DRAFTING A PLAIN LANGUAGE JURY INSTRUCTION

1. **In general.** It is the judge's duty to instruct the jury clearly and correctly as to the law applicable to the issues in the case. *Commonwealth v. Corcione*, 364 Mass. 611, 618, 307 N.E.2d 321, 326 (1974); *Commonwealth v. Kenneally*, 10 Mass. App. Ct. 162, 177, 406 N.E.2d 714, 725, aff'd, 383 Mass. 269, 418 N.E.2d 1224, cert. denied, 454 U.S. 849 (1981).

> "[W]e adhere to the practice . . . consistently followed in this commonwealth, of preserving to the trial court the power and imposing upon it the duty of so enlightening the intelligence and directing the attention of the jury that notwithstanding disparity in skill, ingenuity, and efficiency with which the various issues are presented, justice may be even and incline one way or the other only according to the weight of credible evidence."

Plummer v. Boston Elevated Ry. Co., 198 Mass. 499, 515, 84 N.E. 849, 853 (1908). The charge must set out the elements of the crime, *Commonwealth v. Reilly*, 5 Mass. App. Ct. 435, 438, 363 N.E.2d 1126, 1128 (1977), and must reflect current controlling precedent, *United States v. DeWolf*, 696 F.2d 1, 4 (1st Cir. 1982). It is appropriate that the charge be "comprehensively strong, rather than hesitatingly barren, or ineffective." *Commonwealth v. McColl*, 375 Mass. 316, 321, 376 N.E.2d 562, 565 (1978), quoting from *Whitney v. Wellesley & Boston St. Ry. Co.*, 197 Mass. 495, 502, 84 N.E. 95, 95 (1908).

"It is the duty of the trial judges to inform themselves of recent decisions of this court and to incorporate them into their charges, as it is the duty of both the prosecution and the defense to inform the judge of these decisions." *Commonwealth v. Diaz*, 426 Mass. 548, 553 n.3, 689 N.E.2d 804, 807 n.3 (1998).

As long as the judge gives adequate and clear instructions on the applicable law, the judge has discretion as to the phraseology, method and extent of the charge, including whether to instruct the jury generally or specifically, and whether to utilize his or her own words or the words of the party making the request. *Commonwealth v. Williams*, 388 Mass. 846, 857, 448 N.E.2d 1114, 1121-1122 (1983); *Commonwealth v. Silva*, 388 Mass. 495, 506-507, 447 N.E.2d 646, 654 (1983); *Commonwealth v. Roberts*, 378 Mass. 116, 130, 389 N.E.2d 989, 998 (1979); *Commonwealth v. DeChristoforo*, 360 Mass. 531, 539-540, 277 N.E.2d 100, 106 (1971); *Commonwealth v. Martorano*, 355 Mass. 790, 244 N.E.2d 725 (1969); *Commonwealth v. MacDougal*, 2 Mass. App. Ct. 896, 319 N.E.2d 739 (1974).

The judge must cover in substance a request for instruction that is both supported by evidence and legally correct. *Varelakis v. Etterman*, 4 Mass. App. Ct. 841, 842, 354 N.E.2d 886, 887 (1976). See *United States v. Leach*, 427 F.2d 1107, 1112 (1st Cir.), cert. denied sub nom. *Tremont v. United States*, 400 U.S. 829 (1970). The judge may be required to charge on a matter of law appropriately raised, even if the requested instructions are incorrect in particulars. *Commonwealth v. Martin*, 369 Mass. 640, 646 n.6, 341 N.E.2d 885, 890 n.6 (1976). But the judge is not required to charge on an issue not relevant to the evidence, and generally should not, even if it is correct as an abstract principle of law. *Commonwealth v. Noxon*, 319 Mass. 495, 548, 66 N.E.2d 814, 846 (1946); *Commonwealth v. Clark*, 292 Mass. 409, 415, 198 N.E. 641, 645 (1935). If the judge charges adequately and accurately, "the law does not require repetition of the same thought at every turn." *Commonwealth v. Fitzgerald*, 380 Mass. 840, 846, 406 N.E.2d 389, 395 (1980), quoting from *Commonwealth v. Peters*, 372 Mass. 319, 324, 361 N.E.2d 1277, 1280 (1977); *Gibson v. Commonwealth*, 377 Mass. 539, 540, 387 N.E.2d 123, 125 (1979).

