Massachusetts District Court

Criminal Model Jury Instructions

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Criminal Model Jury Instructions for use in the District Court

2017 Edition
Trial Court of the Commonwealth
District Court Department
Criminal Model Jury Instructions for use in the District Court

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Latest revision, March and May 2017 [June 2016, January, 2009* Revised May 2011, January 2013 and May 2014, March 2015 and July, and November 2015]
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Revisions in the 2017 Edition

The Committee has revised the following instructions:

- 3.210 Motor vehicle
- 3.660 First Complaint
- 5.180 Leaving the scene of an Accident Involving Property Damage
- 5.700 Operating a boat with a Blood Alcohol Level of 0.08% or Greater
- 5.710 Operating a Boat under the influence of Intoxicating Liquor
- 6.180 Assault and Battery on a Person Protected by an Abuse Prevention Order
- 6.200 Assault and Battery on a Pregnant Woman
- 6.300 Assault and Battery by Means of a Dangerous Weapon
- 6.360 ABDW on a Person Protected by an Abuse Prevention Order
- 7.270 Cruelty to Animals
- 7.400 Open and Gross Lewdness and Lascivious Behavior
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- 8.200 Theft, Purchase, Receipt, Possession or Concealment of Stolen Motor Vehicle…
- 8.250 Vandalism
- 8.260 Wanton Destruction of Property
- 8.280 Wilful and Malicious Destriction of Property
- 8.220 Trespass
- 9.230 Duress
- 9.240 Necessity

Revisions in the 2016 Edition

The Committee has created the following new instructions:

1.270 Use of Interpreter
8.250 Vandalism
9.250 Parental Discipline

The Committee has also revised the following instructions:

5.180 Leaving the Scene of an Accident Involving Property Damage
5.190-Leaving the Scene of an Accident Involving Personal Injury Not Resulting in Death
5.300-Operating with a Blood Alcohol Level of .08% or Greater
6.140-Assault and Battery
6.275-Assault and Battery on Family or Household Member
6.600-Annoying and Accosting Persons of the Opposite Sex
7.220-Escape
7.620-Possession of a Firearm

Revisions in the 2015 Edition:

The Committee has created the following new instructions:

1.340 Preliminary Identification Instruction
6.270 Assault on Family or Household Member
6.275 Assault and Battery on Family or Household Member
6.390 Suffocation
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The Committee has also revised the following instructions:

2.180 Proof Beyond a Reasonable Doubt
9.160 Model Eyewitness dentification

Introduction

To all District Court Judges:
I am pleased to distribute to you this 2009 revised edition of the District Court's Criminal Model Jury Instructions.

A judge is never more aware than when presiding over a jury trial of our mutual commitment to deliver "right and justice freely, . . . completely, and without any denial; promptly, and without delay; conformably to the laws." MASSACHUSETTS DECLARATION OF RIGHTS, ART. XI. An accurate and intelligible charge to the jury plays a pivotal role in that process. As the American Bar Association has noted, "Instructions to the jury should not only be technically correct but also expressed as simply as possible and delivered in such a way that they can be clearly understood by the jury." ABA STANDARDS FOR CRIMINAL JUSTICE, *Trial by Jury* § 15-3.6 (2d ed. 1980).

This new edition marks the 35th anniversary of the initial publication of these model jury instructions. Over the years they have embodied a major commitment by the District Court to inform our citizen jurors about the law not only accurately but also intelligibly and in plain English. The introductory essay on "Drafting a Plain Language Jury Instruction" sets out some of the principles that have guided this effort.
Since their initial publication in 1974, this set of model instructions has been greatly expanded and updated through the sustained research and drafting of many judges, assisted by staff of the Administrative Office of the District Court. The many supplemental instructions and extensive notes have assured that the model instructions do not become a rote script, but a starting point that can easily be tailored or supplemented for the particular case being tried.

Greatly expanded editions were published in 1988 and 1995 by the Committee on Juries of Six, chaired by Hon. Arthur Sherman (Cambridge), with members Hon. Neil Colicchio (East Boston), Hon. Wendie I. Gershengorn (Cambridge), Hon. Ernest S. Hayeck (Worcester), Hon. William B. McDonough (Holyoke), Hon. John B. Murphy, Jr. (Malden), Hon. Alphonse C. Turcotte (Chicopee), and Hon. Elbert Tuttle (Superior Court), with the help of Executive Director and General Counsel Michael J. Shea.
This 2009 revision has been accomplished by the Committee on Criminal Proceedings, chaired by Hon. Phyllis J. Broker (Woburn), and consisting of Assistant Clerk-Magistrate Catherine M. Coughlin (Newton), Hon. James F. X. Dinneen (Region 2), Assistant Clerk-Magistrate James J. Foley (Quincy), Chief Probation Officer Peter P. Heymanns (Holyoke), Hon. Rita Koenigs (Pittsfield), Hon. Michael C. Lauranzano (Lynn), Hon. Andrew L. Mandell (Fitchburg), Chief Probation Officer John M. Morganstern (Springfield), Hon. Tobey S. Mooney (New Bedford) and Hon. David S. Ross (Orange).

The Committee was greatly assisted by the considerable legal talents of Deputy General Counsel Ellen S. Shapiro, with research assistance from Law Clerk Brien M. Cooper. The Committee's work has made a substantial contribution to the administration of justice in this Commonwealth, and they have the thanks of all the judges.

This new edition includes 27 model instructions that have been added and distributed since the last edition in 1995 and additionally includes 3 new model instructions that have not previously been distributed:
2.540 Subsequent Offense
7.240 Failing to Register as a Sex Offender
7.300 Giving False Name upon Arrest.

The Committee on Criminal Proceedings has also reworked the wording of another 36 model instructions, sometimes substantially. Finally, the notes for all instructions have been reviewed and the notes for 101 instructions have been revised to reflect legal developments sincet he 1995 edition.

The 2009 Edition includes two new charts. One is a chart of "Required Jury Instructions." This will provide judges with a convenient checklist of instructions that the appellate courts have required be given (either sua sponte or on request of the parties) or have affirmatively recommended. A chart of "Potential Money Assessments has been appended to Instruction 2.520, which offers suggested dialogues for imposing sentence.

After consideration the Committee decided to completely revise the numbering scheme for instructions in order to permit them to be grouped better. It is hoped that the advantages of the new groupings will offset any adjustments occasioned by the renumbering. The former numbers (and last revision date) are shown in the table of contents.

This new edition will be available in the "Criminal" area of both the District Court's intranet and internet sites (the latter at www.mass.gov/courts/districtcourt). Future updates will be posted on those sites.

Our sincere thanks to Massachusetts Continuing Legal Education, Inc., and to John M . Reilly, Esq., its Executive Director, and Maryanne G. Jensen E sq., its Director of Publications, for their generosity in printing and distributing this new edition to the judges, and for making it available to the Bar and the public. We are sincerely grateful to MCLE for its many contributions to the District Court judiciary.

Lynda M. Connolly
Chief Justice of the District Court

*The jury instructions were revised May 2011 and January 2013.

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DRAFTING A PLAIN LANGUAGE JURY INSTRUCTION

2009 Edition

1. In general. It is the judge's duty to instruct the jury clearly and correctly as to the law applicable to the issues in the case. Commonwealth v. Corcione, 364 Mass. 611, 618, 307 N.E.2d 321, 326 (1974); Commonwealth v. Kenneally, 10 Mass. App. Ct. 162, 177, 406 N.E.2d 714, 725, aff'd, 383 Mass. 269, 418 N.E.2d 1224, cert. denied, 454 U.S. 849 (1981).

"[W]e adhere to the practice . . . consistently followed in this commonwealth, of preserving to the trial court the power and imposing upon it the duty of so enlightening the intelligence and directing the attention of the jury that notwithstanding disparity in skill, ingenuity, and efficiency with which the various issues are presented, justice may be even and incline one way or the other only according to the weight of credible evidence."

Plummer v. Boston Elevated Ry. Co., 198 Mass. 499, 515, 84 N.E. 849, 853 (1908). The charge must set out the elements of the crime, Commonwealth v. Reilly, 5 Mass. App. Ct. 435, 438, 363 N.E.2d 1126, 1128 (1977), and must reflect current controlling precedent, United States v. DeWolf, 696 F.2d 1, 4 (1st Cir. 1982). It is appropriate that the charge be "comprehensively strong, rather than hesitatingly barren, or ineffective." Commonwealth v. McColl, 375 Mass. 316, 321, 376 N.E.2d 562, 565 (1978), quoting from Whitney v. Wellesley & Boston St. Ry. Co., 197 Mass. 495, 502, 84 N.E. 95, 95 (1908).

"It is the duty of the trial judges to inform themselves of recent decisions of this court and to incorporate them into their charges, as it is the duty of both the prosecution and the defense to inform the judge of these decisions." Commonwealth v. Diaz, 426 Mass. 548, 553 n.3, 689 N.E.2d 804, 807 n.3 (1998).

As long as the judge gives adequate and clear instructions on the applicable law, the judge has discretion as to the phraseology, method and extent of the charge, including whether to instruct the jury generally or specifically, and whether to utilize his or her own words or the words of the party making the request. Commonwealth v. Williams, 388 Mass. 846, 857, 448 N.E.2d 1114, 1121 1122 (1983); Commonwealth v. Silva, 388 Mass. 495, 506 507, 447 N.E.2d 646, 654 (1983); Commonwealth v. Roberts, 378 Mass. 116, 130, 389 N.E.2d 989, 998 (1979); Commonwealth v. DeChristoforo, 360 Mass. 531, 539 540, 277 N.E.2d 100, 106 (1971); Commonwealth v. Martorano, 355 Mass. 790, 244 N.E.2d 725 (1969); Commonwealth v. MacDougal, 2 Mass. App. Ct. 896, 319 N.E.2d 739 (1974).

The judge must cover in substance a request for instruction that is both supported by evidence and legally correct. Varelakis v. Etterman, 4 Mass. App. Ct. 841, 842, 354 N.E.2d 886, 887 (1976). See United States v. Leach, 427 F.2d 1107, 1112 (1st Cir.), cert. denied sub nom. Tremont v. United States, 400 U.S. 829 (1970). The judge may be required to charge on a matter of law appropriately raised, even if the requested instructions are incorrect in particulars. Commonwealth v. Martin, 369 Mass. 640, 646 n.6, 341 N.E.2d 885, 890 n.6 (1976). But the judge is not required to charge on an issue not relevant to the evidence, and generally should not, even if it is correct as an abstract principle of law. Commonwealth v. Noxon, 319 Mass. 495, 548, 66 N.E.2d 814, 846 (1946); Commonwealth v. Clark, 292 Mass. 409, 415, 198 N.E. 641, 645 (1935). If the judge charges adequately and accurately, "the law does not require repetition of the same thought at every turn." Commonwealth v. Fitzgerald, 380 Mass. 840, 846, 406 N.E.2d 389, 395 (1980), quoting from Commonwealth v. Peters, 372 Mass. 319, 324, 361 N.E.2d 1277, 1280 (1977); Gibson v. Commonwealth, 377 Mass. 539, 540, 387 N.E.2d 123, 125 (1979).

A general verdict must be set aside if the jury was instructed that it could rely on alternate grounds to convict and one of the grounds was erroneous, since the verdict may rest solely on the insufficient ground. Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 2745 (1983); Stromberg v. California, 283 U.S. 359, 367 368, 51 S.Ct. 532, 535 (1931); Commonwealth v. Richards, 384 Mass. 396, 403 404, 425 N.E.2d 305, 310 (1981). See also Williams v. North Carolina, 317 U.S. 287, 292, 63 S.Ct. 207, 210 (1942).

Mistakes in a jury charge can usually be corrected by explaining the mistake and correctly re instructing the jury. See Commonwealth v. Lammi, 310 Mass. 159, 165, 37 N.E.2d 250, 254 (1941); Commonwealth v. Glowski, 15 Mass. App. Ct. 912, 443 N.E.2d 900 (1982); Commonwealth v. LaVoie, 9 Mass. App. Ct. 918, 919, 404 N.E.2d 114, 115 (1980).

2. Use of model instructions. Learned Hand once commented on jury instructions that:

"Whatever enlightenment a jury gets, ordinarily it gets from the colloquial charge, and from any later colloquial additions to it. It is exceedingly doubtful whether a succession of abstract propositions of law, pronounced staccato, has any effect but to give them a dazed sense of being called upon to apply some esoteric mental processes, beyond the scope of their daily experience which should be their reliance."

United States v. Cohen, 145 F.2d 82, 93 (2d Cir. 1942). The American Bar Association similarly recommends that:

"Instructions to the jury should be not only technically correct but also expressed as simply as possible and delivered in such a way that they can be clearly understood by the jury."

3 ABA Standards for Criminal Justice, Trial by Jury § 15 3.6(a) (2d ed. 1980). See also Donohue v. Holyoke Transcript Telegram Pub. Co., 9 Mass. App. Ct. 899, 900, 402 N.E.2d 1114, 1115 (1980) (judge is encouraged to restate requested instructions in language easily understood by the jury); ABA Standards of Judicial Administration, Trial Courts § 2.13 (1976).

