

## FIRST COMPLAINT

*The jury should be instructed on the limited use of such evidence both when it is admitted and again during final instructions. Commonwealth v. King, 445 Mass. 217, 248 (2005).*

**The alleged victim is also known as the “complainant.” In sexual assault cases the law allows testimony by one person whom the complainant told of the alleged assault. We call this “first complaint” evidence. The complainant may have reported the alleged sexual assault to more than one person. However, our rules normally permit testimony only as to the complainant’s first report.**

**(The next witness will testify) (During this case you heard a witness testify) about the complainant’s “first complaint.” You may consider this evidence only for specific limited purposes: first, to establish the circumstances in which the complainant first reported the alleged offense, and then to determine whether that first complaint either supports or fails to support the complainant’s own testimony about the crime.**

**You may not consider this testimony as evidence that the assault in fact occurred. The purpose of this “first complaint” evidence is to assist you in your assessment of the credibility and reliability of the complainant’s testimony here in court.**

**In assessing whether this “first complaint” evidence supports or detracts from the complainant’s credibility or reliability, you may consider all the circumstances in which the first complaint was made. The length of time between the alleged crime and the report of the complainant to this witness is one factor you may consider in evaluating the complainant’s testimony, but you may also consider that sexual assault complainants may delay reporting the crime for a variety of reasons.**

*Commonwealth v. King*, 445 Mass. 217, 247-48 (2005), cert. denied, 546 U.S. 1216 (2006).

SUPPLEMENTAL INSTRUCTION

***When non-sexual crime also charged.* You may consider any such statements made after the incident only to corroborate the complainant’s present testimony about the alleged sexual assault. They are not relevant to the alleged non-sexual offense at all, and you may not consider them in evaluating the alleged victim’s testimony about that alleged offense.**

NOTES:

1. **Fresh complaint doctrine abolished and first complaint doctrine recognized.** *Commonwealth v. King*, 445 Mass. 217 (2005), cert. denied, 546 U.S. 1216 (2006), abolished the fresh complaint doctrine and substituted for it the doctrine of “first complaint.” Unlike the prior rule, first complaint evidence is not excluded because of a delay in reporting the alleged assault. Any delay is only one factor the jury may consider in weighing the complainant’s testimony. *Id.* at 242.

2. **Relevance and admissibility.** First complaint testimony is limited to the specific purpose of assisting the jury in determining the credibility of the complainant’s own testimony about the alleged sexual assault and therefore admissible except “where neither the occurrence of a sexual assault nor the complainant’s consent is at issue.” For example, it is not admissible in cases where the sole issue is the identity of the perpetrator. *King*, 445 Mass. at 247-48.

3. **Neutral rule of evidence.** The first complaint rule is a neutral rule of evidence, applicable whenever the credibility of a sexual assault allegation is at issue. As such, a defendant may proffer first complaint evidence where the defendant claims to be the victim of sexual assault and that claim is a live issue in the case. *Commonwealth v. Mayotte*, 475 Mass. 254, 260-61 (2016). In such instances, the substantive instruction should be modified to reflect its application to both the alleged victim and the defendant.

4. **Commonwealth limited to one first complaint witness or substitute.** Unless the testimony is about different periods of time and escalating levels of abuse, which constitute different and more serious acts committed over a lengthy period of time, *Commonwealth v. Kebreau*, 454 Mass. 287, 294 (2009), only one first complaint witness may testify. Multiple witnesses testifying about a victim’s repeated complaints of the same sexual assault “likely serves no additional corroborative purpose, and may unfairly enhance a complainant’s credibility as well as prejudice the defendant . . . .” *King*, 445 Mass. at 243. See *Commonwealth v. Aviles*, 461 Mass. 60, 71 (2011) (where a complainant makes successive complaints to the first complaint witness, only the initial complaint is admissible as first complaint evidence); *Commonwealth v. Stuckich*, 450 Mass. 449, 457 (2008) (complainant may not testify on direct examination that she “told” others because, even without details, listing the people to whom she told “is akin to a parade of multiple complaint witnesses, because the jury are likely to assume, and reasonably so, that the complainant repeated the substance of her testimony to each person to whom she complained”). Compare *Commonwealth v. Lyons*, 71 Mass. App. Ct. 671, 673-74 (2008) (after admitting complainant’s tape-recorded 911 call as first complaint testimony, reversible error also to admit complaint to responding officer) with *Commonwealth v. Revells*, 78 Mass.App.Ct. 492, 496 (2010) (finding no first complaint violation from the introduction of both written and oral communications, where “the victim’s first complaint to her mother consisted of a single, tightly intertwined oral and written communication”). Where there is more than one witness to the first complaint, only one witness may testify as a first complaint witness. *Commonwealth v. Velazquez*, 78 Mass. App. Ct. 660, 665 n.7 (2011).