A general verdict must be set aside if the jury was instructed that it could rely on alternate grounds to convict and one of the grounds was erroneous, since the verdict may rest solely on the insufficient ground. *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 2745 (1983); *Stromberg v. California*, 283 U.S. 359, 367-368, 51 S.Ct. 532, 535 (1931); *Commonwealth v. Richards*, 384 Mass. 396, 403-404, 425 N.E.2d 305, 310 (1981). See also *Williams v. North Carolina*, 317 U.S. 287, 292, 63 S.Ct. 207, 210 (1942).

Mistakes in a jury charge can usually be corrected by explaining the mistake and correctly re-instructing the

jury. See *Commonwealth v. Lammi*, 310 Mass. 159, 165, 37 N.E.2d 250, 254 (1941); *Commonwealth v. Glowski*, 15 Mass. App. Ct. 912, 443 N.E.2d 900 (1982); *Commonwealth v. LaVoie*, 9 Mass. App. Ct. 918, 919, 404 N.E.2d 114, 115 (1980).

2. **Use of model instructions.** Learned Hand once commented on jury instructions that:

> "Whatever enlightenment a jury gets, ordinarily it gets from the colloquial charge, and from any later colloquial additions to it. It is exceedingly doubtful whether a succession of abstract propositions of law, pronounced staccato, has any effect but to give them a dazed sense of being called upon to apply some esoteric mental processes, beyond the scope of their daily experience which should be their reliance."

United States v. Cohen, 145 F.2d 82, 93 (2d Cir. 1942). The American Bar Association similarly recommends that:

> "Instructions to the jury should be not only technically correct but also expressed as simply as possible and delivered in such a way that they can be clearly understood by the jury."

3 ABA Standards for Criminal Justice, *Trial by Jury* § 15-3.6(a) (2d ed. 1980). See also *Donohue v. Holyoke Transcript-Telegram Pub. Co.*, 9 Mass. App. Ct. 899, 900, 402 N.E.2d 1114, 1115 (1980) (judge is encouraged to restate requested instructions in language easily understood by the jury); ABA Standards of Judicial Administration, *Trial Courts* § 2.13 (1976).

Some judges fear that the omission of traditional language "is an elevator giving ready access to the justices upstairs." *Godwin v. LaTurco*, 272 Cal. App.2d 475, 479, 77 Cal. Rptr. 305, 307 (1st Dist. 1969). But "a jury instruction is not abracadabra. It is not a magical incantation, the slightest deviation from which will break the spell. Only its poorer examples are formalistic codes recited by a trial judge to please appellate masters . . . . Instructions are to be viewed in this commonsense perspective, and not through the remote and distorting knothole of a distant appellate fence." *Time, Inc. v. Hill*, 385 U.S. 374, 418, 87 S.Ct. 534, 558 (1967) (Fortas, J., dissenting).

Model jury instructions have been recommended to trial judges as providing a useful checklist of what must be covered in a jury instruction. See *Commonwealth v. Starling*, 382 Mass. 423, 431, 416 N.E.2d 929, 934 (1981) (Kaplan, J., joined by Wilkins, J., concurring). But it is important that such model instructions be a supplement to, and not a replacement for, the judge's own research, creativity and style:

> "A collection of accurate, impartial and understandable pattern jury instructions should be available for use in criminal cases in each jurisdiction. Counsel and the court should nonetheless remain responsible for ensuring that the jury is adequately instructed as dictated by the needs of the individual case, and to that end should modify and supplement the pattern instructions whenever necessary."

3 ABA Standards for Criminal Justice, *Trial by Jury* § 15-3.6(b) (2d ed. 1980). Since any model instruction is designed to apply to a range of factually-distinct cases, at minimum a model instruction should *always* be pruned of any language that is irrelevant to the fact pattern of the case being tried. In 1988 the District Court's Committee on Juries of Six introduced a new edition of these model instructions to their colleagues with these words:

> "One of the prime duties of a judge presiding over a jury trial is to be a communicator. This is essential to his or her being 'the directing and controlling mind at the trial, and not a mere functionary to preserve order and lend ceremonial dignity to the proceedings.'[1] The judge's charge to the jury is the centerpiece of that function, since it must be framed not only to correctly inform the jury of the law, but also to prevent the jury from misunderstanding the law.[2] Failure to communicate in even small and simple matters may lead to an unjust verdict.
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> "In each of these model instructions we have attempted to set forth a correct statement of law which a judge may use as a starting point for crafting an understandable and legally-satisfactory charge.