Some judges fear that the omission of traditional language "is an elevator giving ready access to the justices upstairs." Godwin v. LaTurco, 272 Cal. App.2d 475, 479, 77 Cal. Rptr. 305, 307 (1st Dist. 1969). But "a jury instruction is not abracadabra. It is not a magical incantation, the slightest deviation from which will break the spell. Only its poorer examples are formalistic codes recited by a trial judge to please appellate masters . . . . Instructions are to be viewed in this commonsense perspective, and not through the remote and distorting knothole of a distant appellate fence." Time, Inc. v. Hill, 385 U.S. 374, 418, 87 S.Ct. 534, 558 (1967) (Fortas, J., dissenting).

Model jury instructions have been recommended to trial judges as providing a useful checklist of what must be covered in a jury instruction. See Commonwealth v. Starling, 382 Mass. 423, 431, 416 N.E.2d 929, 934 (1981) (Kaplan, J., joined by Wilkins, J., concurring). But it is important that such model instructions be a supplement to, and not a replacement for, the judge's own research, creativity and style:

"A collection of accurate, impartial and understandable pattern jury instructions should be available for use in criminal cases in each jurisdiction. Counsel and the court should nonetheless remain responsible for ensuring that the jury is adequately instructed as dictated by the needs of the individual case, and to that end should modify and supplement the pattern instructions whenever necessary."

3 ABA Standards for Criminal Justice, Trial by Jury § 15 3.6(b) (2d ed. 1980). Since any model instruction is designed to apply to a range of factually-distinct cases, at minimum a model instruction should always be pruned of any language that is irrelevant to the fact pattern of the case being tried. In 1988 the District Court's Committee on Juries of Six introduced a new edition of these model instructions to their colleagues with these words:

"One of the prime duties of a judge presiding over a jury trial is to be a communicator. This is essential to his or her being 'the directing and controlling mind at the trial, and not a mere functionary to preserve order and lend ceremonial dignity to the proceedings.'[1] The judge's charge to the jury is the centerpiece of that function, since it must be framed not only to correctly inform the jury of the law, but also to prevent the jury from misunderstanding the law.[2] Failure to communicate in even small and simple matters may lead to an unjust verdict.

"In each of these model instructions we have attempted to set forth a correct statement of law which a judge may use as a starting point for crafting an understandable and legally-satisfactory charge. Every effort has been made to make the instructions comprehensible, although legal constraints (and occasional uncertainties in present law) preclude oversimplification. Some terms which necessarily retain an element of ambiguity may best be explained with an example cautiously and correctly phrased.

"Model jury instructions have often been recommended to judges for use as a checklist to avoid basic errors and as a source of suggested plain-English phrasing.[3] However, these model instructions were not designed, nor should they be used, for verbatim recitation. They should always be adapted to each judge's speaking style and tailored to the facts of the case. The First Circuit has cautioned that over reliance on 'boiler plate' charges may result in instructions that are inadequate to a particular case, and that a '"one size fits all" charge burdens the jury with legal irrelevancies, lowers its attention span, and can only distract it from the true issues.'[4] We hope that the expanded notes and supplemental charges in this edition will assist judges in devising their own accurate and creative explanations of the law."

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1 Commonwealth v. Wilson, 381 Mass. 90, 118-119, 407 N.E.2d 1229, 1247 (1980) (internal quotes omitted).

2 Commonwealth v. Carson, 349 Mass. 430, 435, 208 N.E.2d 792, 795 (1965).

3 See, e.g. Commonwealth v. Starling, 382 Mass. 423, 431, 416 N.E.2d 929, 934 (1981) (Kaplan, J., joined by Wilkins, J., concurring); Morgan v. Lalumiere, 22 Mass. App. Ct. 262, 267 n.5, 493 N.E.2d 206, 210 n.5 (1986). For a list of all the model jury instructions now published, see Nyberg & Boast, "Jury Instructions: A Bibliography," 6 Legal Reference Servs. Q. at 5 (Spring/Summer 1986) and 3 (Fall/Winter 1986).

4 United States v. DeWolf, 696 F.2d 1, 4 (1st Cir. 1984).

3. Formulating a jury instruction. One federally sponsored study indicates that the average juror may understand only about fifty percent of the judge's instructions. A. Elwork, B.D. Sales and J.J. Alfini, Making Jury Instructions Understandable (1982). The authors indicate that the judge may lessen the difficulties of comprehension by following these suggestions:

- Utilize a perceptibly logical organization in presentation.
- Use short, simple sentences and avoid grammatically complex sentences.
- Utilize positive rather than negative formulations, the active rather than the passive voice, and transitive rather than intransitive verbs whenever possible.
- Use concrete rather than abstract words.
- Employ parallel construction of clauses and phrases, as an aid to aural comprehension and memory.
- Avoid legal jargon and uncommon words.

- Avoid homonyms (words that sound alike) and words with more than one meaning (such as "court" to refer to "judge"); if used, they should be clarified through the use of synonyms, examples, and contrast with their opposites.
- Avoid the use of negatively modified words that may be misheard (e.g. use "rude" rather than "impolite").

Id. See also E.J. Devitt and C.B. Blackmar, Federal Jury Practice and Instructions § 10.01 (1977); R.C. Nieland, Pattern Jury Instructions (1979); Severance and Lofts, "Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions," 17 Law & Soc'y Rev. 153 (1982); and the classic article by Wydick, "Plain English for Lawyers," 66 Calif. L. Rev. 727 (1978).

The Federal Judicial Center also offers several suggestions for drafting comprehensible instructions:

- Avoid using words that are uncommon in everyday speech and writing ("accomplice, admonish, applicable, corroborate, credence, deliberation, demeanor, discredit, impeach, improbability, insofar, misrecollection, pertain, scrutinize, trait, transaction, unsupported, veracity").
- Avoid using words to convey their less common meanings ("burden of proof, incompetent, court [to refer to the judge rather than the building or institution], disregard evidence, find a fact, material matter, sustain objections").
- Avoid using legal terms not in common use unless it is really necessary to do so.
- Avoid sentences with multiple subordinate clauses. Particularly avoid placing multiple subordinate clauses before or within the main clause, so that the listener must wait for the end of the sentence to learn what it is all about. Complex grammatical structures, rather than sentence length per se, is the problem to be avoided.
- Do not omit relative pronouns ("consider only the evidence that I have admitted") or auxiliary verbs ("any act that was not alleged in the complaint"). They signal the grammatical structure of what is coming.
- Avoid double negations ("the defendant is charged only with . . . and not with . . .").
- Use a concrete style rather than an abstract one. Speak to the jury in the second person rather than in abstract generalizations.
- Do not instruct the jury about things that they don't need to know (e.g. do not distinguish direct and circumstantial evidence at length before telling the jury that the distinction is irrelevant to their consideration of the evidence).

Appendix A, "Suggestions for Improving Juror Understanding of Instructions" in Federal Judicial Center, Pattern Criminal Jury Instructions (1988). One staffer from the Federal Judicial Center offers even blunter advice:

- Don't deliver a jury instruction that you don't understand yourself.
- Don't deliver an instruction that you wouldn't have understood before you went to law school.
- Don't use vocabulary that your teenage children wouldn't understand—or better yet, the teenage children of friends who aren't lawyers.
- Don't use sentence structures that you wouldn't use in talking about day-to-day affairs with your family and friends.
- Find a way to return to the language you spoke before you began the study of law.

A. Partridge, "When Judges Throw Gibberish at Jurors," 8 Update on Law-Related Education 6, 46 (Spring 1984).

4. Repeating original instructions in response to jury question. "Responding to a jury inquiry by repeating the instruction that relates to the question is a tempting practice. But the jury submits the question with knowledge of the original instruction. Submission of the question indicates that after considering the evidence in light of the instruction, the jury needs more assistance. Additional guidance is provided by a direct answer to the question presented." For example, where the jury sent a note asking, "As we understood the instruction on the confession, if the confession was coerced it must be disregarded. Is this correct? What is coercion? Can something be coerced and true?", instead of merely repeating the humane practice instruction and adding a dictionary definition of coercion, "an answer might be in the following terms: 'Yes, a coerced confession must be disregarded whether true or not. Coercion is the use of force or intimidation to obtain compliance. Yes, a statement may be both coerced and true.'" Commonwealth v. Robinson, 449 Mass. 1, 8 n.11, 864 N.E.2d 1186, 1191 n.11 (2007).

5. Specific issues in jury instructions.

• Absence of investigation or testing. Defense counsel may argue to the jury that they should draw an adverse inference against the Commonwealth from the failure of the police to preserve and introduce material evidence or to perform probative tests. See Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333 (1988) (while police have no constitutional duty to perform any particular test, the defense may argue to the jury that a particular test may have been exculpatory). In such a case, it is error to caution the jury against drawing any inferences from the absence of evidence. Commonwealth v. Person, 400 Mass. 136, 140, 508 N.E.2d 88, 91 (1987); Commonwealth v. Gilmore, 399 Mass. 741, 745, 506 N.E.2d 883, 886 (1987); Commonwealth v. Bowden, 379 Mass. 472, 485-486, 399 N.E.2d 482, 491 (1980); Commonwealth v. Rodriguez, 378 Mass. 296, 308, 391 N.E.2d 889, 896 (1979); Commonwealth v. Jackson, 23 Mass. App. Ct. 975, 975-976, 503 N.E.2d 980, 981-982 (1987); Commonwealth v. Flanagan, 20 Mass. App. Ct. 472, 475-477 & n.2, 481 N.E.2d 205, 207-209 & n.2 (1985).

While the defendant is entitled to make such an argument, a judge is not required to instruct the jury that they may draw such an inference. Commonwealth v. Smith, 412 Mass. 823, 838, 593 N.E.2d 1288, 1296 (1992); Commonwealth v. Fitzgerald, 412 Mass. 516, 525, 590 N.E.2d 1151, 1156 (1992); Commonwealth v. Daye, 411 Mass. 719, 740-741, 587 N.E.2d 194, 206-207 (1992); Commonwealth v. Andrews, 403 Mass. 441, 463, 530 N.E.2d 1222, 1234-1235 (1988); Commonwealth v. Porcher, 26 Mass. App. Ct. 517, 520-521, 529 N.E.2d 1348, 1350-1351 (1988); Commonwealth v. Ly, 19 Mass. App. Ct. 901, 901-902, 471 N.E.2d 383, 384-385 (1984). The Appeals Court, while recognizing such discretion, has suggested that "it might be[ ] preferable for the judge to inform the jurors that the evidence of police omissions could create a reasonable doubt." Commonwealth v. Reid, 29 Mass. App. Ct. 537, 540-541, 562 N.E.2d 1362, 1365 (1990).

• Acquittal as a possible verdict. A charge is adequate if it tells the jury that they may return a guilty verdict only if they are convinced of the defendant's guilt beyond a reasonable doubt, but it is better for the judge to mention specifically the option of acquittal. Commonwealth v. Sheline, 391 Mass. 279, 297, 461 N.E.2d 1197, 1209 (1984).

• "All or nothing" charge. A charge that multiple complaints rise or fall together, because the judge so views the weight of the evidence, is reversible error unless the situation "is so clearly monolithic in nature as to require identity of verdicts," because of the jury's freedom to accept or reject evidence selectively. Commonwealth v. Corcione, 364 Mass. 611, 617-619, 307 N.E.2d 321, 325-326 (1974). The defendant has no right to an "all or nothing" charge that forecloses the jury from acquitting on the primary charge and convicting on a lesser included offense supported by the evidence. Commonwealth v. Barry, 397 Mass. 718, 726 727, 493 N.E.2d 853, 858 859 (1986). It is improper to instruct the jury that it is "inconceivable" that they could find one codefendant guilty and the other not, where the evidence is not the same against both. Commonwealth v. Cote, 5 Mass. App. Ct. 365, 369 370, 363 N.E.2d 276, 278 279 (1977).

