

## REPUTATION OF DEFENDANT

### I. REPUTATION FOR CHARACTER TRAIT OTHER THAN TRUTHFULNESS

You have heard (a witness) (several witnesses) testify about the defendant's reputation for (honesty and integrity) (being a peaceful and law-abiding citizen) (  [other character trait]  ), (in the community in which he [she] lives) (among the people whom he [she] habitually deals with in his [her] business or work).

Let me explain to you how you may use such evidence. It does not matter whether any particular witness believes that the defendant is guilty or not guilty. That question is for you alone to determine. However, knowing what a person's reputation is in his (her) (community) (business or workplace) may be of some help to you in making that decision. In some cases, a person's good reputation may cause you to doubt whether a person of that character would commit such an offense.

If you determine that the (witness has) (witnesses have) accurately reported the defendant's reputation in his (her) (community) (business or workplace) for (honesty and integrity) (being a peaceful and law-abiding citizen) (  [other character trait]  ), you may consider that reputation, along with

all the other evidence in the case. It is for you to determine how important such evidence is.

If the defendant's reputation, together with all the other evidence, leaves you with a reasonable doubt, then you must find him (her) not guilty. On the other hand, if all the evidence convinces you of the defendant's guilt beyond a reasonable doubt, then it is your duty to find him (her) guilty, even though he (she) may have a good reputation.

## II. REPUTATION FOR TRUTHFULNESS

In this case, the defendant has testified and the Commonwealth has questioned the truthfulness of that testimony. You then heard from (a witness) (several witnesses) who testified about the defendant's reputation for truthfulness and veracity (in the community in which he [she] lives) (among the people he [she] habitually deals with in his [her] business or work).

Let me explain to you how you may use such information. It does not matter whether any particular witness believes that the defendant is guilty or not guilty. That question is for you alone to determine. However, in this case you will have to determine whether or not you believe the defendant's

testimony, and it may be of some help to you in making that decision to know what the defendant's reputation for telling the truth is in his (her) (community) (business or workplace).

If you determine that the (witness has) (witnesses have) accurately reported the defendant's reputation in his (her) (community) (business or workplace), you may consider that reputation, along with all the other evidence in the case, in deciding whether to believe the defendant's testimony. It is up to you to decide how important such evidence is.

SUPPLEMENTAL INSTRUCTION

*Impeachment of reputation witness.*

**On cross-examination, the Commonwealth was allowed to ask this witness whether he (she) had heard rumors or reports about certain events in which the defendant was allegedly involved. Those questions and answers were allowed for one purpose only — to help you decide how well this witness knows the defendant's reputation in his (her) (community) (business or workplace) and whether the witness has described it to you accurately.**

**You may consider those questions and answers only to**

**evaluate how familiar this witness is with the defendant's reputation and how accurately the witness has recounted it to you. Those questions and answers are *not* proof that such events took place, and you are not to take them as any indication about the defendant's character, or to regard them as any evidence about the defendant's guilt or innocence on this charge.**

The judge may allow the prosecutor to cross-examine a reputation witness as to whether or not the witness has heard rumors or reports of prior misconduct inconsistent with that character trait, including prior arrests or convictions. Such a question should be phrased, "Have you heard . . . ?" rather than "Are you aware . . . ?" The question is permitted solely to test the credibility and weight of the witness's testimony, and not for the truth of the prior misconduct or the defendant's bad character. If the witness has *not* heard such a report but still maintains the defendant has a good reputation, the jury may consider whether the witness is as familiar with the defendant's reputation as the witness asserts to be. If the witness *has* heard such a report but still maintains the defendant has a good reputation, the jury may consider whether the witness is truthful or whether community standards are too low. Because of the high potential of prejudice, this procedure requires close judicial supervision and cautionary instructions, and a judge has discretion to exclude references to prior acts where the prejudice would likely outweigh any usefulness for testing the witness's credibility. *Commonwealth v. Montanino*, 27 Mass. App. Ct. 130, 135-137, 535 N.E.2d 617, 620-621 (1989). See *Michelson v. United States*, 335 U.S. 469, 477-478, 69 S.Ct. 213, 219 (1948); *Bates v. Barber*, 4 Cush. 107, 109-110 (1849); K.B. Hughes, *Evidence* 373-374 (1961). It is improper impeachment to ask if a reputation witness's testimony would be different if he or she knew of specific bad acts by the defendant. *Commonwealth v. Kamishlian*, 21 Mass. App. Ct. 931, 933-934, 486 N.E.2d 743, 746 (1985); *Commonwealth v. Marler*, 11 Mass. App. Ct. 1014, 1015, 419 N.E.2d 854, 855-856 (1981).

#### NOTES:

1. **Reputation evidence offered by defendant.** The defendant may offer evidence of his or her good reputation with respect to character traits pertinent to the offense charged, in order to establish the improbability of his or her guilt. *Commonwealth v. Belton*, 352 Mass. 263, 268-269, 225 N.E.2d 53, 56-57, cert. denied, 389 U.S. 872 (1967); *Commonwealth v. Wilson*, 152 Mass. 12, 14, 25 N.E. 16, 17 (1890); *Commonwealth v. Schmukler*, 22 Mass. App. Ct. 432, 437-438, 494 N.E.2d 48, 52 (1986). Mass. G. Evid. § 404(a)(1) (2008-2009). M.S. Brodin & M. Avery, *Handbook of Massachusetts Evidence* §§ 4.4.2 and 4.4.4. (8th ed. 2007).