> Every effort has been made to make the instructions comprehensible, although legal constraints (and occasional uncertainties in present law) preclude oversimplification. Some terms which necessarily retain an element of ambiguity may best be explained with an example cautiously and correctly phrased.
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> "Model jury instructions have often been recommended to judges for use as a checklist to avoid basic errors and as a source of suggested plain-English phrasing.[3] However, these model instructions were not designed, nor should they be used, for verbatim recitation. They should always be adapted to each judge's speaking style and tailored to the facts of the case. The First Circuit has cautioned that over reliance on 'boiler plate' charges may result in instructions that are inadequate to a particular case, and that a '"one size fits all" charge burdens the jury with legal irrelevancies, lowers its attention span, and can only distract it from the true issues.'[4] We hope that the expanded notes and supplemental charges in this edition will assist judges in devising their own accurate and creative explanations of the law."

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[1] *Commonwealth v. Wilson,* 381 Mass. 90, 118-119, 407 N.E.2d 1229, 1247 (1980) (internal quotes omitted).

[2] *Commonwealth v. Carson,* 349 Mass. 430, 435, 208 N.E.2d 792, 795 (1965).

[3] See, e.g. *Commonwealth v. Starling,* 382 Mass. 423, 431, 416 N.E.2d 929, 934 (1981) (Kaplan, J., joined by Wilkins, J., concurring); *Morgan v. Lalumiere,* 22 Mass. App. Ct. 262, 267 n.5, 493 N.E.2d 206, 210 n.5 (1986). For a list of all the model jury instructions now published, see Nyberg & Boast, "Jury Instructions: A Bibliography," 6 Legal Reference Servs. Q. at 5 (Spring/Summer 1986) and 3 (Fall/Winter 1986).

[4] *United States v. DeWolf,* 696 F.2d 1, 4 (1st Cir. 1984).

3. **Formulating a jury instruction.** One federally-sponsored study indicates that the average juror may understand only about fifty percent of the judge's instructions. A. Elwork, B.D. Sales and J.J. Alfini, *Making Jury Instructions Understandable* (1982). The authors indicate that the judge may lessen the difficulties of comprehension by following these suggestions:

- Utilize a perceptibly logical organization in presentation.
- Use short, simple sentences and avoid grammatically complex sentences.
- Utilize positive rather than negative formulations, the active rather than the passive voice, and transitive rather than intransitive verbs whenever possible.
- Use concrete rather than abstract words.
- Employ parallel construction of clauses and phrases, as an aid to aural comprehension and memory.
- Avoid legal jargon and uncommon words.
- Avoid homonyms (words that sound alike) and words with more than one meaning (such as "court" to refer to "judge"); if used, they should be clarified through the use of synonyms, examples, and contrast with their opposites.
- Avoid the use of negatively-modified words that may be misheard (e.g. use "rude" rather than "impolite").

Id. See also E.J. Devitt and C.B. Blackmar, *Federal Jury Practice and Instructions* § 10.01 (1977); R.C. Nieland, *Pattern Jury Instructions* (1979); Severance and Lofts, "Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions," 17 Law & Soc'y Rev. 153 (1982); and the classic article by Wydick, "Plain English for Lawyers," 66 Calif. L. Rev. 727 (1978).

The Federal Judicial Center also offers several suggestions for drafting comprehensible instructions:

- Avoid using words that are uncommon in everyday speech and writing ("accomplice, admonish, applicable, corroborate, credence, deliberation, demeanor, discredit, impeach, improbability, insofar, misrecollection, pertain, scrutinize, trait, transaction, unsupported, veracity").

- Avoid using words to convey their less common meanings ("burden of proof, incompetent, court [to refer to the judge rather than the building or institution], disregard evidence, find a fact, material matter, sustain objections").

- Avoid using legal terms not in common use unless it is really necessary to do so.

- Avoid sentences with multiple subordinate clauses. Particularly avoid placing multiple subordinate clauses before or within the main clause, so that the listener must wait for the end of the sentence to learn what it is all about. Complex grammatical structures, rather than sentence length per se, is the problem to be avoided.

- Do not omit relative pronouns ("consider only the evidence *that* I have admitted") or auxiliary verbs ("any act *that was* not alleged in the complaint"). They signal the grammatical structure of what is coming.

- Avoid double negations ("the defendant is charged only with . . . and not with . . .").