- "Alleged victim." The better practice is always to refer to "the alleged victim" rather than "the victim" in instructing the jury. Commonwealth v. Krepon, 32 Mass. App. Ct. 945, 947, 590 N.E.2d 1165, 1167 (1992).
- Appeal. It is improper to refer in jury instructions to the availability of appeal. Commonwealth v. Allen, 377 Mass. 674, 680, 387 N.E.2d 553, 557 (1979); Commonwealth v. Walker, 370 Mass. 548, 574, 350 N.E.2d 678, 696, cert. denied, 429 U.S. 943 (1976).
- Commonwealth's theory of the case. The judge is not restricted by the Commonwealth's theory of the case, and may instruct the jury as to any legal basis for conviction with support in the evidence. Commonwealth v. Jones, 16 Mass. App. Ct. 931, 450 N.E.2d 635 (1983).
- "Defendant." The defendant has no right to be referred to in the judge's instructions as "the accused," since "[t]he word 'defendant' is the customary and appropriate term for a person charged with a crime, and does not convey any belief that the person is guilty." Commonwealth v. Levy, 29 Mass. App. Ct. 279, 284-285, 559 N.E.2d 1255, 1258 (1990). Accord, Commonwealth v. Brown, 414 Mass. 123, 124-125, 605 N.E.2d 837, 838-839 (1993); Commonwealth v. Matos, 36 Mass. App. Ct. 958, 962, 634 N.E.2d 138, 142-143 (1994).
- Defense theory of the case. Any reference by the judge to the defense theory of the case must avoid any suggestion that the jury must accept that theory in order to acquit the defendant. Commonwealth v. Therrien, 371 Mass. 203, 206, 355 N.E.2d 913, 915 (1976).
- Directing a verdict for the defendant. The defendant is not entitled to an instruction that would, in effect, direct a verdict, since this must be done by motion. Superior Court Rule 70 (1974) (apparently made applicable to District Court jury sessions by G.L. c. 218, § 27A[e]); White v. Lofts, 275 Mass. 559, 562 564, 176 N.E. 646, 648 (1931).
- Equality of jurors. Upon motion of a party or whenever the judge deems it appropriate, the jury shall in substance be charged that no juror is better qualified to determine the truth of the facts in controversy or to deliberate upon a verdict solely because of that juror's occupation or reputation. G.L. c. 234A, § 70. The judge is not required to give such an instruction sua sponte. Commonwealth v. Oram, 17 Mass. App. Ct. 941, 942 943, 457 N.E.2d 284, 285 286 (1983).
- "Finding" or "satisfied" language. The judge should avoid "if you find" or "if you are satisfied" or "if you accept the defendant's version" language that may impliedly shift or obfuscate the degree and bearer of the burden of proof. Commonwealth v. Richards, 384 Mass. 396, 405, 425 N.E.2d 305, 310-311 (1981); Gibson v. Commonwealth, 377 Mass. 539, 542-543, 387 N.E.2d 123, 126 (1979); Connolly v. Commonwealth, 377 Mass. 527, 533 534, 387 N.E.2d 519, 523 524 (1979); Commonwealth v. Rodriguez, 370 Mass. 684, 690 692, 352 N.E.2d 203, 207 208 (1976); Commonwealth v. Vidito, 21 Mass. App. Ct. 332, 336 338, 487 N.E.2d 206, 209 (1985); Commonwealth v. Deeran, 10 Mass. App. Ct. 646, 650, 411 N.E.2d 488, 491 (1980).
- Interests of jurors and Commonwealth. The judge should not appear to equate the interests of the jurors and the interests of the Commonwealth, since the two are not synonymous. Commonwealth v. Cundriff, 382 Mass. 137, 152, 415 N.E.2d 172, 181 (1980), cert. denied, 451 U.S. 973 (1981).
- Jury nullification. Though "the jury has the power to bring in a verdict in the teeth of both law and facts," the defendant has no right to an instruction informing the jury that they have the de facto power of "jury nullification." Horning v. District of Columbia, 254 U.S. 135, 138, 41 S.Ct. 53, 54 (1920); Sparf v. United States, 156 U.S. 51, 102, 15 S.Ct. 273, 295 (1895); Commonwealth v. Fernette, 398 Mass. 658, 670 671, 500 N.E.2d 1290, 1297 1298 (1986); Commonwealth v. Diaz, 19 Mass. App. Ct. 29, 33 n.4, 471 N.E.2d 741, 744 n.4 (1984). When the judge charges as to lesser included offenses, and in other appropriate circumstances, the judge should charge that the jurors have a duty, if they conclude that the defendant is guilty, to return a verdict of guilty of the highest crime which has been proved beyond a reasonable doubt. Commonwealth v. Johnson, 399 Mass. 14, 17, 502 N.E.2d 506, 507 (1987); Commonwealth v. Dickerson, 372 Mass. 783, 797, 364 N.E.2d 1052, 1061 (1977).

- Law of the case. A jury charge too favorable to the defendant does not become the "law of the case" to which the evidence must conform. Commonwealth v. David, 365 Mass. 47, 55-56, 309 N.E.2d 484, 489-490 (1974); Commonwealth v. Bruneau, 7 Mass. App. Ct. 858, 386 N.E.2d 29 (1979).
- Legislative purpose. The judge may inform the jury about the legislative purpose of a statute if this is done accurately. Commonwealth v. Brunelle, 361 Mass. 6, 12, 277 N.E.2d 826, 831 (1972).
- Sentence. It is improper in a jury charge to refer to the possible sentence, Commonwealth v. A Juvenile, 396 Mass. 108, 112, 438 N.E.2d 822, 825 826 (1985); Commonwealth v. Smallwood, 379 Mass. 878, 882 883, 401 N.E.2d 802, 805 (1980); Commonwealth v. Buckley, 17 Mass. App. Ct. 373, 375 377, 458 N.E.2d 781, 783 784 (1984), or to discuss the parole consequences of the possible sentence, Id.
- Statutory exceptions. The prosecution need not prove that the defendant is not within an exception to an offense defined by statute if the exception does not constitute part of the definition of the offense. Commonwealth v. Freeman, 354 Mass. 685, 687, 241 N.E.2d 815, 816 (1968). Cf. G.L. c. 277, § 37 (statutory exception not appearing in enacting clause need not be charged in complaint "unless necessary for a complete definition of the crime"); Commonwealth v. David, 365 Mass. 47, 53-55, 309 N.E.2d 484, 488-489 (1974) (same rule applies to proof of statutory crime). See also G.L. c. 278, § 7 ("license, appointment . . . or authority" is affirmative defense) (see Instruction 3.10).
- Statutory language. It is in the judge's discretion whether to read to the jury the statute defining the offense being tried. The judge is not required to do so if the nature and elements of the offense are otherwise sufficiently stated in the jury charge. Commonwealth v. Burns, 167 Mass. 374, 379, 45 N.E. 755, 756 (1897); Commonwealth v. Mascolo, 6 Mass. App. Ct. 266, 277, 375 N.E.2d 17, 26, cert. denied, 439 U.S. 899 (1978).
- Recording of jury charge. A judge may provide the jury with an audiotape or videotape recording of the jury charge, provided: (a) the judge advises both counsel in advance, although counsel's consent is not required; (b) the tape recording is audible in its entirety and contains the whole instruction; (c) the judge instructs the jury to consider the tape recorded instructions in their entirety and to avoid selective overemphasis on any one area of the charge; and (d) the judge has the tape recording marked for identification. Commonwealth v. Baseler, 419 Mass. 500, 504-506, 645 N.E.2d 1179, 1181-1183 (1995).
- "Undisputed" evidence. It is the jury's function as fact finder to resolve all issues of fact. Commonwealth v. Ford, 18 Mass. App. Ct. 556, 559 n.2, 468 N.E.2d 663, 665 n.2 (1984). The judge may not direct a verdict against the defendant, absent a stipulated agreement to all facts material to the offense, even if the defendant admits guilt on the witness stand and defense counsel concedes in closing argument that the defendant is not contesting the charge. Commonwealth v. Stracuzzi, 30 Mass. App. Ct. 161, 162-163, 566 N.E.2d 1151, 1152 (1991).

Similarly, the defendant's failure to contest an essential element of the crime does not relieve the Commonwealth of its burden of proving every element of the crime beyond a reasonable doubt. Commonwealth v. Gabbidon, 398 Mass. 1, 5, 494 N.E.2d 1317, 1320 (1986). The judge therefore should not refer to any portion of the government's evidence as undisputed, proved or conceded. See Commonwealth v. McDuffee, 379 Mass. 353, 363 364, 398 N.E.2d 463, 469 (1979); Commonwealth v. Meyers, 356 Mass. 343, 348 349, 252 N.E.2d 350, 352 353 (1969); Commonwealth v. Caramanica, 49 Mass. App. Ct. 376, 379, 729 N.E.2d 656, 660 (2000). See DeCeco v. United States, 338 F.2d 797 (1st Cir. 1964). The judge should also use care in referring to an issue as the "central," "sole," "main," "most important," "whole," or "real" issue, since this may imply that other matters are uncontroverted. Commonwealth v. Drumgold, 423 Mass. 230, 257-258, 668 N.E.2d 300, 318-319 (1996); Commonwealth v. Murray, 396 Mass. 702, 705-709 & n.15, 488 N.E.2d 415, 418-419 & n.15 (1986); Commonwealth v. Chotain, 31 Mass. App. Ct. 336, 338-340, 577 N.E.2d 629, 630-631 (1991); Commonwealth v. Connors, 18 Mass. App. Ct. 285, 287 290, 464 N.E.2d 1375, 1378 1379 (1984).

• Written copy of jury charge. The Supreme Judicial Court has indicated that it "would endorse any reasonable procedure by which all or portions of a judge's charge agreed to by the parties are made available in writing to a jury." Commonwealth v. Dilone, 385 Mass. 281, 287 n.2, 431 N.E.2d 576, 580 n.2 (1982). See Commonwealth v. O'Dell, 15 Mass. App. Ct. 257, 259 260, 444 N.E.2d 1303, 1305 (1983); United States v. Previte, 648 F.2d 73, 84 (1st Cir. 1981) (dicta). But any such written instructions "should be an exact reproduction of the judge's oral charge" and not an additional set of instructions proposed by the parties. Commonwealth v. Lavelley, 410 Mass. 641, 652 n.15, 574 N.E.2d 1000, 1007 n.15 (1991). The First Circuit has approved a judge's cautious use of a visual outline of the charge. Id.; United States v. Flaherty, 668 F.2d 566, 599 600 (1st Cir. 1981).

6. Closing the courtroom during jury instructions. Barring spectators from entering or leaving the courtroom during jury instructions in order to avoid distracting the jurors "is a practice suitable to the solemnity and importance of the charge . . . . It is not unreasonable, and certainly not unconstitutional, to require that one who wishes to hear jury instructions hear them in their entirety and not interrupt the judge's charge by entering or leaving in the midst of it." A judge who decides to do so need not make findings, articulate reasons, or narrowly tailor the order. While not required, the judge may wish to make an announcement shortly before the charge if he or she will be doing so. Commonwealth v. Dykens, 438 Mass. 827, 835-836, 784 N.E.2d 1107, 1115-1116 (2003).

Chart of Required Jury Instructions.

This chart is available here : (Original not formatted for epub viewing.)
http://www.mass.gov/courts/docs/courts-and-judges/courts/district-court/jury-instructions-criminal/0005-required-jury-instructions.pdf

INSTRUCTIONS BEFORE AND DURING TRIAL

1.100 IMPANELING THE JURY

2009 Edition

***Court Officer*: Hear ye. Hear ye. Hear ye. All persons having business before the Honorable, the Justices of the _____ District Court, draw near, give your attendance and you shall be heard. God save the Commonwealth of Massachusetts. Please be seated.**

Clerk: **Will the defendant(s) please stand. You are placed at the bar for trial and these good jurors whom I shall call are to pass between the Commonwealth and you upon your trial. If you should object to any of the jurors, you will do so after their names are called and before they are sworn. You have the right to challenge two of the jurors without giving any reason therefor, and as many more as you have good cause to challenge. You may be seated.**

Members of the panel, please answer as your names and numbers are called and take your places in the jury box as indicated by the court officer.

The clerk should draw a panel of jurors' names from the jury panel sheets and have them take their seats in the jury box.
In a case to be tried to a jury of six persons, seven jurors must be impanelled, G.L. c. 234A, § 68, and the judge may direct that eight jurors be impanelled if the trial is likely to be protracted, G.L. c. 234, § 26B. In the case of a juvenile being tried to a jury of twelve persons, fourteen jurors must be impanelled, G.L. c. 234A, § 68, and the judge may direct that up to sixteen jurors be impanelled if the trial is likely to be protracted, G.L. c. 234, § 26B.

Will those jurors sitting in the jury box, please rise and the rest of the jurors in the courtroom, also rise, and raise your right hands.

Do each of you solemnly swear or affirm that you will make true answers to such questions as shall be put to you by the Court in the matter now pending, so help you God? Please be seated.

If a member of the venire prefers to omit reference to the Deity, he or she may be sworn by substituting the words "under the penalties of perjury" for the words "so help you God." See G.L. c. 233, § 19.

Judge **: Ladies and gentlemen, this is the trial of Commonwealth versus _____. The defendant is accused of _____. The defendant has entered a plea of not guilty to that charge.**

In this case, the Commonwealth is represented by Assistant District Attorney _____. The defendant is represented by Attorney _____. Will the defendant and both of the attorneys please stand? Thank you. You may be seated.

There may be several witnesses in this case. Will the potential witnesses stand as I name them: ___*[Names and home towns]*___. Thank you. You may be seated.

The defense may not be compelled to disclose its witnesses in advance, and the jury should not be told for which party any prospective witness may appear. See Jury Trial Manual for Criminal Offenses Tried in the District Court § 2.14.

