WHAT IS EVIDENCE; STIPULATIONS; JUDICIAL NOTICE

You are to decide what the facts are solely from the evidence admitted in this case, and not from suspicion or conjecture. The evidence consists of the testimony of witnesses, as you recall it, any documents or other things that were received into evidence as exhibits, and any fact on which the lawyers have agreed or which I have told you that you may accept as proved.

Of course, the quality or strength of the proof is not determined by the sheer volume of evidence or the number of witnesses. It is the *weight* of the evidence, its strength in tending to prove the issue at stake, that is important. You might find that a smaller number of witnesses who testify to a particular fact are more believable than a larger number of witnesses who testify to the opposite.

Some things that occur during a trial are *not* evidence and you may *not* consider them as evidence in deciding the facts of this case. The complaint itself is not evidence. A question put to a witness is never evidence; only the answers are evidence. Also, you may not consider any answer that I struck from the record and told you to disregard. Do not

consider such answers. You may not consider any item that was marked for identification but was never received in evidence as an exhibit. Anything that you may have seen or heard when the court was not in session is not evidence.

The opening statements and the closing arguments of the lawyers are not a substitute for the evidence. They are only intended to assist you in understanding the evidence and the contentions of the parties. My instructions and anything that I have said in passing during the trial are not evidence. If your memory of the testimony differs from the attorneys' or mine, you are to follow your own recollection.

Consider the evidence as a whole. Do not make up your mind about what the verdict should be until after you have gone to the jury room to decide the case, and you and your fellow jurors have discussed the evidence. Keep an open mind until then.

The model and supplemental instructions are based in part on *Manual of Model Jury Instructions for the Ninth Circuit,* Instructions 1.04, 1.05, 2.03, 2.04 and 2.05 (1985 ed.)

It is the jury's responsibility to determine the weight to be given testimonial evidence (see Instruction 2.260) or physical evidence. *Commonwealth v. LaCorte,* 373 Mass. 700, 702, 369 N.E.2d 1006, 1008 (1977). In defining what the jury may consider as evidence, the judge should avoid suggesting that only *credible* testimony constitutes evidence. See *Commonwealth v. Gaeten,* 15 Mass. App. Ct. 524, 531, 446 N.E.2d 1102, 1107 (1983). The judge must not discuss the exclusion of inadmissible evidence in a way that improperly vouches for the reliability of the evidence that *is* admitted, particularly where the defense does not offer any evidence. *Commonwealth v. Richards*, 53 Mass. App. Ct. 333, 338-341, 758 N.E.2d 1095, 1098-1100 (2001) (error to charge that admitted evidence is "reliable" and "high quality information").

SUPPLEMENTAL INSTRUCTIONS

1. Stipulations of fact. **The Commonwealth and the defendant have agreed, or stipulated, that _____ . This means that they both agree that this is a fact. You are therefore to treat this fact as undisputed and proved.**

2. Stipulated testimony. **The Commonwealth and the defendant have agreed, or stipulated, that if *[witness]* were called as a witness, he (she) would testify that _____ . Both parties have agreed that *[witness]* would give that testimony if called as a witness. You should consider that testimony in the same way as if it had been given here in court. As with all witnesses, it is for you to determine how believable and how significant that testimony is.**

A stipulation of fact leaves that fact no longer at issue, and must be accepted by the jury. By contrast, a stipulation as to testimony does not compel the jury to accept as true all the facts within the stipulated testimony, but permits the jury to accept the stipulated evidence in whole, in part, or not at all. *Commonwealth v. Triplett,* 398 Mass. 561, 570, 500 N.E.2d 262, 267 (1986).