- Use a concrete style rather than an abstract one. Speak to the jury in the second person rather than in abstract generalizations.

- Do not instruct the jury about things that they don't need to know (e.g. do not distinguish direct and circumstantial evidence at length before telling the jury that the distinction is irrelevant to their consideration of the evidence).

Appendix A, "Suggestions for Improving Juror Understanding of Instructions" in Federal Judicial Center, *Pattern Criminal Jury Instructions* (1988). One staffer from the Federal Judicial Center offers even blunter advice:

- Don't deliver a jury instruction that you don't understand yourself.

- Don't deliver an instruction that you wouldn't have understood before you went to law school.

- Don't use vocabulary that your teenage children wouldn't understand—or better yet, the teenage children of friends who aren't lawyers.

- Don't use sentence structures that you wouldn't use in talking about day-to-day affairs with your family and friends.

- Find a way to return to the language you spoke before you began the study of law.

A. Partridge, "When Judges Throw Gibberish at Jurors," 8 Update on Law-Related Education 6, 46 (Spring 1984).

4. **Repeating original instructions in response to jury question.** "Responding to a jury inquiry by repeating the instruction that relates to the question is a tempting practice. But the jury submits the question with knowledge of the original instruction. Submission of the question indicates that after considering the evidence in light of the instruction, the jury needs more assistance. Additional guidance is provided by a direct answer to the question presented." For example, where the jury sent a note asking, "As we understood the instruction on the confession, if the confession was coerced it must be disregarded. Is this correct? What is coercion? Can something be coerced and true?", instead of merely repeating the humane practice instruction and adding a dictionary definition of coercion, "an answer might be in the following terms: 'Yes, a coerced confession must be disregarded whether true or not.

Coercion is the use of force or intimidation to obtain compliance. Yes, a statement may be both coerced and true.'" *Commonwealth v. Robinson,* 449 Mass. 1, 8 n.11, 864 N.E.2d 1186, 1191 n.11 (2007).

5. **Specific issues in jury instructions**.

- ***Absence of investigation or testing***. Defense counsel may argue to the jury that they should draw an adverse inference against the Commonwealth from the failure of the police to preserve and introduce material evidence or to perform probative tests. See *Arizona v. Youngblood,* 488 U.S. 51, 109 S.Ct. 333 (1988) (while police have no constitutional duty to perform any particular test, the defense may argue to the jury that a particular test may have been exculpatory). In such a case, it is error to caution the jury against drawing any inferences from the absence of evidence. *Commonwealth v. Person*, 400 Mass. 136, 140, 508 N.E.2d 88, 91 (1987); *Commonwealth v. Gilmore*, 399 Mass. 741, 745, 506 N.E.2d 883, 886 (1987); *Commonwealth v. Bowden*, 379 Mass. 472, 485-486, 399 N.E.2d 482, 491 (1980); *Commonwealth v. Rodriguez*, 378 Mass. 296, 308, 391 N.E.2d 889, 896 (1979); *Commonwealth v. Jackson*, 23 Mass. App. Ct. 975, 975-976, 503 N.E.2d 980, 981-982 (1987); *Commonwealth v. Flanagan*, 20 Mass. App. Ct. 472, 475-477 & n.2, 481 N.E.2d 205, 207-209 & n.2 (1985).

  While the defendant is entitled to make such an argument, a judge is not required to instruct the jury that they may draw such an inference. *Commonwealth v. Smith,* 412 Mass. 823, 838, 593 N.E.2d 1288, 1296 (1992); *Commonwealth v. Fitzgerald,* 412 Mass. 516, 525, 590 N.E.2d 1151, 1156 (1992); *Commonwealth v. Daye,* 411 Mass. 719, 740-741, 587 N.E.2d 194, 206-207 (1992); *Commonwealth v. Andrews,* 403 Mass. 441, 463, 530 N.E.2d 1222, 1234-1235 (1988); *Commonwealth v. Porcher*, 26 Mass. App. Ct. 517, 520-521, 529 N.E.2d 1348, 1350-1351 (1988); *Commonwealth v. Ly,* 19 Mass. App. Ct. 901, 901-902, 471 N.E.2d 383, 384-385 (1984). The Appeals Court, while recognizing such discretion, has suggested that "it might be[ ] preferable for the judge to inform the jurors that the evidence of police omissions could create a reasonable doubt." *Commonwealth v. Reid,* 29 Mass. App. Ct. 537, 540-541, 562 N.E.2d 1362, 1365 (1990).

