire case.

6) I had a professional prepare my exhibits

Studies show that lawyers spend hundreds of hours working on a case to get it prepared for trial: writing and practicing an opening statement, crafting the killer cross-examination. Yet lawyers often spend little time thinking about and creating the exhibits we use to explain the case, or, even worse, delegate the task to someone who does not know the case well.

Focus groups can describe what they want to see and critique exhibits with a "fresh eye." Focus groups will always help tweak the exhibits you have started so that they are the best they can be and send the right message to the jury.

7) I already have the "smoking gun" discovery

Too often, we have heard focus group participants ask for specific testimony or documents that they believe they need to determine the case or award significant damages and the lawyers don't have it. Why? Because they waited until discovery was closed before running a focus group. In any significant case, focus groups should be conducted while there is still time to send out discovery requests or lock in deposition testimony. Focus groups conducted during the pre-trial phase provide the opportunity to send discovery requests to the opposing side, obtain the documents and information that is important to the jury's decision and ask the right questions at depositions.

8) I know my case better than anyone

Except maybe the opposing counsel, because they are running focus groups. The fact is, you don't know what you don't know. During recent focus groups, the lawyer told us that he learned more about his case in the two focus groups we ran than he had with his experts during the entire pre-trial phase. Focus group participants say some amazing things and every time, it is a surprise to find out what they think.

Issues that we think are important or will be easily handled at trial may not be so clear to the focus group. Discussions of things we think are irrelevant (alcohol usage, or lack thereof, in a car crash case is one example) often are raised within minutes of the focus group deliberations. Questions or assumptions about routine documents like a police report are not so routine to focus group members. Much of the pre-trial phase is spent trying to obtain and learn the information in possession of the other side. Interrogatories are sent, depositions are taken, documents are reviewed and analyzed. Why would we then fail to conduct focus groups and allow the other side to be the only one with the knowledge? To create a level playing field, you must learn what the other side knows, and the other side knows to run focus groups.

9) That evidence will never come in
Maybe, maybe not. But sometimes you find out you want it in so you can explain it to the jury, as opposed to having the jury make up an answer you don't like. In a recent case, the lawyer wanted to exclude facts concerning why

the client was in prison. It was evidence that clearly could be kept out. But we found out that the "juror" reasons for him being in jail were a lot worse than the real reasons. When the focus group was presented with the real reasons, they were less harsh on the plaintiff. In fact, some felt sorry for him. You need to know how to handle these issues and the other points that you think will never come into evidence but that the jury wants to know about. Questions left unanswered are problems for you.

10) I've been doing it this way forever
Times change. What worked 10 years ago doesn't work today. Jurors have biases and attitudes, including personal responsibility, anti-plaintiff, suspicion, anti-lawyer and "stuff happens." We need to use focus groups to find out how to use these biases and attitudes in our favor, not against us. Psychology plays a major role in decision making. By hearing the psychology of the focus group "juror" we can structure and sequence our case for the real juror.

Conclusion

The bottom line is that focus groups should be run so that you know the best way to present your case to the people that really matter most: the jury. Focus groups should be run before discovery is started and before structuring your trial presentation. That way, you will know who they want to hear from, what they want to see and what the "juror" proof is. Only then are you ready to win in today's climate.

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other grounds. *Carrroll v. Barberry Homes, Inc.*, 1999 WL 1204020 (Mass. Super. 10/22/99).

In addition, language from two other Massachusetts cases implies that a liquidated damages provision, even when it purports to provide the vendor's sole remedy, limits only the vendor's contract based claims, and has no effect on claims based on non-contractual duties. In 24 Mass. L. Rptr. 487, 2008 WL 4635856 (Mass. Super. 9/30/08), the court held that a liquidated damages provision in a real estate offer to purchase precluded the vendors claims for violation of c.93A and breach of the covenant of good faith and fair dealing. The court essentially held that the vendor could not evade the liquidated damages provision by expressing its contract claims in non-contractual language: "Genesis gave up its right to seek damages in excess of the amount of the deposit, and attempting to use non-contractual language in its claims does not change the fact that the agreed-upon sole and exclusive remedy is liquidated damages." *Id.* at *2.

The implication is that if the claims had been for an independent wrong, not simply for non-performance of the contract, the liquidated damages provision would not have applied to them. See also *Showstead v. Holzman*, 2004 WL 1109820, *2 (Mass. Super. 4/7/04) (holding that claims for estoppel and breach of the covenant

of good faith and fair dealing arose from the contract and were barred by liquidated damages provision. "The seller cannot circumvent [the liquidated damages provision] by calling his breach of contract action by a different name").

Courts from other jurisdictions have been more explicit.

