FUNCTION OF THE JURY

WHAT IS EVIDENCE

CREDIBILITY OF WITNESSES

Your function as the jury is to determine the facts of this case. You alone determine what evidence you believe, how important any evidence is that you *do* believe, and what conclusions to draw from that evidence. In making these determinations, you are to use all of your common sense, life experience, and good judgment.

You are to decide what the facts are solely from the evidence admitted in this case. In evaluating the evidence and determining the facts, keep in mind that we all tend to perceive information and form opinions based on our own personal experience and background. This tendency may cause us to hold biases of which we may or may not be conscious. As I previously instructed you, you must not allow bias – whether held consciously or subconsciously – to interfere with your ability to fairly evaluate the evidence, apply the law as I instruct you, or render a fair and impartial verdict based on the evidence before you.

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).

[See Instruction 2.240 (Direct and Circumstantial Evidence) for additional instructions on direct and circumstantial evidence].

Picture in your minds that all of the evidence – [(testimony) (exhibits) (stipulations)] **– went into a box. That box is now closed**. **Your verdict(s) must be based on what is in the box, together with any reasonable inferences you choose to draw from it.**

Your determination of the facts must not be based on speculation or conjecture. Do not guess about things. During your deliberations one of you might say, "what about this?" or "what about that?" Well, if the "this" or the "that" is not in the box – if it is mere guesswork – don't consider it.

In short, base your verdict on the evidence and any reasonable inferences you choose to draw from it, but do not guess or speculate about things about which there is no evidence.

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. If your memory of the testimony differs from the attorneys', you are to follow your own recollection. You should not consider anything I have said or done during the trial as any indication of my opinion as to how you should decide the defendant's guilt or innocence.

In evaluating a witness's testimony you have to decide what testimony to believe, and how much weight to give that testimony. You should give the testimony of a witness whatever degree of belief and importance that you judge it is fairly entitled to receive.

You are the sole judges of the credibility of a witness. You may believe everything a witness says, or only part of it, or none of it. If there are any conflicts, discrepancies, or inconsistencies in the testimony, you should examine them carefully. You may consider whether a witness was candid or guarded, responsive or evasive, and whether the testimony is reasonable or unreasonable, probable or improbable. You may take into account how good

an opportunity a witness had to observe the facts about which the witness testifies, and whether the testimony seems accurate. You may also consider evidence, if any, about a witness's motive for testifying, whether a witness displays any bias in testifying, and whether or not a witness has any interest in the outcome of the case.

In deciding whether to believe a witness and how much importance to give a witness's testimony, you must look at all the evidence, drawing on your own common sense and life experience.

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. Once you have determined the facts, apply the law as I explain it to you to the facts in order to decide the verdict(s).

The credibility of witnesses is always a jury question, *Commonwealth v. Sabean,* 275 Mass. 546, 550 (1931); *Commonwealth v. Bishop,* 9 Mass. App. Ct. 468, 471 (1980), and no witness is incredible as a matter of law, *Commonwealth v. Hill,* 387 Mass. 619, 623-24 (1982); *Commonwealth v. Haywood,* 377 Mass. 755, 765 (1979). Inconsistencies in a witness's testimony are a matter for the jury, *Commonwealth v. Clary,* 388 Mass. 583, 589 (1983); *Commonwealth v. Dabrieo,* 370 Mass. 728, 734 (1976), which is free to accept testimony in whole or in part, *Commonwealth v. Fitzgerald,* 376 Mass. 402, 411 (1978). Disbelief of a witness is not affirmative evidence of the opposite proposition. *Commonwealth v. Swartz,* 343 Mass. 709, 713 (1962).

In charging on credibility, the judge should avoid any suggestion that only *credible* testimony constitutes evidence. See *Commonwealth v. Gaeten,* 15 Mass. App. Ct. 524, 531 (1983).

