DISSEMINATING OBSCENE MATTER; POSSESSING OBSCENE MATTER TO DISSEMINATE

The defendant is charged with (disseminating obscene matter) (possessing obscene matter with the intent to disseminate it). Section 29 of chapter 272 of our General Laws provides as follows:

"Whoever disseminates any matter which is obscene,

knowing it to be obscene,

or whoever has in his possession any matter which is obscene,

knowing it to be obscene,

with intent to disseminate [it],

shall be punished . . . ."

In order to prove the defendant guilty, the Commonwealth must prove three things beyond a reasonable doubt:

First: **That the matter that is in evidence is obscene;**

Second: **That the defendant (disseminated the matter that is in evidence) (possessed the matter that is in evidence, with the intent to disseminate it); and**

Third: **That the defendant knew of the obscene character of the matter that is in evidence.**

The *first* element of the crime is that the matter be obscene. The type of "matter" that is regulated by our law includes:

> **"any printed material, visual representation, live performance or sound recording,**
>
> **including but not limited to books, magazines, motion picture films, pamphlets, phonograph records, pictures, photographs, figures, statues, plays, [and] dances."**

Any such material is obscene if, taken as a whole, it meets all three of the following requirements: *[1]* it appeals to the prurient interest of an average citizen of this county; *[2]* it shows or describes sexual conduct in a way that is patently offensive to an average citizen of this county; and *[3]* it has no serious value of a literary, artistic, political or scientific kind.

G.L. c. 272, § 31.

First requirement: appeals to prurient interest. **The *first* requirement for something to be obscene is that, taken as a whole, it must appeal to the prurient interest of an average adult person in this county. You are to determine this by applying the contemporary standards in this county on the date of the alleged offense. "Prurient interest" means "a shameful or morbid**

interest in nudity, sex, or excretion," an unhealthy interest about sexual matters which is repugnant to prevailing moral standards.

Roth v. United States, 354 U.S. 476, 487 n.20, 77 S.Ct. 1304, 1310 n.20 (1957), quoting from Model Penal Code § 207.10(2) (Tent. Draft No. 6, 1957); *Commonwealth v. Dane Entertainment Servs., Inc. (No. 2),* 397 Mass. 201, 204, 490 N.E.2d 785, 787 (1986) (community standards to be applied are those at time of act, not those at time of trial).

In deciding the factual question whether this matter appeals to the prurient interest of an average adult person of this county, you are to look to the matter as a whole and see whether its dominant theme depicts hard core sexual conduct that goes substantially beyond customary limits of candor and appeals to an unhealthy, shameful or morbid interest in sex.

Commonwealth v. 707 Main Corp., 371 Mass. 374, 384, 357 N.E.2d 753, 760 (1976); *Commonwealth v. United Books, Inc.,* 18 Mass. App. Ct. 948, 949, 468 N.E.2d 283, 285 (1984); *Commonwealth v. Dane Entertainment Servs., Inc.,* 13 Mass. App. Ct. 931, 932, 430 N.E.2d 1231, 1233 (1982).

In making this determination, you should keep in mind that sexual matters and erotic materials are not the same thing as obscenity. Nudity alone is not identical with obscenity. Many recognized literary, artistic and scientific works concern themselves with sexual and erotic themes. The fact that materials may arouse sexual thoughts and desires is not enough

to make them obscene. Material is obscene if it deals with sex in a manner that appeals to prurient interest.

Jenkins v. Georgia, 418 U.S. 153, 161, 94 S.Ct. 2750, 2755 (1974); *Roth,* 354 U.S. at 487, 77 S.Ct. at 1310; *Attorney General v. "John Cleland's Memoirs of a Woman of Pleasure",* 349 Mass. 69, 70-71, 206 N.E.2d 403, 404 (1965), rev'd on other grounds, 383 U.S. 413, 86 S.Ct. 975 (1966).

You are not to consider what may be harmful to minors, that is, unmarried persons under the age of 18. In this case it is an adult standard which you are to apply.