In *Kona Hawaiian Assoc. v. The Pacific Group*, 680 F.Supp. 1438 (D. Hawaii. 1988), the court stated:

Finally, KHA asserts that, if in effect and enforceable, the liquidated damages clause precludes a suit for damages only on the contract causes of action. Here, KHA is correct. The clause is unambiguous and waives damages for breach of contract. A waiver of the parties' right to recover for the torts of negligent or intentional misrepresentation cannot be inferred absent some evidence supporting that interpretation ...

Accordingly, the liquidated damages clause prohibits KHA from recovering damages in excess of \$400,000 for its breach of contract claim only. The tort causes of action remain unaffected as to the damages actually incurred after the date of any misrepresentation or omissions which can be proven at trial.

Id. at 1450. (Emphasis added).

In *HGN Corp. v. Chamberlain, Hrdlicka, White, Johnson & Williams*, 642 F.Supp. 1443 (N. D. Ill. 1986), the court held that a lender, having rec-

covered liquidated damages under a loan agreement, was not precluded from also recovering tort damages for fraud: "HGN can recover the entire loss occasioned by the Firm-Farrell fraud. That measure of damages is not automatically controlled by Agreement's liquidated damages provision ... " *Id.* at 1450-51. (Emphasis added). *Id.* at 187-88. (Emphasis added, footnote references omitted). See also *Lewis v. Methodist Hospital, Inc.*, 326 F.3d 851, 854 (7th Cir. 2003) (citing *Better Foods, infra*, for the proposition that one cannot avoid a liquidated damages clause merely by casting a suit for breach of contract as a tort claim); *Johnson v. Orkin Exterminating Co., Inc.*, 746 F.Supp. 627, 631-32 (E. D. La. 1990) (same); *Fireman's Fund Ins. Co. v. Morse Signal Devices*, 151 Cal. App. 681, 198 Cal. Rptr. 756 (1984) (same); *Better Foods Markets, Inc. v. American Dist. Tel. Co.*, 40 Cal.2d 179, 253 P.2d 10 (1953); *Orkin Exterminating Co. of South Fla. v. Clark*, 253 So. 2d 884, 885 (Fla. App. 3 Dist., 1971) (same); *Lenny's, Inc. v. Allied Sign Erectors, Inc.*, 170 Ga.App.706, 318 S.E.2d 140 (1984); *Woodhull Corp. v. Saibaba Corp.*, 234 Ga.App. 707, 712-13, 507 S.E.2d 493, 497-98 (1998) (liquidated damages provision prevented plaintiff from recovering in tort any damages he could have recovered in contract, but where the damages in tort and contract are not duplicative and where separate transactions supported recovery under the tort and contract theories, there could

be separate recoveries); *Wells v. Stone City Bank*, 691 N.E. 2d 1246, 1249 (Ind. App. 1998) (one cannot avoid a liquidated damages clause merely by casting a suit for breach of contract as a tort claim); *Eden United, Inc. v. Short*, 653 N.E.2d 126, 132 (Ind. App. 1995) (holding that plaintiff's recovery for tortious interference should not be offset by liquidated damages obtained for breach of contract); *Bremerton Central Lions Club, Inc. v. Manke Lumber Co.*, 25 Wash. App. 1, 604 P. 2d 1325 (1979) (holding that liquidated damages clause did not bar suit for separate tort of conversion).

In our scenario, if the corporation's conduct went beyond merely breaching the P&S, and involved fraudulent misrepresentations, breach of fiduciary duty, other tortious conduct or a tort-based violation of 93A, then the liquidated damages provision of the P&S arguably would not limit recovery on those non-contractual claims.

When faced with a P&S or other contract containing a liquidated damages provision, it is worth asking whether the liquidated damages are grossly unfair under the circumstances and, therefore, unenforceable. Even if the clause is enforceable, consideration should be given to whether the breaching party's conduct constitutes an independent tort, as well as a breach of contract. If so, the liquidated damages provision may not limit the available damages.



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Impeachment by evidence of prior criminal convictions

Continued from page 1

400 Mass. 214, 215 (1987). But see *Commonwealth v. Bly*, 444 Mass. 640, 653 (2005) (holding that a trial judge is not required to exercise discretion in the absence of an objection or motion in limine).

In order to impeach a witness by a prior criminal conviction, the conviction must be proven by the introduction of a court record or certified copy thereof. *Commonwealth v. Puleio*, 394 Mass. 101, 104 (1985). There is no longer a requirement that counsel seeking to impeach a witness prove that the witness had counsel or validly waived counsel in connection with the prior conviction. *Commonwealth v. Saunders*, 435 Mass. 691, 695-96 (2002) (“presumption of regularity” applies), overruling *Commonwealth v. Cook*, 371 Mass. 832 (1977). Additionally, G.L.c. 233 §23 overrides §21 in that a party who calls a witness, including an opposing party, is prohibited from impeaching that witness’s character by evidence of prior criminal convictions. Walter at 122-23.