SUPPLEMENTAL INSTRUCTION

1. Discrepancies in testimony.

In evaluating testimony, you may find inconsistencies or discrepancies. They may or may not cause you to discredit such testimony. Consider whether they involve important facts or only minor details, and whether any inconsistencies or discrepancies result from innocent lapses of memory or intentional falsehoods.

2. Prejudice.

It would be improper for you to allow any feelings you might have about the nature of the crime to interfere with your decision. Any person charged with any crime is entitled to the same presumption of innocence, and the Commonwealth has the same burden of proving the defendant's guilt beyond a reasonable doubt.

The fact that the prosecution is brought in the name of the Commonwealth entitles the prosecutor to no greater consideration and no less consideration than any other litigant, since all parties are entitled to equal treatment before the law.

The word "verdict" comes from two Latin words meaning "to tell the truth," and that is what the law looks to your verdict(s) to do based solely on the evidence in the case. Justice is done when a verdict is returned based

on the evidence and the law regardless of whether that verdict is guilty or not guilty.

Commonwealth v. Smith, 387 Mass. 900, 909-10 (1982) (verdict must be based on evidence and not sympathy); *Commonwealth v. Fitzgerald,* 376 Mass. 402, 424(1978) (verdict may not be based on sympathy for victim or general considerations); *Commonwealth v. Clark,* 292 Mass. 409, 411 (1935) (jury should be both impartial and courageous); *Commonwealth v. Anthes,* 5 Gray 185, 197-98 (1855) (jury's judgment is conclusive of facts in case); *Commonwealth v. Carney,* 31 Mass. App. Ct. 250, 254 (1991) (approving charge not to use judge's questions or statements to determine how judge feels case should be decided, since judge has no right to interfere with jury's duty to find the facts and determine where the truth lies); *Commonwealth v. Ward,* 28 Mass. App. Ct. 292, 296 (1990).

3. Sympathy.

In many criminal cases there is an element of sympathy which surrounds the trial. You may not permit sympathy to affect your verdict(s).

The model instruction is drawn from *Commonwealth v. Harris,* 28 Mass. App. Ct. 724, 733 n.5 (1990). It may be appropriate where the trial is for a particularly emotional offense, such as vehicular homicide.

4. Number of witnesses.

The weight of the evidence on each side does not necessarily depend on the number of witnesses testifying for one side or the other. You are going to have to determine the credibility of each witness who has testified, and then reach a verdict based on all the believable evidence in the case. You may come to the conclusion that the testimony of a smaller number of witnesses concerning some fact is more believable than the testimony of a larger number of witnesses to the contrary.

Commonwealth v. McCauley, 391 Mass. 697, 703 n.5 (1984).

5. Juror equality.

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 provides that this instruction must be given upon motion of either party or whenever the court deems it appropriate. *Commonwealth v. Oram,* 17 Mass. App. Ct. 941, 942-43 (1983).

6. Judge's questions.

I want to reemphasize my instruction that you draw no conclusions from the fact that on occasion I asked questions of some witnesses. I intended those questions only to clarify or expedite matters. They were not intended to suggest any opinions on my part about your verdict or about the credibility of any witness. You should understand that I have no opinion as to the verdict you should render in this case.

7. Interested witnesses.

The fact that a witness may have some interest in the outcome of this case doesn't mean that the witness isn't trying to tell you the truth as that witness recalls it or believes it to be. But the witness's interest is a factor that you may consider along with all the other factors.

8. Sentencing consequences.

Your function as the jury is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged. By contrast, my

function as the judge is to impose sentence if the defendant is found guilty. You are not to consider the sentencing consequences of your verdict at all, so please put any issues about sentencing out of mind.

Shannon v. United States, 512 U.S. 573, 579 (1994); *Rogers v. United States,* 422 U.S. 35, 40 (1975).