- ***Acquittal as a possible verdict.*** A charge is adequate if it tells the jury that they may return a guilty verdict only if they are convinced of the defendant's guilt beyond a reasonable doubt, but it is better for the judge to mention specifically the option of acquittal. *Commonwealth v. Sheline*, 391 Mass. 279, 297, 461 N.E.2d 1197, 1209 (1984).

- ***"All or nothing" charge.*** A charge that multiple complaints rise or fall together, because the judge so views the weight of the evidence, is reversible error unless the situation "is so clearly monolithic in nature as to require identity of verdicts," because of the jury's freedom to accept or reject evidence selectively. *Commonwealth v. Corcione*, 364 Mass. 611, 617-619, 307 N.E.2d 321, 325-326 (1974). The defendant has no right to an "all or nothing" charge that forecloses the jury from acquitting on the primary charge and convicting on a lesser included offense supported by the evidence. *Commonwealth v. Barry*, 397 Mass. 718, 726-727, 493 N.E.2d 853, 858-859 (1986). It is improper to instruct the jury that it is "inconceivable" that they could find one codefendant guilty and the other not, where the evidence is not the same against both. *Commonwealth v. Cote*, 5 Mass. App. Ct. 365, 369-370, 363 N.E.2d 276, 278-279 (1977).

- ***"Alleged victim."*** The better practice is always to refer to "the alleged victim" rather than "the victim" in instructing the jury. *Commonwealth v. Krepon,* 32 Mass. App. Ct. 945, 947, 590 N.E.2d 1165, 1167 (1992).

- ***Appeal.*** It is improper to refer in jury instructions to the availability of appeal. *Commonwealth v. Allen*, 377 Mass. 674, 680, 387 N.E.2d 553, 557 (1979); *Commonwealth v. Walker*, 370 Mass. 548, 574, 350 N.E.2d 678, 696, cert. denied, 429 U.S. 943 (1976).

- ***Commonwealth's theory of the case.*** The judge is not restricted by the Commonwealth's theory of the case, and may instruct the jury as to any legal basis for conviction with support in the evidence. *Commonwealth v. Jones*, 16 Mass. App. Ct. 931, 450 N.E.2d 635 (1983).

- ***"Defendant."*** The defendant has no right to be referred to in the judge's instructions as "the accused," since "[t]he word 'defendant' is the customary and appropriate term for a person charged with a crime, and does not convey any belief that the person is guilty." *Commonwealth v. Levy,* 29 Mass. App. Ct. 279, 284-285, 559 N.E.2d 1255, 1258 (1990). Accord, *Commonwealth v. Brown,* 414 Mass. 123, 124-125, 605 N.E.2d 837, 838-839 (1993); *Commonwealth v. Matos,* 36 Mass. App. Ct. 958, 962, 634 N.E.2d 138, 142-143 (1994).

- ***Defense theory of the case.*** Any reference by the judge to the defense theory of the case must avoid any suggestion that the jury must accept that theory in order to acquit the defendant. *Commonwealth v. Therrien*, 371 Mass. 203, 206, 355 N.E.2d 913, 915 (1976).

- ***Directing a verdict for the defendant.*** The defendant is not entitled to an instruction that would, in effect, direct a verdict, since this must be done by motion. Superior Court Rule 70 (1974) (apparently made applicable to District Court jury sessions by G.L. c. 218, § 27A[e]); *White v. Lofts*, 275 Mass. 559, 562-564, 176 N.E. 646, 648 (1931).

- ***Equality of jurors.*** Upon motion of a party or whenever the judge deems it appropriate, the jury shall in substance be charged that no juror is better qualified to determine the truth of the facts in controversy or to deliberate upon a verdict solely because of that juror's occupation or reputation. G.L. c. 234A, § 70. The judge is not required to give such an instruction sua sponte. *Commonwealth v. Oram*, 17 Mass. App. Ct. 941, 942-943, 457 N.E.2d 284, 285-286 (1983).