Pursuant to §21, it is “the fact of the conviction, and the nature of the crime committed, that can be considered on the issue of credibility.” *Commonwealth v. Eugene*, 483 Mass. 343, 352 (2003). The sentence imposed for the prior conviction is inadmissible because it “does not logically add anything to an assessment of the witness’s credibility.” *Id.* at 352-53. Furthermore, once the record of a witness’s prior conviction has been used to impeach him, “the conviction must be left unexplained and thus the proponent of the witness may not undertake in rehabilitation of the witness to show the circumstances of the conviction.” *Commonwealth v. Maguire*, 392 Mass. 466, 471 n. 10 (1984) (internal quotations omitted). But see *Commonwealth v. McGeoghean*, 412 Mass. 839, 843 (1992) (“When, however, . . . cross-examination goes beyond simply establishing that the witness is the person named in the record of conviction, the proponent of the witness may, in the judge’s discretion, properly inquire on redirect examination about those collateral matters raised during the cross-examination.”).

Although the use of prior convictions is generally limited to five years for misdemeanors and ten years for felonies, §21 also permits otherwise time-barred convictions to be revived for the purpose of impeachment if the witness was subsequently convicted of a crime during the five or ten years, respectively, prior to the witness’s testimony.

For example, if a witness in a civil matter has two felony convictions, the first occurring twenty years prior to his testimony and the second occurring only five years ago, §21 permits the latter conviction to revive the former conviction for the purpose of impeachment at trial. See e.g., *Saunders* at 693-94. Furthermore, in limited situations, prior convictions which are otherwise inadmissible under § 21 nonetheless may still be admissible if relevant to the witness’s credibility, *Commonwealth v. Jacobs*, 6 Mass. App. Ct. 867, 868 (1978) (evidence of a prior conviction was admissible where the defendant put the prior conviction in issue by

repeatedly denying having any prior criminal record), or probative of a fact at issue, *Care and Protection of Frank*, 409 Mass. 492, 494-95 (1991) (convictions of operating under the influence and possession of a controlled substance which were outside the scope of §21 were admissible and relevant on the issue of a mother’s parental fitness).

What constitutes unfair prejudice?

The SJC has noted that impeachment of a witness by a prior criminal conviction is permissible based on the theory that “[o]ne who has been convicted of a crime is presumed to be less worthy of belief than one who has not been so convicted.” *Harris* at 720, quoting *Brilliant* at 545. The admission of evidence of a prior con-

Although the SJC has, on rare occasions, placed its own “judicial gloss” on § 21, the court has generally shied away from adding to or detracting from the words of that statute.

viction, however, “particularly a conviction of a crime not involving the defendant’s truthfulness and one closely related to or identical to the crime with which the defendant is charged, may well divert the jury’s attention from the question of the defendant’s guilt to the question of the defendant’s bad character.” *Maguire* at 469.

As such, prior to admitting evidence of prior criminal convictions for the purpose of impeachment, a trial judge is required to carefully balance the probative value of the evidence against the unfair prejudice which the evidence may have on the jury. *Commonwealth v. Brown*, 451 Mass. 200, 202-03 (2008). Furthermore, in order to blunt the potential for unfair prejudice, appropriate limiting instructions are required if prior convictions are admitted for the purpose of impeachment. *Commonwealth v. Leno*, 374 Mass. 716, 718-19 (1978).

Although the SJC has, on rare occasions, placed its own “judicial gloss” on § 21, the court has generally shied away from adding to or detracting from the words of that statute. Thus, the court has determined that issues such as the quantity and nature of admissible prior convictions are generally a matter for the Legislature, not the courts. *Brown* at 204 (“As with the number of convictions, the Legislature has not included a limitation on the type of convictions that can be used for impeachment.”).

The court has, however, stated on numerous occasions that a paramount factor in determining whether to exclude evidence of prior convictions is whether the prior crimes and the present accusations, whether criminal or civil, have a “substantial similarity.” *Commonwealth v. Little*, 453 Mass. 766, 773-74 (2009); *Brown* at 203 (“[i]t is at least difficult, if not impossible, to show an abuse of discretion in the absence of a substantial similarity between the offenses

being tried and the prior convictions.”).

This reasoning, which is generally more appropriate in criminal trials, is based on the theory that “no defendant should be convicted of a crime by proof of his reputation or propensity to commit similar crimes.” *Commonwealth v. Fano*, 400 Mass. 296, 303 (1987). But see *Commonwealth v. Crouse*, 447 Mass. 558, 565 (2006) (even the use of prior convictions to impeach that are substantially similar to the crime charged may be justified in the absence of other prior convictions with which to impeach a defendant’s testimony.”)