It is not necessary that a stipulation be formally entered as an exhibit. *Sierra Marketing, Inc. v. New England Wholesale Co.,* 14 Mass. App. Ct. 976, 978, 438 N.E.2d 1101, 1103 (1982). The defendant's willingness to stipulate to a fact does not preclude the Commonwealth from introducing evidence on that issue. *Commonwealth v. Andrews*, 403 Mass. 441, 451, 530 N.E.2d 1222, 1227-1228

(1988); *Commonwealth v. Rhoades,* 379 Mass. 810, 820, 401 N.E.2d 342, 349 (1980).

Where a defendant is tried upon a stipulation as to either facts or evidence that is conclusive of guilt, the defendant in effect is relinquishing the same rights as one who pleads guilty, and the judge must offer the defendant "the same safeguards that surround the acceptance of a guilty plea" including a colloquy. *Commonwealth v. Lewis,* 399 Mass. 761, 506 N.E.2d 891 (1987); *Commonwealth v. Garrett*, 26 Mass. App. Ct. 964, 527 N.E.2d 240 (1988); *Commonwealth v. Feaster,* 25 Mass. App. Ct. 909, 514 N.E.2d 1336 (1987); *Commonwealth v. Hill,* 20 Mass. App. Ct. 130, 131-133, 478 N.E.2d 169, 169-171 (1985). A stipulation to evidence only warranting a guilty finding does not require such safeguards. *Commonwealth v. Garcia,* 23 Mass. App. Ct. 259, 264-265, 501 N.E.2d 527, 530-531 (1986).

3. Judicial notice. **The law permits me to take notice of certain facts that are not subject to reasonable dispute. I have decided to accept as proved the fact that _____ . Therefore, you may accept this fact as true, even though no evidence has been introduced about it. You are not required to do so, but you may.**

All factual issues should be submitted to the jury, including matters of which the judge may take judicial notice. *Commonwealth v. Kingsbury,* 378 Mass. 751, 754-755, 393 N.E.2d 391, 393-394 (1979) (time of sunset). "It appears from our cases that the jury should be instructed that they *may* but *are not required to* accept any matter of which the judge has taken judicial notice." *Commonwealth v. Green,* 27 Mass. App. Ct. 762, 770, 543 N.E.2d 424, 428-429 (1990). See Mass. G. Evid. § 201(e) (2008-2009) ("In a criminal case, the court shall instruct the jury that they may, but are not required to, accept as conclusive any fact which the court has judicially noticed").

The general rule in Massachusetts is that courts do not take judicial notice of regulations; they must be put in evidence. *Shafnacker v. Raymond James & Assocs., Inc.*, 425 Mass. 724, 730, 683 N.E.2d 662, 667 (1997). This rule has been overridden in part by G.L. c. 30A, § 6, which requires judicial notice of regulations published in the Code of Massachusetts Regulations. *Shafnacker, supra,* 425 Mass. at 730 n.7, 683 N.E.2d at 667 n.7.

4. Depositions. **A deposition is a transcript of testimony that was given out of court by a witness under oath, in response to questions asked by either of the attorneys. You are to treat a deposition in the same way as if the testimony had been given here in court. As with all witnesses, it is for you to determine how believable and how significant that testimony is.**

Mass. R. Crim. P. 35(g).

NOTES:

1. **Limiting instruction on character evidence not required sua sponte.** Although prompt cautionary instructions to the jury are critical to protecting a defendant against prejudice where character evidence is admitted, there is no requirement that the judge give limiting instructions sua sponte. *Commonwealth v. Sullivan*, 436 Mass. 799, 809, 768 N.E.2d 529, 537 (2002). Nor does the lack of a limiting instruction necessarily create a substantial likelihood of a miscarriage of justice. *Id.*

2. **Negative answer to leading question.** When a witness on cross-examination answers a leading question in the negative, the facts suggested by the question do not constitute evidence for the jury's consideration. *Commonwealth v. Judge*, 420 Mass. 433, 452 n.12, 650 N.E.2d 1242, 1254 n.12 (1995). See also *Commonwealth v. Bailey*, 12 Mass. App. Ct. 104, 106 n.2, 421 N.E.2d 791, 793 n.2 (1981).