

COMMONWEALTH OF MASSACHUSETTS

At the Supreme Judicial Court holden at Boston within and for said Commonwealth on the twenty ninth day of April, in the year of our Lord two thousand and fifteen:

present,

<u>HON. RALPH D. GANTS</u>)	Chief Justice
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<u>HON. FRANCIS X. SPINA</u>)	
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)	
<u>HON. ROBERT J. CORDY</u>)	Justices
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<u>HON. MARGOT BOTSFORD</u>)	
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<u>HON. FERNANDE R.V. DUFFLY</u>)	
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<u>HON. BARBARA A. LENK</u>)	
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<u>HON. GERALDINE S. HINES</u>)	

ORDERED: That the Massachusetts Rules of Criminal Procedure adopted by order dated October 19, 1978, as amended, to take effect on July 1, 1979, are hereby amended as follows:

Rule 23	By inserting the new Rule 23, attached hereto.
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The amendment accomplished by this order shall take effect on
July 1, 2015.

ORDERED:

<u>RALPH D. GANTS</u>)	Chief Justice
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<u>FRANCIS X. SPINA</u>)	
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<u>ROBERT J. CORDY</u>)	Justices
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<u>MARGOT BOTSFORD</u>)	
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<u>FERNANDE R.V. DUFFLY</u>)	
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<u>BARBARA A. LENK</u>)	
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<u>GERALDINE S. HINES</u>)	

Rule 23 STIPULATIONS

(a) Essential Elements. Any stipulation to an essential element of a charged offense entered by the parties before or during trial shall be in writing and signed by the prosecutor, the defendant, and defense counsel. Any such stipulation shall be read to the jury before the close of the Commonwealth's case and may be introduced into evidence.

(b) Other Stipulations. Any other stipulation shall be placed on the record before the close of evidence and may be read or otherwise communicated to the jury or introduced into evidence in the discretion of the court.

Rule 23 REPORTER'S NOTES

Rule 23 is intended to fill a gap in the Rules of Criminal Procedure identified by the Supreme Judicial Court in *Commonwealth v. Ortiz*, 466 Mass. 475 (2013). The rule provides for the manner in which stipulations of fact agreed to by the parties before or during trial are to be memorialized and used at trial. Rule 11 governs stipulations of fact agreed to at the pretrial conference, but prior to Rule 23 there were no rules that applied to such stipulations reached after the filing of the pretrial conference report at the pretrial hearing. Rule 23 remedies that deficiency, supplementing Rule 11's provisions concerning stipulations of fact.

Rule 23(a) Essential Elements

Rule 23(a) is modeled on Rule 11 in its treatment of stipulations of fact, but its coverage is narrower. Rule 11(a)(2)(A) requires that the pretrial conference report include "any stipulations of fact" agreed to by the parties at the pretrial conference and further provides that the report be "subscribed by the prosecuting attorney and counsel for the defendant, and . . . when the report contains stipulations as to material facts, by the defendant." Rule 11(a)(2)(A) requires the parties to file the pretrial conference report with the clerk of court and provides that agreements contained in the report, including stipulations, "shall be binding on the parties and shall control the subsequent course of the proceeding." These requirements for binding stipulations of fact are consistent with such rules of other states. See, e.g., Ark. R. Cr. P. 20.4, Pretrial Conference; Vt. R. Cr. P. 17.1, Pretrial Conference; Ia. R. Cr. P. 2.16, Pretrial Conference; Haw. R. Cr. P. 17.1, Pretrial Conference.

Unlike Rule 11, Rule 23(a) is limited to stipulations to "an essential element of a charged offense," that is, a fact that the Commonwealth must prove beyond a reasonable doubt in order to secure a conviction. To take a common example, in a trial for operating a motor vehicle while under influence of intoxicating liquor, G.L. c. 90, § 24(1)(a)(1), the Commonwealth must prove three elements, one of which is "that the defendant operated a motor vehicle." *Commonwealth v. Cabral*, 77 Mass. App. Ct. 909, 909, rev. denied, 458 Mass. 1107 (2010). See Criminal Model Jury Instruction for Use in the District Court 5.310, *Operating Under the Influence of Intoxicating Liquor* (2013). If the parties stipulate to such operation, the Commonwealth's burden of production for that element is satisfied, foreclosing the need for further proof in that regard. See *Commonwealth v. Ortiz*, 466 Mass. 475, 481 (2013). Rule 23(a) thus requires that a stipulation subject to its coverage be memorialized, that the defendant formally express his or her agreement to the stipulation, and that it be made a matter of record. Moreover, because the stipulated fact constitutes sufficient evidence, maybe the only evidence, of the element in question, the rule requires that the stipulation be read to the jury before the prosecution rests, affording the judge the discretion to decide whether it should further be entered into evidence and given to the jury as an exhibit. The model jury instructions for the charged crime set out its constituent elements, providing a ready reference for the facts subject to Rule 23(a).