Other factors which may be considered by a trial judge include whether the prior convictions involve crimes implicating truthfulness, *Maguire* at 469; whether the witness has other prior convictions which could be used to impeach him, *Commonwealth v. Whitman*, 416 Mass. 90, 95 (1993); whether the judge conducted the required balancing test, *Commonwealth v. Paulding*, 438 Mass. 1, 12 (2002); whether the judge provided the appropriate limiting instructions, *Commonwealth v. Walker*, 401 Mass. 338, 346 (1987); and the extent to which the impeaching party referred to the prior convictions in closing argument, *Id.*

Of particular importance among these lesser factors is whether the prior conviction involves a crime implicating truthfulness and, in turn, the nature of the crime itself. An issue which is often hotly contested during litigation is whether crimes which provoke significant animosity among society, such as driving under the influence or crimes involving sexual misconduct, should be admissible for the purpose of impeachment.

On one hand, the SJC has determined that crimes which do not involve truthfulness should receive more scrutiny so as to avoid diverting the jury’s attention from the questions of guilt or fault to the question of a witness’s bad character. *Maguire* at 469. On the other hand, the court has also held that “convictions relevant to credibility are not limited to crimes involving dishonesty or false statements.” *Commonwealth v. Smith*, 450 Mass. 395, 407 (2008). Furthermore, the court has held on separate occasions that crimes such as driving under the influence and those of a sexual nature may be admissible for the purpose of impeachment. *Commonwealth v. Stewart*, 422 Mass. 385, 387 (1996) (driving under the influence of alcohol); *Maguire* at 471-72 (open and gross lewdness and lascivious behavior).

Finally, should a trial judge exclude a prior criminal conviction on the grounds of unfair prejudice, counsel for the impeaching party should request that the judge redact the nature of the prior offense and permit impeachment with the mere fact of conviction of “a felony” or “a misdemeanor.” See *Commonwealth v. Kalhauser*, 52 Mass. App. Ct. 339, 342 (2001).

Obtaining prior criminal convictions of a witness

Inquiries about prior criminal convictions and pending charges are standard in most litigators’ interrogatories and at depositions. There are, however, procedures available to counsel to ob-

tain information about prior criminal convictions which go beyond merely requesting an admission directly from the witness. Most notable among these procedures is seeking a court order directed to the Criminal History Systems Board or the commissioner of probation. In practice, it is far easier and more efficient to seek a court order directed to the former. See *Strong v. American Drug Stores, Inc.*, 14 Mass. L. Rptr. 353 (Mass. Super. 2002) (Agnes, J.).

Pursuant to G.L.c. 6 §172, the CHSB has the authority to disseminate criminal offender record information (CORI) to “agencies and individuals where it has been determined that the public interest in disseminating such information to these parties clearly outweighs the interest in security and privacy.” See generally *Bellin v. Kelley*, 435 Mass. 261 (2001). In accordance with §172 and 803 C.M.R. §3.04, CHSB has established a General Grant of Access which provides that “[a]ttorneys of record may receive CORI in civil litigation, administrative hearings, and criminal cases for witness impeachment or trial strategy purposes. This general grant of access requires an approved motion from the court.” See www.state.ma.us/chsb (Criminal Offender Record Information – CORI > General Grants of Access to CORI > Justice and Court Activity). Upon receipt of the CORI, counsel will still be required to obtain a certified copy of the criminal convictions in order to use them for impeachment purposes at trial.

Of note, counsel should be aware that the Legislature recently overhauled the laws governing CORI. See St. 2010, c. 256 §§2-37. As of May 2012, when most substantive changes take effect, the agency overseeing CORI will be renamed the Department of Criminal Justice Information Services. The new law generally places greater restrictions on the access to CORI. Under the amended law, however, the commissioner of the DCJIS appears to have greater authority to provide access to CORI under the public interest exception of § 21 (under the new law, § 21 will no longer require a determination by the commissioner that the public interest clearly outweighs the interest in security and privacy).

Conclusion

Impeaching a witness in a civil matter with a prior criminal conviction is a powerful weapon for any civil litigator, not only at trial, but throughout settlement negotiations. As such, counsel should carefully follow the applicable statutory and evidentiary rules in order to guarantee admission of the prior conviction at trial. This is particularly true in a disputed liability case where the credibility of the parties is paramount. In such a case, impeachment with a prior criminal conviction could amount to the difference between winning and losing.

Jason R. Markle is a MATA member and an attorney at Keches Law Group in Taunton, where he concentrates his practice on personal injury litigation and appellate matters. For additional information, contact him at jmarkle@kecheslaw.com, or visit his firm’s website at www.kecheslaw.com.

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