UNNATURAL AND LASCIVIOUS ACT

The defendant is accused of having committed an unnatural and lascivious act. Section 35 of chapter 272 of our General Laws provides as follows:

"Whoever commits any unnatural and lascivious act with another person shall be punished . . . ."

The purpose of the statute is to prevent public sexual conduct that might give offense to persons present in a place that is frequented by members of the public.

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

First: **That the defendant committed an unnatural and lascivious act with another person. The term "unnatural and lascivious act" includes (anal intercourse) (fellatio, or oral sex involving contact between the mouth of one person and the penis of another person) (cunnilingus, or oral sex involving contact between the mouth of one person and the female sex organs — the vagina, vulva or labia — of another person) (masturbation of another person) (or) (any other intrusion of a part of one person's body or**

some other object into the genital or anal opening of another person's body);

Second: **That the defendant committed that act intentionally; and**

Third: **That the sexual act was done in a public place; that is, a place where the defendant either intended public exposure, or recklessly disregarded a substantial risk of public exposure at that time and under those circumstances, to others who might be offended by such conduct.**

The defendant cannot be found guilty of this charge if he (she) desired privacy for a sexual act

If relevant: **with another consenting adult**

and took reasonable measures in order to secure that privacy. Therefore the Commonwealth must prove that in choosing that particular locale, the defendant either intended public exposure or recklessly disregarded a substantial risk of public exposure at that place and time.

See Instructions 3.120 (Intent) and 3.140 (Knowledge).

G.L. c. 277, § 45 ("allegation that the defendant committed an unnatural and lascivious act with the person named or referred to in the indictment shall be sufficient"). *Commonwealth v. Ferguson*, 384 Mass. 13, 16, 422 N.E.2d 1365, 1367 (1981) (in circumstances, parking lot was not a public place) (statutory objective is to prevent possibility of offense to persons present in a place frequented by the

public; theoretical right of public access is insufficient, since a "place may be public at some times and under some circumstances and not public at others"; statute cannot be applied to the consensual acts of "persons who desire privacy and who take reasonable measures to secure it," but only to persons who "intended . . . or recklessly disregarded a substantial risk of exposure . . . . The Commonwealth must prove that the likelihood of being observed by casual passersby must have been reasonably foreseeable to the defendant, or stated otherwise, that the defendant acted upon an unreasonable expectation that his conduct would remain secret"); *Commonwealth v. Scagliotti*, 373 Mass. 626, 628, 371 N.E.2d 726, 727 (1977) (private cubicle in motion picture theatre) (statute cannot be applied to private places removed from public view which eliminate the possibility of offending persons in place frequented by the public); *Commonwealth v. Balthazar*, 366 Mass. 298, 302, 318 N.E.2d 478, 481 (1974), habeas corpus granted sub nom. *Balthazar v. Superior Court*, 428 F. Supp. 425 (D. Mass. 1977) (statute inapplicable to consensual conduct of adults unless committed in a public place); *Commonwealth v. Morrill*, 68 Mass. App. Ct. 812, 814, 815-816, 864 N.E.2d 1235, 1238, 1239 (2007) (second-floor holding cell adjacent to two courtrooms as well as courthouse basement accessible to court personnel are public places); *Commonwealth v. Bloom*, 18 Mass. App. Ct. 951, 952, 468 N.E.2d 667, 667 (1984) (open area of public toilet, as distinguished from inside of stall, is a public place).

The definition of what constitutes "unnatural" sexual intercourse is drawn from *Commonwealth v. Gallant*, 373 Mass. 577, 584, 369 N.E.2d 707, 712 (1977) (in rape prosecution, "unnatural sexual intercourse" includes "oral and anal intercourse, including fellatio, cunnilingus, and other intrusions of a part of a person's body or other object into the genital or anal opening of another person's body"). See also *Commonwealth v. Sefranka*, 382 Mass. 108, 116, 414 N.E.2d 602, 607 (1980) (statute includes public fellatio and oral-anal contact); *Commonwealth v. Delano*, 197 Mass. 166, 166-167, 83 N.E. 406, 406 (1908) (statute is applicable to "any and all unnatural and lascivious acts with another person," but not copulation, i.e. "the natural act of coition"); *Commonwealth v. Dill*, 160 Mass. 536, 536-537, 36 N.E. 472, 473 (1894) (statute was enacted to apply to a broader range of sexual acts than the common law definition of sodomy); *Commonwealth v. Benoit*, 26 Mass. App. Ct. 641, 646-648, 531 N.E.2d 262, 265-266 (1988) (cunnilingus is an "unnatural and lascivious act" and, except in a rape prosecution, does not require proof of penetration of the genital opening); *Commonwealth v. Guy*, 24 Mass. App. Ct. 783, 785-787, 513 N.E.2d 701, 702-704 (1987) (in rape prosecution, "unnatural sexual intercourse" includes female-to-female cunnilingus); *Commonwealth v. Baldwin*, 24 Mass. App. Ct. 200, 204-205, 509 N.E.2d 4, 7 (1987) (in rape prosecution, "unnatural sexual intercourse" includes digital contact with vagina, vulva or labia). *Jaquith v. Commonwealth*, 331 Mass. 439, 442, 120 N.E.2d 189, 192 (1954) held that "unnatural and lascivious" are words of common usage meaning "irregular indulgence in sexual behavior, illicit sexual relations, and infamous conduct which is lustful, obscene and in deviation of accepted customs and manners," but *Benoit*, 26 Mass. App. Ct. at 649, 531 N.E.2d at 267, has cautioned that "the broad language of *Jaquith* . . . would be inappropriate standing alone in jury instructions today [without being] promptly pinned down by specific instructions" (citation omitted).

NOTES:

1. **Non-consensual conduct**. The statute may be applied to non-consensual conduct, in which case the public nature of the act is not an element of the offense, but absence of consent is. *Balthazar*, 366 Mass. at 302-303, 318 N.E.2d at 481. In such prosecutions, absence of consent is an element of the offense that must be proved as part of the Commonwealth's case-in-chief, not a matter of defense to be raised by the defendant. *Commonwealth v. Reilly*, 5 Mass. App. Ct. 435, 437, 363 N.E.2d 1126, 1127-1128 (1977). The third element of the model instruction may be appropriately adapted in such cases.

2. **Unnatural and lascivious act with child under 16 (G.L. c. 272, § 35A).** Nonconsent is not an element of a violation of § 35A. Unlike prosecutions under § 35 involving consenting adults, § 35A may be applied to private as well as public sexual acts. *Benoit*, 26 Mass. App. Ct. at 643-646, 531 N.E.2d at 263-265.