9. Prosecution witnesses with plea agreement.

In this case, you heard the testimony of ___*[prosecution witness]*___**, and you heard that he (she) is testifying under an agreement. You should examine that witness's testimony with particular care. In evaluating his (her) credibility, along with all of the other factors I have already mentioned, you may consider that agreement and any hopes that he (she) may have about receiving future benefits.**

[*Do not read the next two paragraphs unless evidence that the witness has agreed to provide "truthful" testimony has been admitted.*]

You are the sole judges of the credibility of a witness. The prosecutor is not in a position to have any specialized knowledge about whether the witness's testimony is truthful or not. You must disregard any suggestion that the government or prosecutor believes or doesn't believe any part of his (her) testimony.

It is up to you to determine whether the witness's testimony has been affected by his (her) interest in the outcome of the case or by any benefits that he (she) has received or hopes to receive.

When a prosecution witness testifies under a plea agreement that is disclosed to the jury and which makes the prosecution's promises contingent on the witness's testifying truthfully, the judge must "specifically and forcefully" charge the jury to use particular care in evaluating such testimony, in order to dissipate the vouching inherent in such an agreement. "We do not prescribe particular words that a judge should use. We do expect, however, that a judge will focus the jury's attention on the particular care they must give in evaluating testimony given pursuant to a plea agreement that is contingent on the witness's telling the truth." *Commonwealth v. Ciampa,* 406 Mass. 257, 266 (1989). See *Commonwealth v. Marrero*, 436 Mass. 488, 500 (2002) (construing *Ciampa*).

The *Ciampa* rule is not triggered where the prosecution's promises were already fully performed prior to the testimony, and there is nothing before the jury suggesting that the plea agreement was contingent on the witness's veracity or the Commonwealth's satisfaction. *Commonwealth v. James,* 424 Mass. 770, 785-87 (1997).

In non-*Ciampa* situations, a cautionary instruction to weigh an accomplice's testimony with care is discretionary with the judge. Although some cases encourage the giving of such a charge, see *Commonwealth v. Andrews,* 403 Mass. 441, 458-59 (1988) ("judge should charge that the testimony of accomplices should be regarded with close scrutiny"); *Commonwealth v. Beal,* 314 Mass. 210, 232 (1943) (describing the giving of such a charge as "the general practice"), in most circumstances such a charge is entirely in the judge's discretion. *Commonwealth v. Brousseau*, 421 Mass. 647, 654-55 (1996) (no error in failing to instruct specifically on witnesses testifying under immunity grant or plea bargain where judge adequately charged on witness credibility generally); *Commonwealth v. Allen,* 379 Mass. 564, 584 (1980); *Commonwealth v. Watkins,* 377 Mass. 385, 389-90, cert. denied, 442 U.S. 932 (1979); *Commonwealth v. French,* 357 Mass. 356, 395-396 (1970), judgments vacated as to death penalty sub nom. *Limone v. Massachusetts*, 408 U.S. 936 (1972). *Commonwealth v. Luna,* 410 Mass. 131, 140 (1991) (involving a prosecution witness with only a contingent possibility of receiving a finder's fee in a future forfeiture proceeding), directed that "[i]n the future, a specific instruction that the jury weigh [an accomplice's] testimony with care should be given on request." However, *Commonwealth v. Daye,* 411 Mass. 719, 739 (1992), subsequently held that it is not error to refuse such an instruction unless the "vouching" that triggers the *Ciampa* rule is present.

Whether a judge should give a cautionary instruction when a former accomplice testifies as a defense witness appears to be an open question in Massachusetts. See *People v. Guiuan*, 957 P.2d 928, 933-34 (Cal. 1998) (California has held that when an accomplice is called solely as a defense witness, it is error to instruct the jury sua sponte that it should view the testimony with distrust "since it is the accomplice's motive to testify falsely in return for leniency that underlies the close scrutiny given accomplice testimony offered against a defendant . . . . A defendant is powerless to offer this inducement.") See also Fishman, "Defense witness as 'accomplice': should the trial judge give a 'care and caution' instruction?," 96 J. Crim. L. & Criminology 1 (Fall 2005).