While generally the first complaint witness must be “the first person told of the assault,” if that person is unable to testify (e.g., unavailable, incompetent, or too young to testify meaningfully), the Commonwealth may file a motion in limine and the judge may, in his or her discretion, admit testimony of a single substitute complaint witness. *King*, 445 Mass. at 243-44. The judge may also allow a substitute when the victim’s first encounter “does not constitute a complaint” (e.g., when the victim expresses upset but does not actually state that she has been sexually assaulted) or where the first person encountered has an obvious bias or motive to minimize or distort the victim’s remarks. *Commonwealth v. Murungu*, 450 Mass. 441, 446 (2008). The substitute “should in most cases be the next complaint witness, absent compelling circumstances justifying further substitution.” *Id.* The Commonwealth may not “pick and choose among various complaint witnesses to locate the one with the most complete memory, the one to whom the complainant related the most details, or the one who is likely to be the most effective witness . . . . Generally, a voir dire is the appropriate mechanism by which to make the preliminary determinations required by such a decision.” *Id.* The judge should make any necessary findings of fact on which a substitution decision is dependent. *Id.* at 447.

5. **Defense not limited to one rebuttal witness.** The defense is not limited to one witness in attempting to show that the first complaint was misleading, inaccurate or false, that the proffered first complaint witness was not in fact the first person complained to, or that the complainant did not complain at the time, to the person, or in the detail one would expect. *Commonwealth v. Murungu*, 450 Mass. 441, 447 (2008).

**6. Permissible scope of witness's testimony.** The first complaint witness may testify to the details provided by the complainant about the assault, as well as the witness's own observations of the complainant during the complaint, and "the events or conversations that culminated in the complaint; the timing of the complaint, and other relevant conditions that might help a jury assess the veracity of the complainant's allegations or assess the specific defense theories as to why the complainant is making a false allegation." *King*, 445 Mass. at 244.

**7. Permissible scope of complainant's testimony.** Unlike the prior law, see *Commonwealth v. Peters*, 429 Mass. 22, 30 (1999), the complainant herself or himself is no longer limited to testifying only that a complaint was made and to whom. If a first complaint witness or substitute testifies, the complainant may now also testify as to the details of the first complaint (i.e., what he or she told the first complaint witness) and why the complaint was made at that time. If no first complaint witness or substitute testifies, the complainant may not testify to the fact of the complaint or its details unless the witness is absent for a compelling reason that is not the Commonwealth's fault. *King*, 445 Mass. at 245 & n.24. The complainant may not testify about whom else she told in addition to the first complaint witness, even if the details of those conversations are omitted, since "the jury are likely to assume, and reasonably so, that the complainant repeated the substance of her testimony to each person to whom she complained." The judge should not allow a description of the investigative process, which is irrelevant to guilt and prejudicial. *Commonwealth v. Stuckich*, 450 Mass. 449 (2008).

**8. Independently admissible testimony.** While the first complaint doctrine prohibits the "piling on" of multiple complaint witnesses, it does not exclude testimony that "is otherwise independently admissible" and serves a purpose "other than to repeat the fact of a complaint and thereby corroborate the complainant's accusations." *Commonwealth v. Arana*, 453 Mass. 214, 220–21, 229 (2009). "The doctrine [prohibiting multiple complaint testimony] is not intended to be used as a shield to bar the jury from obtaining a fair and accurate picture of the Commonwealth's case-in-chief....If ... after careful balancing of the testimony's probative and prejudicial value, testimony is found by the judge to be relevant and admissible for reasons that are independent of the first complaint doctrine, in the context of a particular case, it is within the judge's discretion to admit the testimony." *Id.* at 337. See e.g., *Commonwealth v. Dargon*, 74 Mass. App. Ct. 330, 338 (2009), *aff'd*, 457 Mass. 387 (2010) (victim's statements recorded in medical records "served the independent purpose of establishing essential elements of the Commonwealth's aggravated rape case" as well as to rebut the claim of recent contrivance; nurse's description of examination, which necessarily conveyed the fact of the complaint, "served the independent purposes of providing background information and laying a foundation for the admission of physical evidence included in the sexual assault examination kit"); *Commonwealth v. Kebreau*, 454 Mass. 287, 298-99 (2009) (admissible to rebut claim of recent contrivance); *Commonwealth v. Lessieur*, 472 Mass. 317, 326, cert. denied 136 S. Ct. 418 (2015) (same). Compare *Commonwealth v. Parent*, 465 Mass. 395, 404 (2013) (claim of fabrication alone insufficient to open the door to the admission of multiple complaints).

**9. Expert on general characteristics of abused children.** "Notwithstanding the theoretical right of a qualified [first] complaint witness also to testify [as an expert] to the general characteristics of sexually abused children, . . . prosecutors would be well advised to avoid such juxtaposition and, if it occurs, trial judges should be alert to its considerable prejudicial potential." *Commonwealth v. Swain*, 36 Mass. App. Ct. 433, 444-45 (1994).