Although a stipulated element under Rule 23(a) relieves the Commonwealth of its burden of producing evidence to prove that element, *Ortiz*, 466 Mass. at 481, it is distinct from a so-called stipulated trial, in which a defendant stipulates to all of the facts conclusive of guilt in order to preserve his or her right to appeal the judge's rulings on one or more pretrial issues. See, e.g., *Commonwealth v. Brown*, 55 Mass. App. Ct. 440 (2002). Because a stipulated trial is tantamount to a guilty plea, the defendant is entitled to the safeguards applicable in a guilty plea or admission to sufficient facts, informing him or her of the consequences of the stipulation and providing a hearing to ensure that the stipulation was entered into knowingly and voluntarily. *Id.* at 448-449. See Rule 12. In contrast, a stipulated element under Rule 23(a) occurs in the context of a contested trial, and it represents a considered, tactical decision by the defendant and defense counsel which is a part of the defendant's litigation strategy. In the ordinary case, Rule 23(a)'s requirement, following that of Rule 11(a)(2)(A), that the stipulation be written and signed by the defendant should adequately demonstrate that the defendant understands and agrees with the decision to stipulate. Requiring in addition a colloquy such as that required for a guilty plea or an admission to sufficient facts seems unnecessary. Cf. *Commonwealth v. Ramsey*, 466 Mass. 489, 496 n. 8 (2013) (observing that plea colloquies required for stipulated trials had no application to a defendant's trial concession, as part of a litigation strategy, that he possessed crack and powder cocaine). Of course, if the judge thinks it appropriate in the circumstances of a particular case to inquire, on the record out of the presence of the jury, in order to make the record clear that the defendant understands the evidentiary consequences of the stipulation and/or that the defendant's agreement to the stipulation is voluntary, the judge has the discretion to do so. See, e.g., *Commonwealth v. Walorz*, 79 Mass. App. Ct. 132, 135-36, rev. denied, 460 Mass. 1103 (2011) (noting trial judge's detailed explanation to defendant of the effect of a stipulation to two elements of the charged offense in holding that a colloquy was not required).

A stipulated element subject to Rule 23(a) is also distinct from a defendant's concession that an essential element will be proved or that he or she is guilty of a lesser included offense. Unlike a stipulation of fact agreed to by the parties, the Commonwealth is not a participant in a defendant's strategic decision to concede that the evidence is sufficient to satisfy a portion of the charged offense. Nor does such a concession relieve the Commonwealth of its burden to prove every element of the charged offense beyond a reasonable doubt. See *Commonwealth v. Charles*, 456 Mass. 378, 383 (2010) (in a narcotics case, defense counsel's concession in opening and closing that defendant possessed "drugs" neither amounted to a tacit stipulation of that fact nor relieved the Commonwealth of its burden to prove each element beyond a reasonable doubt). Rather, a defendant's concession that some part of the Commonwealth's case is beyond dispute is a recognized trial tactic that, like other defense tactics, ordinarily requires no confirmation that the defendant understands its risks and agrees with its employment. The Supreme Judicial Court accordingly has declined to exercise its supervisory authority to require a colloquy to confirm that a defendant understands, and agrees with, a trial concession that he is guilty of a lesser included offense, deferring instead to the sound discretion of the trial judge concerning the need for any such inquiry. See *Commonwealth v. Evelyn*, 470 Mass. 765, 770

(2015). Similarly, Rule 23, including Rule 23(a)'s requirement of a signed writing, does not apply to a defendant's concession of some fact, element, or guilt of a lesser included offense.

Rule 23(b) Other Stipulations

The purpose of limiting Rule 23(a) to facts constituting an essential element of a charged offense is to avoid requiring a formal writing, subscribed by counsel and the defendant, to the variety of other factual stipulations that have long been a non-problematic part of criminal trials. Those stipulations are treated by the less formal provisions of Rule 23(b), which applies to stipulations during trial to evidentiary facts, such as those necessary to authenticate a document or to qualify a witness as an expert, and to facts that, while material, are not sufficient to prove an essential element of a charged offense. For example, in the above-hypothesized trial for operating under the influence, the fact that the defendant had told the police that he was driving a car at the time in question would certainly be material in determining whether he had operated a motor vehicle. However, standing alone, that confession would not be sufficient to prove the element of operation, see *Commonwealth v. Leonard*, 401 Mass. 470, 473 (1988), and the parties' stipulation that the defendant had so confessed would not be subject to Rule 23(a)'s requirements. Such stipulations of evidentiary and material facts have long been utilized to expedite trials where – in the judgment of the parties – nothing would be gained by insisting on a formal mode of proof. Requiring a subscribed, written stipulation in such circumstances would undercut its utility without any apparent gain.

Rule 23(b) does not require that stipulations subject to its coverage be written, mandating only that they be placed on the record before the close of evidence. The rule leaves it to the judge to decide how that is done and, for stipulations of a material fact, how the stipulation should be communicated to the jury. Nothing in the rule prohibits a judge, as a matter of discretion, from requiring that a particular stipulation of fact be reduced to writing, whether because of its complexity or for any other good cause.