I am now going to pose some questions to all of the potential jurors in the room, whether you are sitting in the jury box or with the rest of the jurors. If your answer to any question is "yes," please raise your hand.

[1.] Are any of you related to the defendant? Do any of you know the defendant, either of the lawyers, or any of the witnesses in this case?

[2.] Do any of you have an interest or stake of any kind in this case?

[3.] To the extent that you have heard anything about this case, have any of you expressed or formed any opinions about it?

[4.] Are any of you aware of any bias or prejudice that you have toward either the defendant or the prosecution?

[5.] Do any of you *not* understand that in a criminal case the defendant is presumed innocent until proven guilty?

[6.] Do any of you *not* understand that the prosecution has the burden of proving that the defendant is guilty beyond a reasonable doubt, and that the defendant does not have to present any evidence in (his) (her) behalf?

[7.] Finally, do any of you know of any reason why you would not be impartial in this case, and be able to render a true and just verdict, based solely on the evidence and the law?

Here the judge should ask any other questions thought appropriate on voir dire.

If there is an affirmative response from any of the jurors, the judge should make a determination after any necessary further questioning whether the juror stands indifferent, and if not, the juror should be excused. If any juror seated in the jury box is excused, that juror should be replaced with an additional juror chosen at random by the clerk.

General Laws c. 234, § 28 requires the judge to pose Questions 1-6 to the venire upon motion of either party. In addition, Mass. R. Crim. P. 20(b)(1) apparently requires the court to pose Questions 1-4 sua sponte, even without request by the parties. Question 7 is recommended as a final, summarizing question, but is not required.

As to when individual voir dire of prospective jurors, instead of collective inquiry of the entire venire, is required, see note 2, infra.

It appears that the panel stands indifferent.

Would counsel approach the side-bar.

***At side-bar*: Please keep your voices down so that the jury does not overhear. Are there any challenges for cause?**

Here both sides should exercise any challenges for cause. If any seated juror is excused, that juror should be replaced with an additional juror chosen at random by the clerk. When all challenges for cause have been resolved, the parties may exercise their peremptory challenges.

Massachusetts R. Crim. P. 20(c)(1) provides that in a case to be tried to a jury of six persons, each defendant is entitled to two peremptory challenges. In the case of a juvenile charged with delinquency in which the Commonwealth has proceeded by indictment, the juvenile is entitled to a jury of twelve persons, G.L. c. 119, § 56(e), and each accused juvenile is entitled to four peremptory challenges (or in the case of a life felony, twelve peremptory challenges plus one additional challenge for each alternate juror empanelled). It is undecided whether a judge may discretionarily allow additional peremptory challenges. See *Commonwealth v. Lattimore*, 396 Mass. 446, 450, 486 N.E.2d 723, 726 (1985).
Superior Court Rule 6 generally requires the judge to fill the jury box with the requisite number of indifferent jurors and alternates before requiring the parties to exercise any peremptory challenges, and requires the Commonwealth to exercise its peremptory challenges before the defense does so. It appears that Superior Court Rule 6 governs District Court jury sessions. See G.L. c. 218, § 27A(e) ("Trials by juries of six persons shall proceed in accordance with the provisions of law applicable to trials by jury in the superior court . . . ."); *Commonwealth v. Johnson,* 417 Mass. 498, 505 n.7, 631 N.E.2d 1002, 1007 n.7 (1994) ("Rule 6 . . . is the method of jury selection to be used by trial courts in the Commonwealth"). Individual judges are not free to disregard the requirements of Rule 6. *Commonwealth v. Brown*, 395 Mass. 604, 606, 481 N.E.2d 469, 471 (1985). Even the two exceptions found in Rule 6 itself ("except when an individual voir dire is conducted" and "unless specially ordered otherwise in a particular case") do not allow a judge to order a different method at will, but only "if a judge wishes to expand the parties' rights beyond those provided for by the rule or . . . when a judge is confronted with a special or exceptional situation . . . [and such an order] cannot be upheld in the absence of special or exceptional circumstances which are expressly noted by the judge or clearly apparent on the face of the record." *Commonwealth v. Ptomey*, 26 Mass. App. Ct. 491, 494-495, 529 N.E.2d 400, 402-403 (1988). See Johnson, 417 Mass. at 507, 631 N.E.2d at 1008.

Rule 6 permits (but does not require) the so-called Walker method (sometimes mistakenly called the "struck" method), in which the judge first qualifies as indifferent a number of venire persons equal to the number of jurors and alternates needed plus the total number of peremptory challenges that may be exercised by both parties. Johnson, 417 Mass. at 505-508, 631 N.E.2d at 1007-1009. See *Commonwealth v. Walker*, 379 Mass. 297, 299 n.1, 397 N.E.2d 1105, 1106 n.1 (1979).

Is the Commonwealth content?

Here the Commonwealth should exercise its peremptory challenges, and any challenged jurors should be replaced. "The Commonwealth shall be entitled to as many peremptory challenges as equal the whole number to which all the defendants in the case are entitled." Mass. R. Crim. P. 20(c)(1). When the Commonwealth ceases to challenge:

Is the defendant content?

Here the defense should exercise its peremptory challenges, and any challenged jurors should be replaced.

***If any jurors have been excused upon the defendant's challenge*:** **Is the Commonwealth content with the new jurors who have been chosen?**

Here the Commonwealth may challenge only the newly-drawn jurors. If the Commonwealth does so: Is the defendant content with the new jurors who have been chosen? Here the defendant may challenge only the newly-drawn jurors.

This alternating procedure should be continued until both parties are content or have exhausted their peremptory challenges.

We have a jury. The rest of the jurors may return to the jury pool, with the Court's thanks and those of the parties.

***Clerk* :** **Members of the jury, please rise and raise your right hands. You shall well and truly try the issue between the Commonwealth and the defendant, according to the evidence, so help you God. Please be seated.**

If a juror prefers to omit reference to the Deity, he or she may be sworn by substituting the words: "under the penalties of perjury" for the words: "so help you God." See G.L. c. 233, § 19.

***Clerk or Judge* :** **Juror No. , in seat number , the Court appoints you Foreman (Forelady) of the jury and asks that you exchange seats with Juror No.___, in seat one.**

If the judge will precharge the jury, it should be done at this point. See Instructions 1.120 or 1.140.

***Clerk* :** **Members of the jury, hearken to the complaint.**

Here read the complaint.
In reading the complaint, the clerk must not disclose to the jury: (1) the potential penalties for any offense, see *Commonwealth v. Bart B*., 424 Mass. 911, 913, 679 N.E.2d 531, 533-534 (1997); *Commonwealth v. Smallwood*, 379 Mass. 878, 882-883, 401 N.E.2d 802, 805 (1980); *Commonwealth v. Buckley*, 17 Mass. App. Ct. 373, 375-377, 458 N.E.2d 781, 783-784 (1984); (2) that the defendant is charged as a subsequent offender, G.L. c. 278, § 11A; (3) that there are alternate ways of committing the offense that are charged in the complaint but inapplicable to the case being tried, *Commonwealth v. Johnson*, 45 Mass. App. Ct. 473, 477 n.3, 700 N.E.2d 270, 272 n.3 (1998); or (4) any alias that is unconnected to the offense and unnecessary to establish the defendant's identity as the perpetrator, *Commonwealth v. Martin*, 57 Mass. App. Ct. 272, 275, 782 N.E.2d 547, 550 (2003).

To this complaint the defendant pleads that he (she) is not guilty, and for trial places himself (herself) upon the country, which country you are. You are now sworn to try the issue. If he (she) is guilty, you will say so. If he (she) is not guilty, you will say so and no more. Members of the jury, hearken to the evidence.

Here the prosecutor may present an opening statement, if there is to be one. Defense counsel has the option whether or not to offer an opening statement at this point. The prosecutor should then call the first witness.

Clerk **:** **Will all the witnesses who will testify in this case please stand and raise their right hands. Do each of you solemnly swear or affirm that the evidence you will give in the cause now in hearing will be the truth, the whole truth, and nothing but the truth, so help you God?**

If a witness prefers to omit reference to the Deity, the words "under the penalties of perjury" may be substituted for the words "so help you God." See G.L. c. 233, § 19.

NOTES:

1. **Anonymous jury**. On the propriety of impaneling an anonymous jury, see *Commonwealth v. Angiulo*, 415 Mass. 502, 615 N.E.2d 155 (1993). On the propriety of limiting public reference to venire members to number rather than name, see *Commonwealth v. Howard*, 46 Mass. App. Ct. 366, 368 n.2, 706 N.E.2d 303, 305 n.2 (1999).

2. **Individual voir dire of prospective jurors.** General Laws c. 234, § 28 provides that a collective examination of the venire is insufficient and that venire members must be examined individually and outside the presence of other jurors:

"if it appears that, as a result of the impact of considerations which may cause a decision or decisions to be made in whole or in part upon issues extraneous to the case, including, but not limited to, community attitudes, possible exposure to potentially prejudicial material or possible preconceived opinions toward the credibility of certain classes of persons, the juror[s] may not stand indifferent."

To require the judge to conduct an individual voir dire of jurors, "[t]he defendant must show that there is some basis for finding that a substantial risk of extraneous influences on the jury exists, and that there is a substantial risk that jurors would be influenced by such considerations." *Commonwealth v. Ashman*, 430 Mass. 736, 739, 723 N.E.2d 510, 513 (2000). Such a request may be communicated by counsel, and the judge need not conduct a colloquy with the defendant personally. *Commonwealth v. Ramirez*, 407 Mass. 553, 557, 555 N.E.2d 208, 211 (1990), overruling *Commonwealth v. A Juvenile (No. 2)*, 396 Mass. 215, 485 N.E.2d 170 (1985). The judge is not required to raise the question of individual voir dire sua sponte. *Commonwealth v. Guess*, 23 Mass. App. Ct. 208, 211, 500 N.E.2d 825, 827-828 (1986).

"Under G.L. c. 234, § 28, the judge must examine the jurors individually when it appears that issues extraneous to the case might affect the jury's impartiality. Ordinarily, it is for the judge to determine whether the jury might be influenced by an extraneous issue." *Commonwealth v. Grice*, 410 Mass. 586, 588, 574 N.E.2d 367, 368 (1991). There are four exceptions, where the Supreme Judicial Court has held that, as a matter of law, the judge must question potential jurors individually if the defense so requests:

• in cases involving **sexual offenses against minors**, on request the judge must question each potential juror individually as to whether that juror was the victim of a childhood sexual offense. *Commonwealth v. Flebotte*, 417 Mass. 348, 353-356, 630 N.E.2d 265, 268-270 (1994).

• in cases involving **interracial sexual offenses against minors**, on request the judge must examine potential jurors individually about possible racial or ethnic prejudice. *Commonwealth v. Hobbs*, 385 Mass. 863, 873, 434 N.E.2d 633, 641 (1982).

• in cases involving **interracial rape**, on request the judge must examine potential jurors individually about possible racial or ethnic prejudice. *Commonwealth v. Sanders*, 383 Mass. 637, 640-641, 421 N.E.2d 436, 438 (1981).

• in cases involving **interracial murder**, on request the judge must examine potential jurors individually about possible racial or ethnic prejudice. *Commonwealth v. Young*, 401 Mass. 390, 398, 517 N.E.2d 130, 135 (1987).

Some other common situations include:

• **Lack of criminal responsibility (insanity defense).** Where the defendant indicates that his or her lack of criminal responsibility may be placed in issue and so requests, the judge must inquire individually of each potential juror "whether the juror has any opinion that would prevent him or her from returning a verdict of not guilty by reason of insanity, if the Commonwealth fails in its burden to prove the defendant criminally responsible. It will be in the judge's discretion whether to ask more detailed questions concerning a juror's views of the defense of insanity." *Commonwealth v. Seguin*, 421 Mass. 243, 248-249 & n.6, 656 N.E.2d 1229, 1233 & n.6 (1995), cert. denied, 516 U.S. 1180 (1996). For additional information, see the notes to Instruction 9.200 (Lack of Criminal Responsibility).

• **Mental impairment short of insanity**. Individual voir dire is in the judge's discretion, and is not automatically required, when there will be evidence of mental illness or impairment but no claim of lack of criminal responsibility. *Commonwealth v. Ashman*, 430 Mass. 736, 738-740, 723 N.E.2d 510, 513-514 (2000). For additional information, see the note to Instruction 9.220 (Mental Impairment Short of Insanity).

• **Racial bias**. Questions to prospective jurors designed to discover possible racial prejudice are not constitutionally required in every case where the defendant is of a minority race, but only where there are factors that make the defendant a "special target for racial prejudice." *Commonwealth v. Ross*, 363 Mass. 665, 296 N.E.2d 810 (1973), cert. denied, 414 U.S. 1080 (1973). Determining this is usually in the judge's discretion except in the three situations, supra, where the Supreme Judicial Court has held that individual voir dire is required on request as a matter of law (interracial sexual offenses against children, interracial rape and interracial murder). "However, as a practical matter, when a motion that prospective jurors be interrogated as to possible prejudice is presented, we believe the trial judge should grant that motion" in a trial that involves a crime of violence if the defendant and the victim are of different races. *Commonwealth v. Lumley*, 367 Mass. 213, 216, 327 N.E.2d 683, 686 (1975).

