

OTHER BAD ACTS BY DEFENDANT

I. WHEN INADMISSIBLE FOR ANY PURPOSE

The defendant is not charged with committing any crime other than the charge(s) contained in the complaint. You have heard mention of other acts allegedly done by the defendant. I have struck that reference from the record, and you are to disregard it entirely.

I want to emphasize to you that you are not to consider that reference to other alleged acts at all. Your verdict is to relate only to the charge(s) contained in the complaint.

II. WHEN ADMISSIBLE ONLY FOR LIMITED PURPOSE

The defendant is not charged with committing any crime other than the charge(s) contained in the complaint. You have heard mention of other acts allegedly done by the defendant. You may not take that as a substitute for proof that the defendant committed the crime(s) charged. Nor may you consider it as proof that the defendant has a criminal personality or bad character.

But you may consider it solely on the limited issue of _____

[e.g. whether the defendant acted intentionally and not out of accident or other innocent reason] .

You may not consider this evidence for any other purpose.

Specifically, you may not use it to conclude that if the defendant committed the other act(s), he (she) must also have committed (this charge) (these charges).

This limiting instruction should be given at the time the evidence is admitted. *Commonwealth v. Linton*, 456 Mass. 534, 924 N.E.2d 722 (2010).

Evidence of prior bad acts is not admissible to demonstrate the defendant's bad character or propensity to commit the crime charged but, if not too remote in time, may be admissible to show motive, opportunity, state of mind, intent, preparation, plan, pattern of operation, common scheme, relationship between a defendant and a victim, knowledge, identity, or absence of mistake or accident. *Commonwealth v. Brusgulis*, 406 Mass. 501, 505, 548 N.E.2d 1234, 1237 (1990) (admissible on modus operandi only if prior and current crime share "a special mark or distinctiveness"); *Commonwealth v. Helfant*, 398 Mass. 214, 228 n.13, 496 N.E.2d 433, 443 n.13 (1986); *Commonwealth v. Harvey*, 397 Mass. 803, 809, 494 N.E.2d 382, 386 (1986); *Commonwealth v. Hanlon*, 44 Mass. App. Ct. 810, 817-818, 694 N.E.2d 358, 365 (1998); *Commonwealth v. Calcagno*, 31 Mass. App. Ct. 25, 26-27, 574 N.E.2d 420, 422 (1991); *Commonwealth v. Clemente*, 25 Mass. App. Ct. 229, 239, 517 N.E.2d 479, 485 (1988).

"It has long been recognized that bad acts, even when nominally offered to show common plan or some other legitimate object, become dangerously confusing to the triers when piled on and unduly exaggerated." *Commonwealth v. Mills*, 47 Mass. App. Ct. 500, 505, 713 N.E.2d 1028, 1032 (1999). When evidence of prior bad acts is admitted, the jury must be instructed with particular care on how to use it, in order to avoid diversionary misuse of such information. *Id.*, 47 Mass. App. Ct. 505-506, 713 N.E.2d at 1032.

Instruction 9.160 (Identification) is required on request if the defendant denies being the perpetrator of the asserted prior bad act, even if there is no identity issue about the charge being tried. *Commonwealth v. Delrio*, 22 Mass. App. Ct. 712, 721, 497 N.E.2d 1097, 1102 (1986).

An attorney attempting to impeach a witness with other bad acts should be required to represent that he or she has a reasonable basis for the suggestion and is prepared to prove the act if the witness does not acquiesce. *Id.*, 22 Mass. App. Ct. at 719-712, 497 N.E.2d at 1101-1102.

The model instruction is adapted from L.B. Sand, J.S. Siffert, W.P. Loughlin & S.A. Reiss, *Modern Federal Jury Instructions* §§ 3-3, 5-25 (1985).