EXCLUDED QUESTION; STRICKEN EVIDENCE

I. EXCLUDED QUESTION

During this trial, it is the duty of the attorneys to object to evidence that may not be admissible under our rules of evidence.

If I "sustain" an objection — that is, if I do not allow the witness to answer — you are to disregard that question and you must not wonder or guess about what the answer might have been. An unanswered question is not evidence.

Please note also that a lawyer's question itself, no matter how artfully phrased, is not any evidence. A question can only be used to give meaning to a witness's answer. If a question includes any suggestions or insinuations, you are to ignore them unless I permit the witness to answer and the witness confirms those suggestions.

All of this comes down to a simple rule: testimony comes from the witnesses, not from the lawyers.

Commonwealth v. Repoza, 382 Mass. 119, 131, 414 N.E.2d 591, 598 (1980); *Commonwealth v. Paradiso*, 368 Mass. 205, 208 n.2, 330 N.E.2d 825, 827 n.2 (1975); *Commonwealth v. Bailey,* 12 Mass. App. Ct. 104, 106 n.2, 421 N.E.2d 791, 793 n.2 (1981).

II. STRICKEN EVIDENCE

(I have just ordered) (Sometime during this trial I may order) some (testimony) (piece of evidence) to be stricken from the record. Since it is no longer evidence, you must disregard it.

I recognize that it is a difficult thing for you to ignore something that you have (heard) (seen). But please keep in mind why we have rules of evidence. They are not there to keep evidence from you, but to make sure that all the evidence before you is presented in a reliable form so that you are in a fair position to be able to assess its truth. If I strike something from the record, it is because it would be unreliable or misleading for you to rely on it in that form.

Now it may seem hard to put something out of your mind once you have heard it. But it is really no different than adding up a column of numbers and then going back and subtracting one number in the column from the total. The (testimony) (piece of evidence) that I (have stricken) (may strike) is no longer evidence. You are therefore to subtract it from your consideration when you decide what all the evidence adds up to.

It is your sworn duty not to consider information that has been stricken from the record in deciding this case.

Some phrasing in the model instruction was adapted from Charrow & Charrow, “Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions,” 79 Colum. L. Rev. 1306, 1344-1345 (1979). The "column of numbers" analogy was suggested by Hon. Abraham D. Sofaer, formerly of the United States District Court for the Southern District of New York.

The judge must be careful not to present his or her function in excluding 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”).