• **Sexual orientation bias**. Where there is a possibility of bias against a defendant or a victim based on sexual orientation, the matter "requires careful attention" and the better practice is to conduct an individual voir dire of each potential juror. *Commonwealth v. Plunkett*, 422 Mass. 634, 640-641, 664 N.E.2d 833, 838(1996). "When faced with a question designed to detect such bias, a judge should make a brief examination of the facts of the case to determine if the question is relevant and important and whether sufficient prejudice is manifested to warrant such an inquiry. A judge may also assume that the party who desires the inquiry has evaluated the risk that the inquiry may activate latent bias in some jurors and insult others without uncovering bias in those jurors who refuse to acknowledge their bias. The ultimate

decision as to whether the question should be asked lies within the judge's sound discretion, but the judge must be assisted in this decision by the party seeking the inquiry. That party bears the burden of demonstrating the importance and relevance of the question and the risk of prejudice inuring from its omission by furnishing the judge with a brief summary of the evidence to be presented, and an affidavit or other means indicating the manner and means by which the subject will be introduced or play a role in the case. If the judge determines that the question should be asked, the judge may then inquire of the jury collectively, individually, or may simply cover the matter by incorporating the subject into his or her preliminary statement about the case before asking prospective jurors the mandated question about bias or prejudice under G.L. c. 234, § 28 . . . ." *Toney v. Zarynoff's, Inc.,* 52 Mass. App. Ct. 554, 556-561, 755 N.E.2d 301, 306-309 (2001) (wrongful death action).

• **Victim of violent crime**. The Confidential Juror Questionnaire completed by prospective jurors asks them to "[d]escribe briefly any involvement (past or present) as a party or a victim in a civil or criminal case by you or any member of your immediate family." In a case that involves a crime of violence, the Supreme Judicial Court "would expect" judges on request additionally to ask the venire collectively whether they or a member of their immediate family had ever been the victim of a violent crime. "[A]lthough not required, it has long been common practice to do so on request." *Commonwealth v. Lopes*, 440 Mass. 731, 735-738 & n.9, 802 N.E.2d 97, 101-104 & n.9 (2004).

When individual voir dire is required, G.L. c. 234, § 28 mandates that it be done individually and outside the presence of other impaneled or prospective jurors. Posing questions collectively to the venire and then individually interrogating jurors who come forward is insufficient. Individual voir dire may be done at the side bar if other jurors cannot overhear, but it is preferable to question jurors individually outside the presence of impaneled jurors and other venire members. *Commonwealth v. Shelley*, 381 Mass. 340, 353 n.12, 409 N.E.2d 732, 740 n.12 (1980).

3. **Impanelment errors**. General Laws c. 234, § 32 provides that no irregularity in empanelment is reversible error unless objection is made before the verdict or the defendant "has been injured thereby." See *Commonwealth v. Figueroa*, 451 Mass. 566, 568-573, 887 N.E.2d 1040, 1043-1046 (2008) (unobjected-to failure to pose required questions to venire); *Commonwealth v. Fudge*, 20 Mass. App. Ct. 382, 387-389, 481 N.E.2d 199, 203-204 (1985) (same).

4. **Jurors' criminal records**. The CORI law (G.L. c. 6, § 167) permits a prosecutor to check the criminal records of jurors or prospective jurors. If the prosecutor checks potential jurors' criminal records prior to trial pursuant to G.L. c. 234A, § 67, the results must be disclosed to defense counsel at the start of impanelment. If the prosecutor does so at the start of trial, the results must be shared immediately. Defense counsel may use such information only in connection with the case and must return it to the court after impanelment. The SJC has not yet set forth more detailed procedures and leaves them to the discretion of trial judges. *Commonwealth v. Cousin*, 449 Mass. 809, 815-819, 873 N.E.2d 742 (2007).

5. **Police witnesses**. "[O]rdinarily a trial judge should comply with a defendant's request to ask prospective jurors whether they would give greater credence to police officers than to other witnesses, in a case involving police officer testimony," but a judge is required to do so only there is a substantial risk that the case would be decided in whole or in part on the basis of extraneous issues, such as "preconceived opinions toward the credibility of certain classes of persons." *Commonwealth v. Sheline*, 391 Mass. 279, 291, 461 N.E.2d 1197, 1205-1206 (1983).

6. **Smoking in the jury room**. While G.L. c. 234, § 34C permits smoking in the jury room if a majority of the jurors consent, a subsequently-adopted statute provides that "[n]o person shall smoke in any courthouse . . . except in an area which has specifically been designated as a smoking area. An area shall be designated as a smoking area only if nonsmoking areas of sufficient size and capacity are available to accommodate nonsmokers." G.L. c. 270, § 22.

1.120 PRELIMINARY INSTRUCTION TO JURY BEFORE TRIAL

Revised January 2013

Members of the jury, I am about to make some general remarks to introduce you to the trial of this case and to acquaint you with some of the general legal principles that will control your deliberations. These remarks are not a substitute for the more detailed instructions on the law which I will give you at the conclusion of the trial before you retire to consider your verdict.

Complaint. **This is the trial of a criminal case. The defendant, *[name]*, is charged in a complaint which reads as follows:**

Here read the complaint.

In reading the complaint, do not disclose to the jury: (1) the potential penalties for an offense, see *Commonwealth v. Bart B*., 424 Mass. 911, 913, 679 N.E.2d 531, 533 (1997); *Commonwealth v. Smallwood*, 379 Mass. 878, 882-883, 401 N.E.2d 802, 805 (1980); *Commonwealth v. Buckley*, 17 Mass. App. Ct. 373, 375-377, 458 N.E.2d 781, 783-784 (1984); (2) that the defendant is charged as a subsequent offender, G.L. c. 278, § 11A; or (3) that there are alternate ways of committing the offense that are charged in the complaint but inapplicable to the case being tried, *Commonwealth v. Johnson*, 45 Mass. App. Ct. 473, 477 n.3, 700 N.E.2d 270, 272 n.3 (1998).

You should clearly understand that this piece of paper, called a "complaint," is not itself any evidence of guilt. It is merely a formal manner of accusing a person of a crime in order to bring him or her to trial. You must not draw any inference of guilt from this complaint or the fact that the defendant has been formally charged.

Presumption of innocence and burden of proof. **In any criminal case, the defendant is presumed to be innocent unless he or she is proven guilty beyond a reasonable doubt. The law requires the prosecutor — whom we refer to in court terminology as the "Commonwealth" — to prove that the defendant is guilty beyond a reasonable doubt. The law does *not* require the defendant to prove his (her) innocence or to produce any evidence.**

At the end of trial you must find the defendant not guilty unless the Commonwealth has proved to you beyond a reasonable doubt that the defendant has committed the offense(s) that he (she) is charged with.

Elements of the crime. **As you have heard, the defendant is charged with the crime(s) of _____ . The Commonwealth must prove each of the elements which make up (that crime) (those crimes). Those elements are as follows:**

Here set out the elements of each offense.

The trial will proceed in the following order:

Opening statements. **First, the attorneys for the Commonwealth and for the defendant will have an opportunity to present opening statements. After the assistant district attorney makes his (her) opening statement for the prosecution, the defense attorney may choose to make an opening statement immediately, or may postpone doing so until later, or may decide not to do so at all, since the burden of proof is on the Commonwealth.**

The opening statements of counsel are not evidence. They are somewhat like road maps from the attorneys to explain to you what they expect will lie ahead. We have opening statements to assist you to understand what the evidence is expected to be.

Presentation of evidence. **Next, the prosecution will introduce evidence in support of the charge(s) in the complaint. After that, the defendant may present evidence in his (her) behalf if he (she) wishes to do so, but he (she) is not obliged to do so. Remember, the burden of proof is always on the Commonwealth to prove that the defendant is guilty. The law does not require any defendant to prove his or her innocence or to produce any evidence at all.**

Closing arguments. **After all the evidence, each side will have an opportunity to offer you arguments about what conclusions you might draw from the evidence. I again remind you that the closing arguments of the attorneys, like their opening statements, are *not* evidence. We have closing arguments to assist you to understand the evidence and what each party suggests that the evidence means.**

Jury charge. **Finally, after all the evidence and the attorneys' arguments, I will instruct you in detail on the principles of law which you are to apply in your deliberations when you retire to consider your verdict. Your verdict must be unanimous.**

Judge's function. **Let me now speak with you briefly about your role as the jury and mine as the judge in this case. My responsibility is to see that this case is tried in a way that is orderly, fair and efficient. It is also my function to decide any questions of law that come up during the trial, and to instruct you about the law that applies to this case. It is your duty to accept the law as I state it to you.**

Jury's function. **Your function as the jury is to determine the facts. You are the sole and exclusive judges of the facts. You alone determine what evidence to believe, how important any evidence is that you do believe, and what conclusions all the believable evidence leads you to. You will have to consider and weigh the testimony of all the witnesses who will appear before you, and you alone will determine whether to believe any witness and the extent to which you believe any witness. It is part of your responsibility to resolve any conflicts in testimony that may arise during the course of the trial and to determine where the truth lies. Ultimately, you must determine whether or not the Commonwealth has proved the charge(s) beyond a reasonable doubt.**

Disregard any perceived judicial opinion as guilt. **During the course of the trial, I will be speaking with both attorneys and ruling on their motions and objections. I may pose questions to witnesses, and I will be instructing you on the law. When I do so, you are not to take any of my words or expressions as any indication of my own opinion as to the defendant's guilt or innocence. If you come to believe during the course of the trial that I have an opinion as to any disputed fact in this case, you are to disregard it. That is *your* area of responsibility.**

What constitutes evidence. **You must decide this case solely on the evidence presented in the courtroom. This includes the sworn testimony of witnesses, any exhibits that I admit into evidence, any facts which I tell you have been agreed to by both sides, and any facts which I indicate that you may take to be a matter of common knowledge.**

If there will be a view: **You may also consider anything you observe about the layout of the scene of the alleged crime when we go to visit it.**

Questions to witnesses, no matter how artfully phrased, are not evidence. Only the answers which you receive from the witnesses who are testifying under oath are evidence. If one of the attorneys or I refer to some part of the evidence and that does not coincide with your own recollection, it is your recollection which you are to follow in your deliberations.

Objections. **During the trial, the attorneys may object to questions or statements that may not be admissible under our rules of evidence. That is their responsibility, and you should not look negatively in any way on a lawyer who makes such objections.**

If I agree with an objection to a question — the term we use is "sustained" — you are to disregard that question and you are not to speculate as to what the answer might have been. In the same way, you are to disregard any evidence that I tell you is stricken from the record. If I reject — or "overrule" — an objection, I will permit the witness to answer and you *may* consider that answer. You are not to give that answer any more weight than you would have if no objection had been made.

***Disregard sentencing consequences*.** **You are not to concern yourself with what punishment the defendant might receive if he (she) is convicted. The duty of imposing sentence in the event of conviction rests exclusively with me as the judge, and that issue should not influence your deliberations in any way. You should weigh the evidence in this case and determine the guilt or innocence of the defendant based solely upon the evidence, without any consideration of the matter of punishment.**

***Communicating with the judge*.** **If it becomes necessary during this trial to communicate with me, you may send me a signed note through the court officer. This should normally be done by your foreman (forelady). During this case you may not communicate with the lawyers or the witnesses or the defendant at all.**

Bear in mind also that you are not to tell anyone how the jury stands, numerically or otherwise, on the question of the guilt or innocence of the defendant, until after you have reported a unanimous verdict. You should not even volunteer such information to me unless I directly ask for certain information here in the courtroom.

Discussion prohibited. **Until this case is submitted to you after my final instructions, you must not discuss it with anyone – not even with the other jurors. Discussion can lead to conclusions being drawn or positions being taken prematurely. Fairness requires you to keep an open mind about everything until your deliberations.**

You may only consider evidence presented to you in the courtroom. You may not conduct any investigation on your own; nor may you engage in any research on the law that might apply in this case.

You have been chosen precisely because you are impartial. As soon as you take on the role of investigator or lawyer, you become an advocate and lose your ability to be impartial.

You may not use outside electronic devices such as cell phones or computers nor the internet, social media, news reports, maps, legal texts or dictionaries to learn things outside of what is presented here.

You may not discuss this case with anyone, not even with your fellow jurors. You must not talk to anyone about this case in person, by telephone, the internet, email, or social media. This includes family and friends.

Commonwealth v. Werner, 81 Mass. App. Ct. 689, 700-701, 967 N.E.2d 159, 168 (2012).