Your test is the attitudes and standards of an *average* adult citizen of this county on the date of the alleged offense. You are *not* to use the standards of a particularly sensitive or insensitive person. Nor may you use your own personal attitudes and standards as your test. You should use your knowledge of the views of average citizens of this county in order to decide whether this material appeals to the prurient interest of average adult citizens of this county. If you cannot determine the views of average adult citizens of this county, you must find the defendant not guilty.

Second requirement: patently offensive. **The *second* requirement for something to be obscene is that, taken as a whole, it must depict or describe sexual conduct in a way that would be obviously offensive to an average adult**

person in this county. Again, you are to determine this by applying contemporary standards in this county on the date of the alleged offense. For purposes of this law, the term "sexual conduct" is defined as including the following:

"human masturbation,

[or] sexual intercourse[,] actual or simulated, normal or perverted,

or any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals,

[or] any depiction or representation of excretory functions,

[or] any lewd exhibitions of the genitals,

[or] flagellation or torture in the context of a sexual relationship.

Sexual intercourse is simulated when it depicts explicit sexual intercourse which gives the appearance of the consummation of sexual intercourse, normal or perverted."

G.L. c. 272, § 31.

Please notice that nudity itself is not "sexual conduct" within this definition, although a particular depiction of nudity would be if it includes one of the other enumerated factors.

If the matter that is in evidence does depict or describe "sexual conduct" as I have just defined it to you, you must determine whether, as a whole, it does so in a way that is obviously offensive to an average citizen of this county. As before, the test is not the attitude or standards of a particularly sensitive or a particularly insensitive person, or your own private standards. The test is whether a citizen of this county with average susceptibilities would be repelled by these sexual depictions. If you cannot determine the views of an average citizen of this county, you must find the defendant not guilty.

Third requirement: no serious value. **The *third* requirement for something to be obscene is that a reasonable person would find that, taken as a whole, it has no serious literary, artistic, political or scientific value.**

Material which "deal[s] with sexual conduct in a manner which advocates ideas, which contributes to or illustrates scientific discussion,

or which adds to the general body of art and literature in our culture is protected by the First Amendment" and cannot be found obscene. In determining this, you should look to the work as a whole to see whether it adds significantly to our knowledge and learning, whether it shows imagination and skill in execution, whether it attempts to influence public policies and affairs of state, or whether it assists in exploring or discussing scientific knowledge. You are not to determine this on the basis of the prevailing standards of the adults of this county, but on the basis of whether a reasonable person would find such value in the material.

Pope v. Illinois, 481 U.S. 497, 107 S.Ct. 1918 (1987); *707 Main Corp.,* 371 Mass. at 385-386, 357 N.E.2d at 761.

So, to summarize, the *first* element of this crime is that the material that is in evidence must be proved to be obscene. For the material to be obscene, all three requirements must be proved to you beyond a reasonable doubt: that, taken as a whole, it appeals to the prurient interest of an average citizen of this county; *and* it shows or describes sexual conduct in a way that is patently offensive to an average citizen of this county; *and* it has no serious literary, artistic, political or scientific value. If

the material has not been proved to be obscene, you are required to find the defendant not guilty. If the material has been proved beyond a reasonable doubt to be obscene, you are then to go on and consider the other two elements of this crime.

The *second* element which the Commonwealth must prove beyond a reasonable doubt is that the defendant (disseminated the material that is in evidence) (possessed the material that is in evidence with the intent to disseminate it). Our law defines the word "disseminate" to include all of the following: "import, publish, produce, print, manufacture, distribute, sell, lease, exhibit or display."

G.L. c. 272, § 31.

The *third* element which the Commonwealth must prove beyond a reasonable doubt is that the defendant *knew* of the obscene character of the matter which is in evidence. In this context, the law defines "knowledge" as "a general awareness of the character of the matter."

G.L. c. 272, § 31.

It is *not* necessary that the defendant have known that the matter was legally obscene, but it *is* necessary that the defendant have had a general knowledge of the content, character and nature of the matter that is in evidence.

So there are three elements to this charge: that the material was obscene, that the defendant (disseminated it) (possessed it with intent to disseminate it), and that the defendant knew that it was obscene. If the Commonwealth has proved all three elements beyond a reasonable doubt, you should find the defendant guilty. If the Commonwealth has not proved all three elements beyond a reasonable doubt, you must find the defendant not guilty.

