

**IMPEACHMENT BY PRIOR INCONSISTENT STATEMENT;
REHABILITATION BY PRIOR CONSISTENT STATEMENT**

I. IMPEACHMENT BY PRIOR INCONSISTENT STATEMENT

When you consider whether to believe a witness or how much weight to give his (her) testimony, you may consider whether that witness said or wrote something earlier that differs in any significant way from his (her) present testimony in the courtroom. It is for you to say whether there is a difference and how significant any difference is.

Please note that you may not use the witness's earlier statement as proof that something said in it is true.

[So, for example, if a witness testified here that he found a doughnut, but had earlier written that he found a bagel, that earlier statement would not prove that he found a bagel, but it might raise a doubt as to whether he was truthful or accurate when he testified that he found a doughnut.]

The earlier statement is brought to your attention for the sole purpose of discrediting or casting doubt on the accuracy of the witness's present testimony here at the trial. It is for you to decide whether it does so.

II. REHABILITATION BY PRIOR CONSISTENT STATEMENT

Normally you may not consider any statement that a witness made in the past which is similar to that witness's testimony at trial. That rule rests in part on our common experience that saying something repeatedly does not necessarily make it any more or less true. But we make an exception to that rule where there has been a suggestion that a witness may have recently contrived his testimony. In determining how reliable a witness is who has been accused of recently inventing his testimony, you may consider any earlier statements that the witness made which are consistent with his present testimony. It is for you to say how important the consistency is, depending on when any earlier statement was made and any other circumstances that you consider significant.

The earlier statement is *not* itself positive evidence of any fact that is mentioned in it.

To repeat, if there has been a suggestion that a witness recently contrived his testimony at this trial, when you evaluate that claim you may also take into account any earlier statement the witness made which is consistent with his present testimony. The prior statement is relevant *only*

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as to the witness's credibility, and you may *not* take it as proof of any fact contained in it.

NOTES:

1. **Prior inconsistent statements.** See *Commonwealth v. Festo*, 251 Mass. 275, 278-279, 146 N.E. 700, 701-702 (1925). See also *Commonwealth v. Noble*, 417 Mass. 341, 629 N.E.2d 1328 (1994) (*Daye* rule has been expanded to grand jury testimony unrelated to identification); *Commonwealth v. Daye*, 393 Mass. 55, 469 N.E.2d 483 (1984) (prior inconsistent statements before grand jury are admissible as substantive evidence if uncoerced and based on personal knowledge, and declarant can be effectively cross-examined at trial); *Commonwealth v. Basch*, 386 Mass. 620, 623, 437 N.E.2d 200, 203 (1982) (permissible to limit on collateral, but not on material, issue); *Commonwealth v. Simmonds*, 386 Mass. 234, 242, 434 N.E.2d 1270, 1276 (1982) (prior statement need not directly contradict present testimony); *Commonwealth v. Cobb*, 379 Mass. 456, 465-466, 405 N.E.2d 97, 102-103, vacated and remanded on other grounds sub nom. *Massachusetts v. Hurley*, 449 U.S. 809 (1980), appeal dismissed sub nom. *Commonwealth v. Hurley*, 382 Mass. 690 (1981), S.C., 391 Mass. 76 (1984) (whether permissible to limit Commonwealth's impeachment because of prejudicial effect); *Commonwealth v. Reddick*, 372 Mass. 460, 463, 362 N.E.2d 519, 521 (witness's failure to remember earlier statements); *Commonwealth v. Festa*, 369 Mass. 419, 426, 341 N.E.2d 276, 281 (1976) (same); *Commonwealth v. Chin Kee*, 283 Mass. 248, 261, 186 N.E. 253, 259 (1933) (witness without present memory cannot be impeached with earlier statements); *Commonwealth v. Rosadilla-Gonzalez*, 20 Mass. App. Ct. 407, 413, 480 N.E.2d 1051, 1057 (1985) (judge not required to tell jury which evidence is allegedly a prior inconsistent statement); *Commonwealth v. Denson*, 16 Mass. App. Ct. 678, 684-685, 454 N.E.2d 1283, 1287 (1983) (error to limit to instances of falsification rather than mistake or confusion); *Commonwealth v. Hollyer*, 8 Mass. App. Ct. 428, 431-433, 395 N.E.2d 354, 356-357 (1979) (introducing balance of earlier statement).

A judge is required on request to give a limiting instruction on the evidentiary effect of prior inconsistent statements. Failure to do so may be reversible error in some circumstances. *Commonwealth v. Martin*, 19 Mass. App. Ct. 117, 119-120 & n.3, 472 N.E.2d 276, 278 & n.3 (1984). See *Commonwealth v. Anderson*, 396 Mass. 306, 316, 486 N.E.2d 19, 25 (1985).

Where there is no objection or request for a limiting instruction, a prior inconsistent statement may be considered as substantive evidence. *Commonwealth v. Luce*, 399 Mass. 479, 482, 505 N.E.2d 178, 180 (1987); *Commonwealth v. Costa*, 354 Mass. 757, 757, 236 N.E.2d 94, 95 (1968).

This instruction should be given only if an objection was made to the prior inconsistent testimony and its use was limited by the trial judge. If the prior statement was admitted without objection, or if the prior statement admitted is prior sworn testimony as defined in Mass. G. Evid. § 801(d)(1)(A) (2012), the evidence is admitted for its truth. See *id.* at § 613 & note, third par.

2. **Prior consistent statements.** See *Commonwealth v. Brookins*, 416 Mass. 97, 103, 617 N.E.2d 621, 624 (1993) (prior consistent statement must precede bias allegedly influencing testimony); *Commonwealth v. Andrews*, 403 Mass. 441, 454-455, 530 N.E.2d 1222, 1229-1230 (1988) (judge, and thereafter jury, may conclude that there has been a claim of recent contrivance even where witness's opponent denies such); *Commonwealth v. Mayfield*, 398 Mass. 615, 629, 500 N.E.2d 774, 783 (1986) (prior consistent statement admissible to rebut claim of recent contrivance, inducements or bias); *Commonwealth v. Haywood*, 377 Mass. 755, 762-763, 388 N.E.2d 648, 653 (1979); *Commonwealth v. Binienda*, 20 Mass. App. Ct. 756, 758, 482 N.E.2d 874, 876 (1985) (reversible error to admit victim's prior consistent statement on material issue unless made before the alleged motive to fabricate arose).

A prior consistent statement is also admissible to shore up in-court testimony and rebut a prior *inconsistent* statement if it appears that the prior inconsistent statement may have been the aberrant product of transitory bias or pressure of some sort. *Commonwealth v. Horne*, 26 Mass. 996, 998, 530 N.E.2d 353, 356 (1988). The model instruction may be appropriately adapted for such a situation.