NOTES:

1. **Specific classes of witnesses.** Generally it is in the judge's discretion whether to include additional instructions about specific classes of witnesses, such as police officers, *Commonwealth v. Anderson,* 396 Mass. 306, 316 (1985); *A Juvenile,* 21 Mass. App. Ct. at 125, or children, *Id.* While an exceptional case "may be conceived of where the judge would be bound to particularize on the issue of credibility," no such case has been reported in Massachusetts. *Id.* If additional, specific instructions are given in the judge's discretion, they must not create imbalance or indicate the judge's belief or disbelief of a particular witness. *Id.,* 21 Mass. App. Ct. at 125.

See Instruction 3.540 (Child Witness) for an optional charge on a child's testimony.

2. **Police witnesses.** "[O]rdinarily a trial judge should comply with a defendant's request to ask prospective jurors whether they would give greater credence to police officers than to other witnesses, in a case involving police officer testimony," but a judge is required to do so only if there is a substantial risk that the case would be decided in whole or in part on the basis of extraneous issues, such as "preconceived opinions toward the credibility of certain classes of persons." *Commonwealth v. Sheline,* 391 Mass. 279, 291 (1983). See *Anderson, supra*; *Commonwealth v. Whitlock,* 39 Mass. App. Ct. 514, 521 (1995); *A Juvenile, supra.*

The judge may not withdraw the credibility of police witnesses from the jury's consideration. "The credibility of witnesses is obviously a proper subject of comment. Police witnesses are no exception . . . . With a basis in the record and expressed as a conclusion to be drawn from the evidence and not as a personal opinion, counsel may properly argue not only that a witness is mistaken but also that a witness is lying . . . . [T]he motivations of a witness to lie because of his or her occupation and involvement in the matter on trial can be the subject of fair comment, based on inferences from the evidence and not advanced as an assertion of fact by counsel." *Commonwealth v. Murchison,* 419 Mass. 58, 60-61 (1994).

3. **Interested witnesses.** The defense is not entitled to require the judge to refrain from instructing the jury that, in assessing the credibility of a witness, they may consider the witness's interest in the outcome of the case. It is appropriate for a judge to mention that interest in the case is one of the criteria for assessing the credibility of witnesses, as long as the judge does so evenhandedly. *Commonwealth v. Ramos,* 31 Mass. App. Ct. 362, 368-69 (1991).

4. **Defendant as witness.** Although federal cases have held that it is permissible to charge the jury that they may consider the defendant's inherent bias in evaluating his or her credibility as a witness, the better practice is not to single out the defendant for special comment. *United States v. Rollins*, 784 F.2d 35 (1st Cir. 1986); *Carrigan v. United States*, 405 F.2d 1197, 1198 (1st Cir. 1969). See *Reagan v. United States*, 157 U.S. 301 (1895).

5. **Witness's violation of sequestration order.** It is within the judge's discretion whether to admit or exclude the testimony of a witness who violates a sequestration order. *Commonwealth* v. *Jackson,* 384 Mass. 572, 582 (1981). See *Commonwealth v. Sullivan,* 410 Mass. 521, 528 n.3 (1991), for a charge on a witness's violation of a sequestration order.

6. **Soliciting answers about truthfulness**. A prosecutor may not inquire about the requirement that a cooperating witness be truthful unless the witness's credibility is first attacked based on the agreement. *Commonwealth* v. *Webb*, 468 Mass. 26, 33 (2014).

7. **Redacting signatures on a cooperation agreement**. The signatures of the witness's attorney and the prosecutor should be redacted from any plea agreement entered as an exhibit. *Webb*, *supra*, at 34.

8. **Instruction on cooperating witness should be given twice**. It is preferable to have the cautionary instruction given prior to the testimony as well as in the final instructions. *Webb*, *supra*, at 35.