SUPPLEMENTAL INSTRUCTIONS

1. *Matter appealing to deviant group.* **If the material introduced in evidence was designed for and primarily disseminated to a clearly-defined deviant sexual group, rather than the public at large, you are to consider whether the material as a whole appealed to the prurient interest of members of that intended group, rather than the average citizen of this county.**

Mishkin v. New York, 383 U.S. 502, 508, 86 S.Ct. 958, 963 (1966).

2. *Expert testimony.* **The law does not require you to have expert testimony about any of the issues that you must decide in this case.**

You may consider any expert testimony that *has* been given in this case, and give it whatever weight in your deliberations that you think is appropriate.

You may also decide to disregard any such evidence. You may, if you wish, choose to rely solely on the nature of the material that has been put in evidence and on your common knowledge of what constitutes an appeal to prurient interest and what the standards of an average citizen of this county were at the time of the alleged offense.

You may wish to give careful consideration to any expert testimony about whether this material has any serious literary, artistic, political or scientific value, since those can be specialized areas. But even on that issue, you are not required

to accept the testimony of an expert if you do not find it believable.

707 Main Corp., 371 Mass. at 386, 357 N.E.2d at 761. See *Attorney General v. A Book Named "Naked Lunch",* 351 Mass. 298, 218 N.E.2d 571 (1966).

See also Instruction 3.640 (Expert Witness).

3. *Context of dissemination.* **If it is shown that the defendant made this material available only to consenting adults, that is not by itself a defense to this charge, and the defendant is not entitled to be acquitted on that account. For the same reason, it is not a defense that the material was not available to persons under 18.**

However, any such evidence will be relevant to your deliberations in a different way. When you consider whether the material is patently offensive, you must decide that question in context, considering not only the matter itself but also the circumstances under which it (was) (was to be) disseminated. Those circumstances include the nature and location of the business, what kind of notice was given to prospective patrons, what kind of precautions were taken to ensure that people would

not be exposed to the matter unwillingly, the manner of distribution and all the circumstances of production, sale, advertising and editorial intent. You may take all these factors into account as part of your decision whether this material is patently offensive.

Hamling v. United States, 418 U.S. 87, 130, 94 S.Ct. 2887, 2914 (1974); *Commonwealth v. Dane Entertainment Servs., Inc. (No. 1),* 397 Mass. 197, 198 n.1, 490 N.E.2d 783, 784 n.1 (1986), rev'g 19 Mass. App. Ct. 573, 476 N.E.2d 250 (1985); *Commonwealth v. Dane Entertainment Servs., Inc.,* 16 Mass. App. Ct. 991, 992-993, 454 N.E.2d 917, 919 (1983).

4. *First Amendment references.* **There has been some mention in this case of the First Amendment. The First Amendment to the United States Constitution is part of the Bill of Rights, and it provides in part that the government "shall make no law . . . abridging the freedom of speech." The United States Supreme Court has ruled that in the obscenity area the impact of the First Amendment is to require proper legal standards and procedures in order to ensure that the government does not regulate matter that is not obscene.**

The Massachusetts statute which this defendant is accused of having violated has been repeatedly upheld by the

courts as meeting all of the requirements of the First Amendment. Therefore, I instruct you that the scope of the protections of the First Amendment is not an issue that you must decide in this case.

Commonwealth v. Dane Entertainment Servs., Inc. (No. 1), 389 Mass. 902, 915-916, 452 N.E.2d 1126, 1134-1135 (1983); *Commonwealth v. Dane Entertainment Servs., Inc.,* 23 Mass. App. Ct. 1017, 1018-1019, 505 N.E.2d 892, 893 (1987).

NOTE:

See generally *Jury Trial Manual for Criminal Offenses Tried in the District Court* § 4.14 (Trial of an Obscenity Case). See also Wilcox, "The Craft of Drafting Plain-Language Jury Instructions: A Study of a Sample Pattern Instruction on Obscenity," 59 Temple L. Q. 1159, 1175-1177 (1986).