- ***"Finding" or "satisfied" language.*** The judge should avoid "if you find" or "if you are satisfied" or "if you accept the defendant's version" language that may impliedly shift or obfuscate the degree and bearer of the burden of proof. *Commonwealth v. Richards*, 384 Mass. 396, 405, 425 N.E.2d 305, 310-311 (1981); *Gibson v. Commonwealth*, 377 Mass. 539, 542-543, 387 N.E.2d 123, 126 (1979); *Connolly v. Commonwealth*, 377 Mass. 527, 533-534, 387 N.E.2d 519, 523-524 (1979); *Commonwealth v. Rodriguez*, 370 Mass. 684, 690-692, 352 N.E.2d 203, 207-208 (1976); *Commonwealth v. Vidito*, 21 Mass. App. Ct. 332, 336-338, 487 N.E.2d 206, 209 (1985); *Commonwealth v. Deeran*, 10 Mass. App. Ct. 646, 650, 411 N.E.2d 488, 491 (1980).

- ***Interests of jurors and Commonwealth.*** The judge should not appear to equate the interests of the jurors and the interests of the Commonwealth, since the two are not synonymous. *Commonwealth v. Cundriff*, 382 Mass. 137, 152, 415 N.E.2d 172, 181 (1980), cert. denied, 451 U.S. 973 (1981).

- ***Jury nullification.*** Though "the jury has the power to bring in a verdict in the teeth of both law and facts," the defendant has no right to an instruction informing the jury that they have the de facto power of "jury nullification." *Horning v. District of Columbia*, 254 U.S. 135, 138, 41 S.Ct. 53, 54 (1920); *Sparf v. United States*, 156 U.S. 51, 102, 15 S.Ct. 273, 295 (1895); *Commonwealth v. Fernette*, 398 Mass. 658, 670-671, 500 N.E.2d 1290, 1297-1298 (1986); *Commonwealth v. Diaz*, 19 Mass. App. Ct. 29, 33 n.4, 471 N.E.2d 741, 744 n.4 (1984). When the judge charges as to lesser included offenses, and in other appropriate circumstances, the judge should charge that the jurors have a duty, if they conclude that the defendant is guilty, to return a verdict of guilty of the highest crime which has been proved beyond a reasonable doubt. *Commonwealth v. Johnson*, 399 Mass. 14, 17, 502 N.E.2d 506, 507 (1987); *Commonwealth v. Dickerson*, 372 Mass. 783, 797, 364 N.E.2d 1052, 1061 (1977).

- ***Law of the case.*** A jury charge too favorable to the defendant does not become the "law of the case" to which the evidence must conform. *Commonwealth v. David,* 365 Mass. 47, 55-56, 309 N.E.2d 484, 489-490 (1974); *Commonwealth v. Bruneau*, 7 Mass. App. Ct. 858, 386 N.E.2d 29 (1979).

- ***Legislative purpose.*** The judge may inform the jury about the legislative purpose of a statute if this is done accurately. *Commonwealth v. Brunelle*, 361 Mass. 6, 12, 277 N.E.2d 826, 831 (1972).

- ***Sentence.*** It is improper in a jury charge to refer to the possible sentence, *Commonwealth v. A Juvenile*,

396 Mass. 108, 112, 438 N.E.2d 822, 825-826 (1985); *Commonwealth v. Smallwood*, 379 Mass. 878, 882-883, 401 N.E.2d 802, 805 (1980); *Commonwealth v. Buckley*, 17 Mass. App. Ct. 373, 375-377, 458 N.E.2d 781, 783-784 (1984), or to discuss the parole consequences of the possible sentence, *Id*.

- ***Statutory exceptions.*** The prosecution need not prove that the defendant is not within an exception to an offense defined by statute if the exception does not constitute part of the definition of the offense. *Commonwealth v. Freeman,* 354 Mass. 685, 687, 241 N.E.2d 815, 816 (1968). Cf. G.L. c. 277, § 37 (statutory exception not appearing in enacting clause need not be charged in complaint "unless necessary for a complete definition of the crime"); *Commonwealth v. David,* 365 Mass. 47, 53-55, 309 N.E.2d 484, 488-489 (1974) (same rule applies to proof of statutory crime). See also G.L. c. 278, § 7 ("license, appointment . . . or authority" is affirmative defense) (see Instruction 3.10).

- ***Statutory language.*** It is in the judge's discretion whether to read to the jury the statute defining the offense being tried. The judge is not required to do so if the nature and elements of the offense are otherwise sufficiently stated in the jury charge. *Commonwealth v. Burns*, 167 Mass. 374, 379, 45 N.E. 755, 756 (1897); *Commonwealth v. Mascolo*, 6 Mass. App. Ct. 266, 277, 375 N.E.2d 17, 26, cert. denied, 439 U.S. 899 (1978).