If a caution on extraneous publicity is appropriate: **As I have told you, you must decide this case solely on the evidence presented in the courtroom. You must completely disregard any newspaper, television or radio reports about this case which you might encounter. It would be unfair to consider such reports, since they are not evidence and the parties will have no opportunity to challenge their accuracy or to explain them. Please try to avoid such news reports. If any come to your attention, it is your sworn responsibility to put them aside immediately and to direct your attention elsewhere.**

Conclusion. **I know that you will try this case according to the oath which you have taken as jurors, in which you promised that you would "well and truly try the issue between the Commonwealth and the defendant according to the evidence." If you follow that oath, and try the issues without fear or prejudice or bias or sympathy, you will arrive at a true and just verdict.**

This and the following alternate Instruction 1.140 are provided as optional and general pretrial instructions to the jury. Any part of the instructions may be used as needed, depending upon what instructions the jurors have previously received in the jury pool.

Commentators have noted the advantage of "precharging" the jury before evidence is taken, so that jurors will understand their function and the general significance of the evidence as it is offered. See Jury Trial Manual for Criminal Offenses Tried in the District Court § 2.31. In addition, preliminary instructions will be considered on appeal in deciding whether the instructions as a whole were correct, proper and fair. *Commonwealth v. Cintron*, 438 Mass. 779, 786, 784 N.E.2d 617, 623 (2003) (no requirement that jury be sworn prior to preliminary instructions); *Commonwealth v. Green*, 25 Mass. App. Ct. 751, 753, 522 N.E.2d 424, 425 (1988).

The caution against seeking outside information is pursuant to the Trial Court's "Policy on Juror Use of Personal Communication Devices" (March 26, 2010), which requires judges to inform jury pools and seated jurors that they may not use a computer, cellular phone, or other electronic device with communication capabilities during trial or jury deliberations, or to obtain or disclose information relevant to the case when they are not in court.

1.130 DISCUSSION PROHIBITED

January 2013

This instruction is included in Instruction 1.120 (Preliminary Instruction to Jury Before Trial). Therefore, this instruction need not be given if Instruction 1.120 is used.

Until this case is submitted to you after my final instructions, you must not discuss it with anyone – not even with the other jurors. Discussion can lead to conclusions being drawn or positions being taken prematurely. Fairness requires you to keep an open mind about everything until your deliberations.

You may only consider evidence presented to you in the courtroom. You may not conduct any investigation on your own; nor may you engage in any research on the law that might apply in this case.

You have been chosen precisely because you are impartial. As soon as you take on the role of investigator or lawyer, you become an advocate and lose your ability to be impartial.

You may not use outside electronic devices such as cell phones or computers nor the internet, social media, news reports, maps, legal texts or dictionaries to learn things outside of what is presented here.You may not discuss this case with anyone, not even with your fellow jurors. You must not talk to anyone about this case in person, by telephone, the internet, email, or social media. This includes family and friends.

Commonwealth v. Werner, 81 Mass. App. Ct. 689, 700-701, 967 N.E.2d 159, 168 (2012).

1.140 ALTERNATE PRELIMINARY INSTRUCTION TO JURY BEFORE TRIAL

2009 Edition

Members of the jury, I assume that this is your first jury service. Allow me to make a few observations which you may find helpful in understanding what you are about to participate in.

Discussing the case. **Please do not discuss the case with anyone during the course of the trial, either in or out of court. The human mind being what it is, if you were to discuss the case even among yourselves, you would be engaged in a decision making process. We ask that you maintain an open mind. The case is not over until you have heard from all of the witnesses, the arguments of the lawyers and my charge as to the law. Only then is it proper for you to discuss the case during the course of your deliberations.**

Objections. **During the course of the trial, the attorneys may object to some questions or answers. In raising objections they are performing their duty to represent their respective clients. In making my rulings on those objections, I am performing *my* function. You should draw no inference for either of the parties, either favorable or unfavorable, as a result of any ruling that I may make.**

Questions and statements by judge and counsel. **In the course of the trial I may ask a question of a witness. Usually I would do so only to eliminate some confusion. I consider it reasonable for me to infer that if I am confused, one or more of you may also be. You are to draw no inference for either side, favorable or unfavorable, because of any question which I may put to a witness, and you are not to place any emphasis on the fact that the judge, and not one of the attorneys, asked the question. What I say in the course of the trial, and what the attorneys say in their opening and closing statements, is not evidence in this case. Questions to witnesses, no matter how artfully phrased, are not evidence. Only the answers which you receive from witnesses who are testifying under oath are evidence, along with any exhibits which I tell you are in evidence.**

Presumption of innocence. **In any criminal case, the defendant is presumed to be innocent unless he or she is proven guilty beyond a reasonable doubt.**

Offense(s) charged. **The defendant is charged with the crime(s) of: _____ . The essential elements of the crime(s) are: _____ .**

Burden of proof. **The Commonwealth has the burden to prove the existence of each of those essential elements beyond a reasonable doubt. During the trial the attorneys, in questioning witnesses, may dwell upon incidental matters, such as weather conditions, or the color of a motor vehicle. The Commonwealth is *not* obliged to prove such unessential matters beyond a reasonable doubt, although you may consider a witness's answers even about unessential matters when you determine that witness's credibility.**

Conclusion. **At the conclusion of the trial I shall charge you further on the law to be applied in this case. Please give the proceedings your full attention so that you will have a complete understanding of the evidence and reach a true and just verdict.**

1.160 NOTETAKING BY JURORS

2009 Edition

Any jurors who wish to do so may take notes during the course of this trial. Some jurors may feel that notes are helpful, particularly if the case involves any complicated issues. Of course, you are not required to take notes, and some of you may feel that taking notes may be a distraction and interfere with hearing and evaluating all the evidence.

If you do take notes, I suggest you take them sparingly and keep them brief. Don't try to summarize *all* of the testimony. Notes can help you remember specific testimony, like measurements, or times or distances, or help you to keep straight the names or relationships of people in the case.

But remember — you must decide whether and how much you believe the witnesses, and an important part of that is your observation of each person's appearance on the witness stand. Don't let note taking distract you from those important observations. Most of your work in this trial must be done with your eyes, your ears and your mind, not with your fingers.

When you get to the jury room, remember that your notes are only an aid to your memory, and not a substitute for what you actually remember. Don't use your notes to try to persuade your fellow jurors; your notes are not official transcripts. Whether you take notes or not, you must rely on your own memory in the jury room. Don't be influenced by the notes of other jurors.

If you do take notes, please keep them private and don't show them to anyone but your fellow jurors. In order to help preserve the confidentiality of your deliberations, after you have reached a verdict I will direct the court officers to collect and destroy any notes that have been made in this case.

This instruction is recommended when notetaking is permitted by the judge. See Jury Trial Manual for Criminal Offenses Tried in the District Court § 2.23. It is adapted from E.J. Devitt and C.B. Blackmar, Federal Jury Practice and Instructions § 10.06 (Supp. 1980), which was recommended in *Commonwealth v. Wilborne*, 382 Mass. 241, 253, 415 N.E.2d 192, 200 (1981), and *Commonwealth v. St. Germain*, 381 Mass. 256, 267 n.21, 408 N.E.2d 1358, 1367 n.21 (1980). Superior Court Rule 8A requires that jurors' notes be destroyed upon the recording of the verdict. It appears that this rule governs District Court jury sessions. See G.L. c. 218, § 27A(e) ("Trials by juries of six persons shall proceed in accordance with the provisions of law applicable to trials by jury in the superior court . . . ."); *Commonwealth v. Johnson*, 417 Mass. 498, 505 n.7, 631 N.E.2d 1002, 1007 n.7 (1994) (Superior Court Rule 6 on peremptory challenges "is the method of jury selection to be used by trial courts in the Commonwealth").

The judge has discretion to restrict notetaking to the portion of the jury instructions dealing with the elements of the offenses. *Commonwealth v. Dykens*, 438 Mass. 827, 830-835, 784 N.E.2d 1107, 1112-1115 (2003).

1.180 QUESTIONS TO WITNESSES FROM JURORS

2009 Edition

At the end of each witness's testimony in this case, we are going to give you as jurors the opportunity to suggest any questions that you would like us to pose to that witness. The court officer will make some paper available to you, and if you have such a question, you should write it down. Please don't discuss your questions among yourselves, but write down any questions that you as an individual juror may have for the witness. And please write your juror number on your questions, in case I need to ask you to clarify them.

After the attorneys have questioned each witness, I will ask the court officer to collect any written questions that you have and pass them to me. I will then confer privately with the attorneys and determine whether the question is permitted by our rules of evidence. If it is, I will then pose that question to the witness.

Now there are a few things you must keep in mind about such questions. First of all, you should limit your questions to important matters, or something in a witness's testimony that you think requires clarification, so that we don't get bogged down or distracted from the central issues.

You also have to understand in advance that I may have to alter or refuse a question if it does not comply with our rules of evidence. As I have explained, those rules are not intended to keep information from you, but to make sure that all the information you are given is presented in a manner that you can fairly evaluate its worth. If I change, or I decline to ask, a question that you have suggested, you must not be offended or hold that against either of the parties.

Finally, you must not give the answers to your own questions any disproportionate weight. You will have to consider *all* the evidence to arrive at a true verdict.

"[T]he practice of allowing jurors to question witnesses has the potential for introducing prejudice, delay, and error into the trial, and should be utilized infrequently and with great caution." When a judge allows such questioning, the judge must inform the parties and give them an opportunity to be heard in opposition or to suggest the procedure to be followed. Before jurors are permitted to ask questions, and again in the final instructions, the judge should inform jurors: (1) that they will be given the opportunity to pose questions; (2) that such questions should be written down and passed to the judge; (3) that such questions should be limited to important matters; (4) that the judge may have to alter or refuse questions that do not comply with the rules of evidence; (5) that if a particular question is refused or altered, the juror who posed the question must not be offended or hold that against either party; and (6) that jurors must not give answers to their own questions a disproportionate weight. The judge and the attorneys should discuss the questions, and any objections made and ruled on, outside the hearing of the jury, before they are posed. To avoid delay, the judge might have all jurors submit their questions at one time, at the conclusion of a witness's examination. The parties should be given the opportunity for further examination after juror questions have been answered. *Commonwealth v. Urena*, 417 Mass. 692, 701-703, 632 N.E.2d 1200, 1206 (1994). See also *United States v. Sutton*, 970 F.2d 1001 (1st Cir. 1992).

> "We adhere to the . . . procedures recommended in *Commonwealth v. Urena* . . . with some modifications based on the growing experience with the practice in this and other jurisdictions. (1) The judge should instruct the jury that they will be given the opportunity to pose questions to witnesses.

We suggest that the jury also be instructed not to let themselves become aligned with any party, and that their questions should not be directed at helping or responding to any party. Rather, they must remain neutral and impartial, and not assume the role of investigator or of advocate. (2) Jurors' questions need not be limited to 'important matters,' as we stated in Urena, but may also seek clarification of a witness's testimony. Reining in excessive questioning may present the greatest challenge to a judge . . . . (3) The judge should emphasize to jurors that, although they are not expected to understand the technical rules of evidence, their questions must comply with those rules, and so the judge may have to alter or to refuse a particular question. (4) The judge further should emphasize that, if a particular question is altered or refused, the juror who poses the question must not be offended or hold that against either party. (5) It is important that the jurors are told that they should not give the answers to their own questions a disproportionate weight. We suggest that the judge also instruct jurors not to discuss the questions among themselves but, rather each juror must decide independently any questions he or she may have for a witness. (6) These instructions should be repeated during the final charge to the jury before they begin deliberations. (7) All questions should be submitted in writing to the judge. We suggest that the juror's identification number be included on each question. This will enable the judge to address problems unique to a juror, as by voir dire, or to give a curative instruction without exposing the entire jury to any potential prejudice. On submission of questions, counsel should have an opportunity, outside the hearing of the jury, to examine the questions with the judge, make any suggestions, or register objections. This may be done at sidebar, or the jury may be removed at the judge's discretion. The judge should rule on any objections at this time, including any objection that the question touches on a matter that counsel purposefully avoided as a matter of litigation strategy, and that, if asked, will cause particular prejudice to the party. Finally, counsel should be given the opportunity to reexamine a witness after juror interrogation. The scope of the examination should ordinarily be limited to the subject matter raised by the juror question and the witness's answer. The purpose of reexamination is two fold. First, it cures the admission of any prejudicial questions or answers; and second, it prevents the jury from becoming adversary in its interrogation" (citations and internal quotation marks omitted). *Commonwealth v. Britto*, 433 Mass. 596, 613-614, 744 N.E.2d 1089, 1105-1106 (2001).

While "[r]eining in excessive questioning may present the greatest challenge to a judge," Id., in some technically complex cases allowing juror questions in order to clarify the evidence may reduce delay and confusion during jury deliberations.

1.200 RECORDATION OF PROCEEDINGS

Members of the jury, these proceedings are being recorded on the recorder that you see on the clerk's bench here in front of me. This generally produces a satisfactory record, and is considerably less expensive to you as taxpayers than the cost of a stenographer.

