

IMPEACHMENT BY PRIOR CONVICTION

You have heard evidence that (this) (a) witness was previously convicted of a crime. You may consider that information, as well as whether the past crime involved dishonesty, and any other pertinent information, only for the limited purpose of deciding whether or not to believe (this) (the) witness’s present testimony and how much weight or importance, if any, to give it. It is up to you to decide how relevant you think any particular past conviction is to the witness’s present truthfulness.

See G.L. c. 233, § 21; Mass. G. Evid. § 609.

NOTES:

1. **Generally.** “The idea underlying G.L. c. 233, § 21, is that a conviction of a prior crime is a valid measure of the truthfulness of a witness, i.e., willingness to violate law translates to willingness to give false testimony, and it is solely for that purpose that the evidence of a prior conviction is received. That jurors, properly instructed, use a prior conviction only for that limited purpose may not be our most plausible legal fiction, but we adhere to it — not least because application of the statute so requires.” (citations omitted). *Commonwealth v. Chartier*, 43 Mass. App. Ct. 758, 762-763 (1997). “[C]onvictions relevant to credibility are not limited to crimes involving dishonesty or false statements.” *Commonwealth v. Smith*, 450 Mass. 395, 407 (2008).

2. **Applicable statutes.** General Laws c. 233, § 21 limits the adult convictions which may be admitted to impeach credibility. General Laws c. 119, § 60 provides that juvenile delinquency findings based on violations of statutes (but not those based on violations of municipal ordinances or by-laws) “may be used for impeachment purposes in subsequent delinquency or criminal proceedings in the same manner and to the same extent as prior criminal convictions.” General Laws c. 276, §§ 100A-100C and G.L. c. 94C, § 34 restrict the use of sealed convictions, subject to the constitutional right to show bias. *Commonwealth v. Santos*, 376 Mass. 920, 925-926 (1978).

3. **Judge’s discretion to exclude impeachment by prior conviction.** A judge has discretion to exclude the use of a prior conviction to impeach a witness. *Commonwealth v. Bucknam*, 20 Mass. App. Ct. 121, 123-124 (1985).

4. **Representation by counsel.** If the defendant's prior conviction resulted in a jail sentence, the proponent must show that the defendant was represented by counsel or had validly waived counsel, *Loper v. Beto*, 405 U.S. 473, 483 (1972); *Commonwealth v. Napier*, 417 Mass. 32, 33 (1994). This requirement may be satisfied by a notation of the name of counsel on the face of the complaint, or a judge's notation of waiver by the defendant, or a copy of the "Notice of Assignment of Counsel." *Napier*, 417 Mass. at 33-34. "[A] defendant generally is presumed to have been represented by (or to have waived) counsel in prior proceedings that resulted in a conviction, and the [party offering the conviction] need not come forward with proof on the point unless the defendant first makes a showing that the conviction was obtained without representation by or waiver of counsel." See *Commonwealth v. McMullin*, 76 Mass. App. Ct. 904, 905 (2010), citing *Commonwealth v. Saunders*, 435 Mass. 691, 695-696 (2002).

5. **Method of proof.** Generally, a prior conviction may be proved only through a certified copy of the record of conviction and not through cross-examination of the witness. See *Commonwealth v. Puleio*, 394 Mass. 101, 104 (1985). The traditional procedure is to read the record of conviction, to ask the witness if he or she is the person named therein, and upon such admission to offer the record in evidence. *Commonwealth v. Connolly*, 356 Mass. 617, 626 (1970). The record of conviction should not be put before the jury, however, if it contains extraneous entries, such as defaults, aliases, or probation surrenders. *Commonwealth v. White*, 27 Mass. App. Ct. 789, 795 (1989). The "better reasoned approach" is also to exclude any reference to the sentence, except perhaps in cross-examination of a witness who denies the conviction. *Commonwealth v. Eugene*, 438 Mass. 343, 352-353 & n.7 (2003). If the witness was convicted only of a lesser included offense, the better practice is to omit any reference to the greater charge. *Commonwealth v. Gagliardi*, 29 Mass. App. Ct. 225, 238 (1990).

6. **Prior arrests.** Prior arrests not resulting in conviction are generally inadmissible to impeach a witness, unless there is some persuasive explanation why the arrest might indicate bias or a motive to lie. *Commonwealth v. Allen*, 29 Mass. App. Ct. 373, 378 (1990).