2. **Rebuttal evidence offered by Commonwealth.** Since “[c]haracter evidence may not be used to show criminal propensity,” *Commonwealth v. Turner*, 371 Mass. 803, 810, 359 N.E.2d 626, 630 (1977), the prosecution cannot attack the defendant’s good reputation except in rebuttal of good-character evidence previously offered by the defendant, *Commonwealth v. Palmariello*, 392 Mass. 126, 138, 466 N.E.2d 805, 813 (1984); *Commonwealth v. Maddocks*, 207 Mass. 152, 157, 93 N.E. 253, 353-354 (1910); *Commonwealth v. O’Brien*, 119 Mass. 342, 345 (1876); *Commonwealth v. Hardy*, 2 Mass. 303, 317-318 (1807). See *Commonwealth v. Salone*, 26 Mass. App. Ct. 926, 928, 525 N.E.2d 430, 432 (1988) (“The long-standing rule . . . is that, unless a defendant has made his character an issue in the trial, ‘the prosecution may not introduce evidence . . . for the purposes of showing bad character or propensity to commit the crime charged, but such evidence may be admissible if relevant for some other purpose.’”) The Commonwealth may thereafter either: (1) attack the accuracy of the witness’s knowledge of the defendant’s reputation, or (2) offer its own witness to testify to a contrary reputation, although the judge must carefully instruct the jury not to use this as evidence of guilt but only as nullifying any evidence of good reputation. *Commonwealth v. Maddocks*, 207 Mass. 152, 157, 93 N.E.2d 253, 253-254 (1910); *Commonwealth v. Leonard*, 140 Mass. 473, 480, 4 N.E. 96, 102-103 (1886); *Montanino*, *supra*. Mass. G. Evid. § 404(a)(1) (2008-2009).

3. **Reputation for truthfulness.** Evidence of the defendant’s good reputation with respect to truthfulness and veracity is admissible solely as to the defendant’s credibility, and not as general character evidence, *Commonwealth v. Beal*, 314 Mass. 210, 230, 50 N.E.2d 14, 25 (1943); *Commonwealth v. Shagoury*, 6 Mass. App. Ct. 584, 599, 380 N.E.2d 708, 717 (1978), cert. denied, 440 U.S. 962 (1979), and is admissible only after the defendant’s credibility has been directly attacked, e.g. in cross-examination. Evidence of prior inconsistent statements by the defendant or of contradictory statements by others is not a sufficient trigger for such reputation evidence. *Commonwealth v. Sheline*, 391 Mass. 279, 287-289, 461 N.E.2d 1197, 1204-1205 (1984). See *Commonwealth v. Clark*, 23 Mass. App. Ct. 375, 378-379, 502 N.E.2d 564, 567 (1987) (same rule applies to other witnesses’ reputation for veracity).

4. **Required foundation.** If a proper foundation is present, the judge has no discretion to exclude reputation evidence. *Schmukler*, *supra*.

A person’s reputation is his or her “habitual conduct under common circumstances,” *Commonwealth v. Webster*, 5 Cush. 295, 325 (1850), “what is said of the person under inquiry in the common speech of his neighbors and members of the community or territory of repute,” *F.W. Stock & Sons v. Dellapena*, 217 Mass. 503, 505, 105 N.E. 378, 379 (1914). “Competent evidence of reputation must reflect ‘a uniform and concurrent sentiment [in the public mind].’” *Commonwealth v. Dockham*, 405 Mass. 618, 631, 542 N.E.2d 591, 599 (1989).

Reputation evidence must be based on information from a sufficient number of sources in the community who have had contact with the defendant and had the means to know his or her character. The judge may exclude evidence that is based on the observations of too few people. *Dockham*, *supra*; *Belton*, *supra*; *Commonwealth v. Gomes*, 11 Mass. App. Ct. 933, 933, 416 N.E.2d 551, 552-553 (1981); *Commonwealth v. LaPierre*, 10 Mass. App. Ct. 871, 871, 408 N.E.2d 883, 884 (1980). Evidence of the defendant’s reputation in the workplace or the business world is admissible as well as the defendant’s reputation in the community where he or she resides. G.L. c. 233, § 21A. *Belton*, *supra*.

In Massachusetts, good character may be shown only by evidence of reputation. A witness’s own opinion, or specific instances of good conduct, are inadmissible to prove reputation. *Commonwealth v. Roberts*, 378 Mass. 116, 129, 389 N.E.2d 989, 997 (1979); *Commonwealth v. DeVico*, 207 Mass. 251, 253, 93 N.E. 570, 570-571 (1911). Contra, Proposed Mass. R. Evid. 405 and 608 (1980). However, a cross-examiner may legitimately test a character witness’s knowledge of the defendant’s reputation by asking for specifics regarding the events and opinions that formed the basis for that reputation. *Commonwealth v. Arthur*, 31 Mass. App. Ct. 178, 180, 575 N.E.2d 1147, 1149 (1991).

5. **Jury instruction.** When reputation evidence is admitted, the judge should instruct the jury on how to consider such evidence, *Schmukler*, *supra*, although failure to do so is not per se error, *Commonwealth v. Dilone*, 385 Mass. 281, 288-289, 431 N.E.2d 576, 581 (1982). The instruction should be to the effect that the jury may infer from reputation evidence that it is improbable that a person of such good character would commit the crime as charged. *Commonwealth v. Downey*, 12 Mass. App. Ct. 754, 760, 429 N.E.2d 41, 45 (1982). Although it is a correct statement of the law, the judge is not required to charge that reasonable doubt may be engendered solely by reputation evidence. *Commonwealth v. Simmons*, 383 Mass. 40, 42-43, 417 N.E.2d 430, 431-432 (1981).

6. **Victim's reputation for violence.** See the supplemental instructions to Instruction 9.260 (Self-Defense).