- ***Recording of jury charge.*** A judge may provide the jury with an audiotape or videotape recording of the jury charge, provided: (a) the judge advises both counsel in advance, although counsel's consent is not required; (b) the tape recording is audible in its entirety and contains the whole instruction; (c) the judge instructs the jury to consider the tape recorded instructions in their entirety and to avoid selective overemphasis on any one area of the charge; and (d) the judge has the tape recording marked for identification. *Commonwealth v. Baseler,* 419 Mass. 500, 504-506, 645 N.E.2d 1179, 1181-1183 (1995).

- ***"Undisputed" evidence.*** It is the jury's function as fact finder to resolve all issues of fact. *Commonwealth v. Ford*, 18 Mass. App. Ct. 556, 559 n.2, 468 N.E.2d 663, 665 n.2 (1984). The judge may not direct a verdict against the defendant, absent a stipulated agreement to all facts material to the offense, even if the defendant admits guilt on the witness stand and defense counsel concedes in closing argument that the defendant is not contesting the charge. *Commonwealth v. Stracuzzi,* 30 Mass. App. Ct. 161, 162-163, 566 N.E.2d 1151, 1152 (1991).

  Similarly, the defendant's failure to contest an essential element of the crime does not relieve the Commonwealth of its burden of proving every element of the crime beyond a reasonable doubt. *Commonwealth v. Gabbidon*, 398 Mass. 1, 5, 494 N.E.2d 1317, 1320 (1986). The judge therefore should not refer to any portion of the government's evidence as undisputed, proved or conceded. See *Commonwealth v. McDuffee*, 379 Mass. 353, 363-364, 398 N.E.2d 463, 469 (1979); *Commonwealth v. Meyers*, 356 Mass. 343, 348-349, 252 N.E.2d 350, 352-353 (1969); *Commonwealth v. Caramanica,* 49 Mass. App. Ct. 376, 379, 729 N.E.2d 656, 660 (2000). See *DeCeco v. United States*, 338 F.2d 797 (1st Cir. 1964). The judge should also use care in referring to an issue as the "central," "sole," "main," "most important," "whole," or "real" issue, since this may imply that other matters are uncontroverted. *Commonwealth v. Drumgold,* 423 Mass. 230, 257-258, 668 N.E.2d 300, 318-319 (1996); *Commonwealth v. Murray*, 396 Mass. 702, 705-709 & n.15, 488 N.E.2d 415, 418-419 & n.15 (1986); *Commonwealth v. Chotain,* 31 Mass. App. Ct. 336, 338-340, 577 N.E.2d 629, 630-631 (1991); *Commonwealth v. Connors*, 18 Mass. App. Ct. 285, 287-290, 464 N.E.2d 1375, 1378-1379 (1984).

- ***Written copy of jury charge.*** The Supreme Judicial Court has indicated that it "would endorse any reasonable procedure by which all or portions of a judge's charge agreed to by the parties are made available in writing to a jury." *Commonwealth v. Dilone*, 385 Mass. 281, 287 n.2, 431 N.E.2d 576, 580 n.2 (1982). See *Commonwealth v. O'Dell*, 15 Mass. App. Ct. 257, 259-260, 444 N.E.2d 1303, 1305 (1983); *United States v. Previte*, 648 F.2d 73, 84 (1st Cir. 1981) (dicta). But any such written instructions "should be an exact reproduction of the judge's oral charge" and not an *additional* set of instructions proposed by the parties. *Commonwealth v. Lavelley,* 410 Mass. 641, 652 n.15, 574 N.E.2d 1000, 1007 n.15 (1991). The First Circuit has approved a judge's cautious use of a visual outline of the charge. *Id.*;

United States v. Flaherty, 668 F.2d 566, 599-600 (1st Cir. 1981).

6. **Closing the courtroom during jury instructions.** Barring spectators from entering or leaving the courtroom during jury instructions in order to avoid distracting the jurors "is a practice suitable to the solemnity and importance of the charge . . . . It is not unreasonable, and certainly not unconstitutional, to require that one who wishes to hear jury instructions hear them in their entirety and not interrupt the judge's charge by entering or leaving in the midst of it." A judge who decides to do so need not make findings, articulate reasons, or narrowly tailor the order. While not required, the judge may wish to make an announcement shortly before the charge if he or she will be doing so. *Commonwealth v. Dykens,* 438 Mass. 827, 835-836, 784 N.E.2d 1107, 1115-1116 (2003).