ADMISSION BY SILENCE

You have heard testimony suggesting that ____*[speaker]*____ allegedly (told the defendant) (said in the defendant's presence and hearing) that _____ . You have also heard testimony that the defendant allegedly (offered no response or explanation) (replied by saying that _____).

The Commonwealth is suggesting that the defendant's (silence) (reply was evasive or ambiguous and therefore it) amounts to a silent admission by the defendant that the accusation was true. If you believe the testimony, you will have to decide whether or not that is a fair conclusion.

Sometimes, when a direct accusation against a person is made to his face, you might naturally expect him to deny or correct the accusation if he is innocent of it. But that is not always true. Under some circumstances, it might not be reasonable to expect a routine denial.

You must be cautious in this area to be sure that any conclusions you draw are fair ones. First of all, you must be certain that the defendant heard any accusation and understood its significance.

You must also be satisfied that it is a fair conclusion that a person would always speak up in a situation like this if he were innocent. After all,

no one is required to respond to every negative comment that is made about him. And there may be other factors in a given situation, apart from guilt or innocence with respect to the particular accusation, that might explain why a person did not choose to respond.

On the other hand, some accusations may be of such a nature, or come from such a source, that it may be natural to expect an innocent person to protest when such an accusation is made to his face if there are no other explanations for his silence.

If you accept the testimony about the defendant's alleged (silence) (reply), then you will have to look to your common sense and experience to determine how to interpret the defendant's (silence) (answer) in this particular case.

If you conclude that the defendant *did* silently admit that the accusation was true, you may give that whatever significance you feel it is fairly entitled to receive in your deliberations. If you are uncertain whether the defendant's alleged (silence) (reply) amounted to a silent admission, then you should disregard it entirely and go on to consider the other evidence in this case.

"Even where a jury is given proper instructions concerning the legal principles relating to admissions by silence, there is a substantial risk of misunderstanding and misapplication by a jury." *Commonwealth v. Freeman,* 352 Mass. 556, 563, 227 N.E.2d 3, 8 (1967). For that reason, the Ninth Circuit's Committee on Jury Instructions recommends that no such instruction be given and that, if the evidence permits an adverse inference, counsel be permitted to argue the point. *Manual of Model Jury Instructions for the Ninth Circuit* § 4.02 (1985 ed.).

NOTES:

1. **When admissible**. Either party may show an "adoptive admission by silence" by a witness (including a criminal defendant) who, while not under arrest, did not respond (or responded evasively or equivocally) to a direct accusation that he or she would naturally be expected to deny. (It would not be "natural" to reply if doing so might be self-incriminatory as to another crime, or as to the person's family members.) The jury should be instructed to consider whether the witness heard the statement, understood it, had motive and opportunity to reply, could properly do so, and appeared to acquiesce in the statement. A witness's failure to tell his or her story to authorities may also be admissible to impeach the witness's testimony as a recent contrivance, although evidence of the defendant's pre-arrest failure to volunteer information to authorities should be admitted with great caution. The judge should conduct a voir dire before permitting any evidence of the defendant's pre-arrest silence and weigh its admission carefully. *Jenkins v. Anderson,* 447 U.S. 231, 235-241, 100 S.Ct. 2124, 2127-2130 (1980); *Commonwealth v. Olszewski,* 416 Mass. 707, 718-719, 625 N.E.2d 529, 537 (1993); *Commonwealth v. Brown,* 394 Mass. 510, 515, 476 N.E.2d 580, 583 (1985); *Commonwealth v. Nickerson,* 386 Mass. 54, 57, 434 N.E.2d 992, 994-997 (1982); *Commonwealth v. Cefalo,* 381 Mass. 319, 338, 409 N.E.2d 719, 731 (1981); *Commonwealth v. Haas,* 373 Mass. 545, 560, 369 N.E.2d 692, 702-703 (1977); *Commonwealth v. McGrath,* 351 Mass. 534, 538, 222 N.E.2d 774, 777 (1967); *Commonwealth v. Kleciak,* 350 Mass. 679, 691, 216 N.E.2d 417, 425 (1966); *Commonwealth v. Burke,* 339 Mass. 521, 532, 159 N.E.2d 856, 863 (1959); *Commonwealth v. Aparicio,* 14 Mass. App. Ct. 993, 993, 440 N.E.2d 778, 779 (1982).

Adoptive admissions must be used with caution, since a person "is not bound to answer or explain every statement made by anyone in his presence if he wishes to prevent his silence from being construed as an admission . . . ." *Commonwealth v. Boris,* 317 Mass. 309, 317, 58 N.E.2d 8, 13 (1944).

2. **When inadmissible**. Once a person is given Miranda warnings or placed in a custodial situation, no adverse inference may be drawn from his or her silence, since "every post-arrest silence is insolubly ambiguous because of what the state is required to advise the person arrested." *Doyle v. Ohio,* 426 U.S. 610, 617-619, 96 S.Ct. 2240, 2244-2245 (1976); *Miranda v. Arizona,* 384 U.S. 436, 468 n.37, 86 S.Ct. 1602, 1624 n.37 (1966). See *Greer v. Miller,* 483 U.S. 756, 107 S.Ct. 3102 (1987); *United States v. Hale,* 422 U.S. 171, 175, 181, 95 S.Ct. 2133, 2136, 2139 (1975); *Commonwealth v. Mahdi,* 388 Mass. 679, 694-698, 448 N.E.2d 704, 713-715 (1983); *Nickerson,* 386 Mass. at 58-59 & n.5, 434 N.E.2d at 995 & n.5; *Commonwealth v. Cobb,* 374 Mass. 514, 520-521, 373 N.E.2d 1145, 1149-1150 (1978); *Commonwealth v. Morrison,* 1 Mass. App. Ct. 632, 634, 305 N.E.2d 518, 519-520 (1973). A post-arrest equivocal answer, however, is admissible. *Commonwealth v. Valliere,* 366 Mass. 479, 488-489, 321 N.E.2d 625, 632 (1974); *Commonwealth v. Rogers,* 8 Mass. App. Ct. 469, 473-474, 395 N.E.2d 484, 486-487 (1979).

No inference of guilt may be drawn from a person's declining to speak without counsel present, or declining to speak on advice of counsel, or requesting to confer with counsel, even in a non-custodial situation. *Commonwealth v. Person,* 400 Mass. 136, 141, 508 N.E.2d 88, 91 (1987); *Haas, supra*; *Commonwealth v. Hall,* 369 Mass. 715, 733, 343 N.E.2d 388, 400 (1976); *Commonwealth v. Freeman,* 352 Mass. 556, 563-564, 227 N.E.2d 3, 8 (1967); *Commonwealth v. Sazama,* 339 Mass. 154, 157-158, 158 N.E.2d 313, 315-316 (1959).

3. **Defendant's denial**. When the defendant has denied an accusation, both the statement and the denial are inadmissible hearsay. *Commonwealth v. Ruffen,* 399 Mass. 811, 812-813, 507 N.E.2d 684, 685-686 (1987); *Commonwealth v. Nawn,* 394 Mass. 1, 4-5, 474 N.E.2d 545, 549 (1985); *Commonwealth v. Pleasant,* 366 Mass. 100, 102, 315 N.E.2d 874, 876 (1974).