However, for the benefit of the lawyers and any witnesses who will be testifying, I want to mention that the microphones that are in the witness box and at the lawyers' tables are very focused, to avoid picking up background noise. For that reason, it is important to speak directly into them.

There is a court rule that makes it the responsibility of the attorneys to work with me to produce an accurate record. They should bring to my attention whenever someone is not using the microphone properly, so that I can correct it.

District Court Special Rule 211(A)(3) provides that "[c]ounsel shall be responsible for assisting in the creation of an audible record by properly using the microphones provided. Counsel shall speak with sufficient clarity and in sufficient proximity to the microphones to ensure an audible record, and shall be responsible for requesting the judge, when necessary, to instruct other counsel, witnesses or others as to the proper use of the microphones in order to ensure an audible record."

1.220 LENGTHY BENCH OR LOBBY CONFERENCES

January 2009

From time to time during the trial it is necessary for me to talk with the lawyers out of your hearing, either by having a conference at the judge's bench while you are present in the courtroom, or by calling a recess.

The purpose of these conferences is not to keep relevant information from you, but to decide how certain evidence is to be treated under the rules of evidence and to avoid confusion and error.

Please be patient while these are going on, and understand that while you are waiting, we are working. We will do whatever we can to keep the number and length of these conferences to a minimum.

The model instruction is based in part on *Manual of Model Jury Instructions for the Ninth Circuit* § 2.02 (1985 ed.)

1.240 SEPARATION OF THE JURY

2009 Edition

Until this case is submitted to you, you must not discuss it with anyone, even with your fellow jurors. After it is submitted to you, you may discuss it only in the jury room with your fellow jurors.

It is important that you keep an open mind and not decide any issue in the case until the entire case has been submitted to you along with my instructions as to the law.

Such an instruction should be given on any separation of the jury before the case is submitted for the jury's consideration. *Commonwealth v. Benjamin*, 369 Mass. 770, 772, 343 N.E.2d 402, 404 (1976). See *Commonwealth v. White*, 147 Mass. 76, 80, 16 N.E. 707, 711 (1888); Jury Trial Manual for Criminal Offenses Tried in the District Court § 2.62.

NOTES:

1. **Caution against unauthorized views by jurors.** If there is any likelihood that jurors may undertake an unauthorized view of the crime scene, the judge should explicitly caution against this. *Commonwealth v. Jones*, 15 Mass. App. Ct. 692, 695, 448 N.E.2d 400, 402 (1983). See *Commonwealth v. Philyaw*, 55 Mass. App. Ct. 730, 735-740, 774 N.E.2d 659, 664-667 (2002) (unauthorized view by one or more jurors is an extraneous influence "of a very serious nature").

2. **Caution against unauthorized research by jurors.** The judge may also wish to caution jurors not to conduct their own research or investigations (including Internet or dictionary searches). See *Commonwealth v. Guisti,* 449 Mass. 1018, 867 N.E.2d 740 (2007) (juror soliciting comments by email); *Commonwealth v. Olavarria,* 71 Mass. App. Ct. 612, 885 N.E.2d 139 (2008) (juror looking up definition of "reasonable doubt" and "moral certainty" in law dictionary); *Commonwealth v. Rodriguez,* 63 Mass. App. Ct. 660, 678 n.11, 828 N.E.2d 556, 568 n.11 (2005) (juror searching Internet for statute; these days, in warning against conducting their own research, judges "are well advised" to refer specifically to Internet searches); *Commonwealth v. DiRenzo,* 52 Mass. App. Ct. 907, 754 N.E.2d 1071 (2001) (allegation that jurors consulted a dictionary contrary to judge's instructions); *Commonwealth v. McCaster,* 46 Mass. App. Ct. 752, 710 N.E.2d 605 (1999) (juror searching Internet for chemical composition of cocaine). See also *United States v. Kupau,* 781 F.2d 740, 744-745 (9th Cir.), cert. denied, 479 U.S. 823 (1986) (judge should not give deliberating jury a dictionary at their request, even under cautionary instructions, since the parties are entitled to know what words the jury wishes defined).

3. **Deliberating jury must be given time to reassemble.** Once the case has been submitted to the jury, whenever the judge permits the jurors to separate (including separation for lunch), Mass. R. Crim. P. 20(e)(2) requires that the jury be given a definite time to reassemble in the courtroom before retiring for further deliberations. *Commonwealth v. Hearn,* 31 Mass. App. Ct. 707, 712-713, 583 N.E.2d 279, 283 (1991); *Commonwealth v. Ford,* 20 Mass. App. Ct. 575, 579, 481 N.E.2d 534, 536-537 (1985).

4. **Morning roll call of deliberating jury.** Once the case has been submitted to the jury, a morning roll call may be implicitly required by Mass. R. Crim. P. 20(e)(3) if the jurors separate overnight. Whether or not a roll call is taken, it is preferable that the defendant be present whenever the jurors come into the courtroom, unless the defendant has waived his right to be present. *Commonwealth v. Davila,* 17 Mass. App. Ct. 511, 459 N.E.2d 1248 (1984).

1.260 EXTRANEOUS PUBLICITY

2009 Edition

During the time that you serve on this jury, there may be reports about this case in the newspapers or on radio or television. You may be tempted to look at or listen to them. Please do not do so.

Due process of law requires that the evidence you consider in reaching your verdict meet certain standards; for example, a witness may testify about events he has personally seen or heard but not about matters told to him by others. Also, witnesses must be sworn to tell the truth and must be available for questions from the other side.

News reports about the case are not subject to these standards, and if you look at or listen to such reports, you may be exposed to information, true or not, which unfairly favors one side and which the other side is unable to respond to.

In fairness to both sides, therefore, please avoid such news reports. Put them aside immediately if they come to your attention. Your sworn obligation is to decide this case solely on the evidence presented in the courtroom.

In any trial likely to be of significant public interest, the American Bar Association recommends that such an instruction be given at the end of the first trial day if the jury is not sequestered. 2 ABA Standards for Criminal Justice, *Fair Trial and Free Press* § 8-3.6(e) (2d ed. 1980). See generally *Jury Trial Manual for Criminal Offenses Tried in the District Court* § 2.62.

NOTES:

1. **Claim of extraneous influence.** Where there is an allegation that jurors have been improperly exposed to information from a source other than the evidence at trial, the judge must follow the steps set out in *Commonwealth v. Fidler*, 377 Mass. 192, 385 N.E.2d 513 (1979). Initially the defendant must show by a preponderance of evidence that the improper extraneous influence occurred. The burden then shifts to the Commonwealth to show beyond a reasonable doubt that the defendant was not prejudiced by the extraneous information. In determining the effect the extraneous information would have on a "hypothetical average jury," the judge may consider post-verdict jury testimony as well as whether there was overwhelming evidence of guilt, whether the extraneous matter produced such a high probability of prejudice that error must be inferred, and whether one juror's introduction of extraneous information was rejected by other jurors. *Commonwealth v. Kincaid*, 444 Mass. 381, 828 N.E.2d 45 (2005).

2. **Questions and jury instruction on cameras in the courtroom.** Before allowing cameras in the courtroom pursuant to S.J.C. Rule 1:19, a judge may, but is not required, to question prospective jurors as to any effect that cameras may have on their ability to judge the evidence impartially. "It may be advisable that empanelled jurors be instructed, prior to the commencement of a televised trial, to inform the court if the presence of television cameras interferes with their ability to concentrate and render a fair and impartial verdict." *Commonwealth v. Cross*, 33 Mass. App. Ct. 761, 605 N.E.2d 298 (1992).

1.270 USE OF AN INTERPRETER

June 2016

An interpreter will assist in this trial. (He) (she) is here only to help us communicate. (He) (she) is completely neutral. (He) (she) is not working for either party. (He) (she) is sworn to interpret truthfully and accurately.

The interpreter's role is to interpret what others say so that everyone understands everything that is said. Do not let your judgment be affected by a person's need for an interpreter.

If you understand the language of the witness, you must disregard completely what the witness says in that language. The evidence is the testimony as it is interpreted by the interpreter(s). Even if you think the

interpreter has made a mistake, you must rely on the interpreter's English translation.

1.280 BEFORE A VIEW

2009 Edition

Members of the jury, you are about to visit a place about which you will be hearing testimony during this trial. In court terminology, we call this a "view."

The purpose of the view is to help you better to understand the evidence which you will hear during the trial, and to help you appreciate the location and its surroundings. The view that you will take is a part of this case. The observations that you make while on the view may be used and considered in your deliberations in reaching a verdict.

The place that you will view is ____*[where]*_____. The attorneys (and I) will accompany you or meet you there. The attorneys may point out to you the arrangement of the scene and items there which they want you to take notice of, but otherwise they may not discuss anything in regard to this case.

While you are on the view, you are not to make any notes or sketches. You are not to conduct any independent investigation while we are there or at any other time during the trial. You are not to return to the scene, or ask anyone else to do so, until this case is over.

What you *are* to do on the view may best be summarized in two words that you are all very familiar with: STOP and LOOK. Your responsibility is to see the place, observe it carefully, and remember what you see.

During your trip to and from the place that you will view, you are not to discuss the case or anything about it among yourselves or with anyone, and you are not to permit anyone to talk with *you* about the case.

You will be under the supervision of the court officers at all times, and you will remain together until you are returned to court, unless the court officers direct you otherwise.

Under no circumstances should any of you, during the course of your service as jurors in this case, take any unauthorized view of any location which was mentioned by any of the witnesses or the attorneys in this case.

The clerk will now administer the oath to the court officers who will accompany you on the view. I invite your careful attention to the oath because it covers their responsibilities in supervising you and the attorneys while on the view.

Information acquired at a view is not evidence in a strict sense, but may be used by the jury in reaching a verdict. *Commonwealth v. Jefferson*, 36 Mass. App. Ct. 684, 688, 625 N.E.2d 2, 5 (1994). See generally Jury Trial Manual for Criminal Offenses Tried in the District Court § 2.33.

SWEARING THE COURT OFFICERS

A traditional formulary for swearing court officers before a jury view is as follows:

Clerk: **You (each) solemnly swear or affirm that you will take charge of this jury and conduct them to view the premises as ordered by the Court;**

that you will not permit the parties to enter into debate in the hearing of the jury, nor any person to speak to them, except Assistant District Attorney _____ on behalf of the Commonwealth and Attorney _____ on behalf of the defendant, and they only to point out such places or things as they may deem necessary;

and that you will keep the jury together until you have brought them back into court unless the Court otherwise orders; so help you God.

NOTES:

1. **Defendant's presence.** The defendant is not entitled to be present at a view, and may be barred from boarding the jurors' bus if he or she appears without the judge's permission. *Commonwealth v. Gagliardi,* 29 Mass. App. Ct. 225, 237, 559 N.E.2d 1234, 1243 (1990).

2. **Unauthorized view.** If it is reported that an unauthorized view may have taken place, the juror should be interviewed in the presence of counsel to determine if the unauthorized view has in fact taken place, the extent of the juror's activity at the scene, and whether the juror has shared such information with other jurors. *Commonwealth v. Cuffie*, 414 Mass. 632, 609 N.E.2d 437 (1993); *Commonwealth v. Philyaw,* 55 Mass. App. Ct. 730, 735-740, 774 N.E.2d 659, 664-667 (2002) (unauthorized view by one or more jurors is an extraneous influence "of a very serious nature").

1.300 MULTIPLE DEFENDANTS; EVIDENCE ADMITTED AGAINST ONE DEFENDANT ONLY

2009 Edition

I. MULTIPLE DEFENDANTS

There is more than one defendant on trial in this case. Each defendant is entitled to have you determine his (or her) guilt separately and individually. The fact that the defendants are on trial together is not evidence that there is any connection between them, and is not any evidence of their guilt. The Commonwealth has the burden of proving beyond a reasonable doubt the guilt of each defendant separately.

When you consider the evidence, it is your duty to examine it carefully as to the charge(s) against each defendant separately, as if he (or she) were on trial alone. You may consider only the evidence that applies to that defendant, and you are not to consider any evidence that I have told you was admitted into evidence only against another defendant. Each defendant is entitled to have his (or her) case determined solely from the evidence about his (or her) own acts and statements.

Commonwealth v. Crowe, 21 Mass. App. Ct. 456, 485, 488 N.E.2d 780, 797 798 (1986).

II. EVIDENCE ADMITTED AGAINST ONE DEFENDANT ONLY

During this trial I have told you that some of the evidence was limited to one defendant. Let me emphasize that you may consider such evidence only in your deliberations about that defendant concerning whom it was admitted in evidence. You must not consider it in any way in your deliberations concerning (the other) (any other) defendant.

Commonwealth v. Snyder, 282 Mass. 401, 416, 185 N.E. 376, 381 (1933), aff'd, 291 U.S. 97, 54 S.Ct. 330 (1934).

SUPPLEMENTAL INSTRUCTION

Where one defendant's statement is admitted only against that defendant. **You have heard testimony about a statement that ___*[one codefendant]*___ is alleged to have made. If you accept that testimony, you may consider the statement only in determining the (guilt or innocence) (credibility) of ___*[that codefendant]*___. It is not evidence against (___*[other codefendant]*___) (any other codefendant), and you are not to consider it in any way when you consider the evidence against him (her) (them). Each defendant is entitled to have his (or her) case determined solely from the evidence about his (or her) own acts and statements.**

Commonwealth v. Carita, 356 Mass. 132, 137 139, 249 N.E.2d 5, 8 9 (1969); *Commonwealth v. Valcourt*, 333 Mass. 706, 713, 133 N.E.2d 217, 222 (1956); *Snyder*, supra.

Note that a limiting instruction is insufficient, and severance is required, where the Commonwealth seeks to introduce the extrajudicial statement of one codefendant who does not testify at trial and which "powerfully incriminat[es]" another codefendant against whom it is not admissible. *Bruton v. United States*, 391 U.S. 123, 135 136, 88 S.Ct. 1620, 1627 1628 (1968), made applicable to the states by *Roberts v. Russell*, 392 U.S. 293, 88 S.Ct. 192l (1968). See Jury Trial Manual for Criminal Offenses Tried in the District Court § 1.14.

NOTE:

1. **Hearsay Exceptions.** For a model instruction on the joint venturer hearsay exception, see the supplemental instructions to Instruction 4.200 (Joint Venture). For a model instruction on the co-conspirator hearsay exception, see the supplemental instruction to Instruction 4.160 (Conspiracy).

1.320 WITHDRAWN CASE AGAINST CODEFENDANT; WITHDRAWN CHARGES AGAINST DEFENDANT; DEFENDANT'S ABSENCE MIDTRIAL

2009 Edition

I. WITHDRAWN CASE AGAINST CODEFENDANT

Members of the jury, I am withdrawing from your consideration the case against *[codefendant]* . That case has been disposed of and is no longer before you for decision. You are to deliberate in this case only concerning the complaint(s) pending against *[remaining defendant]* .

You are not to speculate about why the case against *[codefendant]* has been withdrawn from your consideration, and it is not to influence your verdict(s) concerning *[remaining defendant]* in any way. Your responsibility now is to decide the charges that remain pending against *[remaining defendant]* based solely on the evidence against him (her).

This instruction may be given when a codefendant has entered a change of plea or has successfully moved for a required finding of not guilty, and is therefore no longer in the case. *Commonwealth v. Pasciuti*, 12 Mass. App. Ct. 833, 839-846 & n.7, 429 N.E.2d 374, 378 & n.7 (1981) (proper even without request to advise jury not to speculate why case against codefendant has been withdrawn, and that it should not influence their verdict as to remaining codefendant, which should be based solely on evidence against him).

II. WITHDRAWN CHARGES AGAINST DEFENDANT

Members of the jury, I am withdrawing from your consideration the following charge(s) against the defendant: *[withdrawn charge(s)]* . (That charge has) (Those charges have) been disposed of and (is)(are) no longer before you for decision. You are to deliberate in this case only concerning the remaining charge(s) pending against the defendant, namely:

[remaining charges] .

You are not to speculate about why (one charge) (some charges) have been withdrawn from your consideration, and it is not to influence your verdict(s) on the remaining charge(s) in any way. Your responsibility now is to decide the charge(s) that remain(s) pending against the defendant, based solely on the evidence concerning (that charge which is) (those charges which are) now before you.

This instruction may be given when a defendant has successfully obtained a required finding of not guilty as to one or more of multiple pending complaints. See, e.g., *Commonwealth v. Anolik*, 27 Mass. App. Ct. 701, 707-708, 542 N.E.2d 327, 331 (1989); *Commonwealth v. Yelle*, 19 Mass. App. Ct. 465, 475, 475 N.E.2d 427, 433 (1985) ("advisable and proper" to give instruction sua sponte).

III. DEFENDANT'S ABSENCE MIDTRIAL

which the jury is not permitted to consider as evidence of consciousness of guilt

Members of the jury, the defendant may not be present for the rest of the trial. The trial will continue, and the defendant will continue to be represented at trial by his (her) attorney, *[Defense Counsel]* .

You are not to speculate about the reasons for the defendant's absence. You are not to draw any inferences against the defendant from his (her) absence, since there are many reasons why a defendant may not be present for the full trial. It should not influence your verdict in any way.

Your responsibility now is to decide the charge(s) against the defendant, based solely on the evidence before you.

This instruction should not be given if the judge permits the jury to consider the defendant's absence as evidence of consciousness of guilt. Instead see Instruction 3.580 (Consciousness of Guilt).

The Appeals Court has given detailed guidance on the protocol to be followed when a defendant defaults midtrial:

> "When a defendant fails to appear midtrial, the judge is to determine whether the trial should proceed in the defendant's absence or whether a mistrial should be declared. In determining this question, the judge must determine whether the defendant's absence is without cause and voluntary. This judicial determination, in turn, requires that there be time allotted for some measure of inquiry and investigation into the reasons for the defendant's absence and the results of the efforts to locate the defendant. To this end, the judge should grant a recess of such duration as the judge deems appropriate to allow for investigation.[9] There must be evidence introduced on the record. The preferable practice . . . is that a voir dire hearing should be held directed to the evidence garnered concerning the circumstances of the defendant's failure to appear and the efforts to find the defendant.
>
> "Following this hearing, the judge should state a finding concerning whether the defendant's absence is without cause and voluntary. If the judge determines not to declare a mistrial, but rather to continue the trial in absentia, then the judge should give a neutral instruction to the jury to the effect that the defendant may not be present for the remainder of the trial, that the trial will continue, and that the defendant will continue to be represented by his attorney. If there will be no evidence adduced before the jury concerning consciousness of guilt, the judge may add that the jury should not speculate as to the reasons for the defendant's absence and should not draw adverse inferences, as there are many reasons why a defendant may not be present for the full trial . . . ."

"[9] This investigation, in most cases, is not of the kind that would require a substantial amount of time or undue delay in the trial. A reasonably diligent investigation to determine if there is good cause for the defendant's absence from trial might entail some of the following steps: independent police inquiry; contact with the defendant's family and significant other persons in the defendant's life; calls to the places where the defendant lives and works; and inquiry of emergency health facilities in the immediate area
where there is a reasonable probability the defendant may have been treated. Of course, defense
counsel also should check to see if the defendant has communicated with counsel's law office."

Commonwealth v. Muckle, 59 Mass. App. Ct. 593, 639-640, 797 N.E.2d 456, 463-464 (2003) (citations omitted). "We reemphasize . . . that where . . . a defendant has disappeared from a trial without any apparent explanation, [t]here ought to be as vigorous an effort as may be feasible to find the defendant, and some formality in the presentation of the evidence that is gathered about the circumstances of the defendant's disappearance" before the judge decides to instruct the jury to ignore the defendant's absence and not draw any inference against him or her because of it. *Commonwealth v. Carey*, 55 Mass. App. Ct. 908, 772 N.E.2d 597 (2002).

1.340 PRELIMINARY IDENTIFICATION INSTRUCTION

November 2015

Upon request by any party, the trial judge shall give the preliminary/contemporaneous instruction before opening statements or immediately before or after the testimony of an identifying witness, saving the full model instruction to be given at a later time during the trial. The instruction is set forth at 473 Mass. 1051 (2015).

You may hear testimony from a witness who has identified the defendant as the person who committed (or participated in) the alleged crime(s). Where a witness has identified the defendant as the person who committed (or participated in) the alleged crime(s), you should examine the identification with care. As with any witness, you must determine the credibility of the witness, that is, do you believe the witness is being honest? Even if you are convinced that the witness believes his or her identification is correct, you still must consider the possibility that the witness made a mistake in the identification. A witness may honestly believe he or she saw a person, but perceive or remember the event inaccurately. You must decide whether the witness's identification is not only truthful, but accurate.

People have the ability to recognize others they have seen and to accurately identify them at a later time, but research and experience have shown that people sometimes make mistakes in identification. The mind does not work like a video recorder. A person cannot just replay a mental recording to remember what happened. Memory and perception are much more complicated. Generally, memory is most accurate right after the event and begins to fade soon thereafter. Many factors occurring while the witness is observing the event may affect a witness's ability to make an accurate identification. Other factors occurring after observing the event also may affect a witness's memory of that event, and may alter that memory without the witness realizing that his or her memory has been affected. Later in the trial, I will discuss in more detail the factors that you should consider in determining whether a witness's identification is accurate. Ultimately, you must determine whether or not the Commonwealth has proved the charge(s), including the identity of the person who committed (or participated in) the alleged crime(s), beyond a reasonable doubt.

FINAL INSTRUCTIONS, GENERAL

2.100 FUNCTION OF THE JUDGE

2009 Edition

Members of the jury, you are about to begin your final duty, which is to decide the fact issues in this case. Before you do that, I will instruct you on the law.

It was obvious to me throughout the trial that you faithfully discharged your duty to listen carefully to all the evidence and to observe each of the witnesses. I now ask you to give me that same close attention, as I instruct you on the law.

My function as the judge in this case has been to see that this trial was conducted fairly, orderly and efficiently. It was also my responsibility to rule on what you may consider as evidence, and to instruct you on the law which applies to this case.

It is your duty as jurors to accept the law as I state it to you. You should consider all my instructions as a whole. You may not ignore any instruction, or give special attention to any one instruction. You must follow the law as I give it to you whether you agree with it or not.

Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4 (1794) (Jay, C.J.) (judge determines law, while jury decides facts); *Commonwealth v. Wilson*, 381 Mass. 90, 118-119, 407 N.E.2d 1229, 1247 (1980) (judge must be the trial's "directing and controlling mind"); *Pfeiffer v. Salas*, 360 Mass. 93, 99-101, 271 N.E.2d 750, 754-755 (1971) (judge must instruct in language understandable to jurors from all walks of life); *Commonwealth v. Sneed*, 376 Mass. 867, 870, 383 N.E.2d 843, 845 (1978) (judge must instruct on applicable law, and may state evidence and discuss possible inferences neutrally); *Commonwealth v. Brady*, 357 Mass. 213, 214-215, 257 N.E.2d 465, 466 (1970) (questions of law are for judge); *Commonwealth v. Carson*, 349 Mass. 430, 435, 208 N.E.2d 792, 795 (1965) (judge must state applicable law correctly); *Commonwealth v. Davis*, 271 Mass. 99, 100-101, 170 N.E. 924, 925 (1930) (sentencing is judge's responsibility alone); *Commonwealth v. Anthes*, 5 Gray 185, 208-209, 221, 236 (1855) (jury must follow law as stated by judge); *Commonwealth v. Porter*, 10 Metc. 263, 286-287 (1845) (judge must superintend trial, rule on evidence and instruct on law); *Commonwealth v. Knapp*, 10 Pick. 477, 495 (1830) (questions of admissibility of evidence are for judge); *Commonwealth v. Carney*, 31 Mass. App. Ct. 250, 254, 576 N.E.2d 691, 694 (1991) (approving charge not to use judge's questions or statements to determine how judge feels case should be decided, since judge has no right to interfere with jury's duty to find the facts and determine where the truth lies); *Commonwealth v. Kane*, 19 Mass. App. Ct. 129, 138, 472 N.E.2d 1343, 1349 (1985) (judge may give jury a neutral precis of the evidence). See also *Commonwealth v. Murray*, 396 Mass. 702, 705-710, 488 N.E.2d 415, 417-420 (1986).

SUPPLEMENTAL INSTRUCTIONS

1.Jury must follow law. **You must take the law as I give it to you. You should not be concerned about the wisdom of any rule of law that I give you. Whatever your private opinions about what the law is or ought to be, it is your duty to base your verdict on the law as I define it to you.**

2. Where some issues require longer explanation. **If I devote a bit more time to discussing any particular charge or part of the charge, you are not to infer anything from the length of my discussion. Some matters may take longer to explain, but that is not a guide to their relative importance and not an indication that I have an opinion on any issue in this case.**

2.120 FUNCTION OF THE JURY

Your function as the jury is to determine the facts of this case. You are the sole and exclusive judges of the facts. You alone determine what evidence to accept, how important any evidence is that you *do* accept, and what conclusions to draw from all the evidence. You must apply the law as I give it to you to the facts as you determine them to be, in order to decide whether the Commonwealth has proved the defendant guilty of this charge (these charges).

You should determine the facts based solely on a fair consideration of the evidence. You are to be completely fair and impartial, and you are not to be swayed by prejudice or by sympathy, by personal likes or dislikes, toward either side. You are not to allow yourselves to be influenced because the offense(s) charged is (are) popular or unpopular with the public.

You are not to decide this case based on what you may have read or heard outside of this courtroom. You are not to engage in any guesswork about any unanswered questions that remain in your mind, or to speculate about what the "real" facts might or might not have been.

You should not consider anything I have said or done during the trial — in ruling on motions or objections, or in my comments to the attorneys, or in questions to witnesses, or in setting forth the law in these instructions — as any indication of my opinion as to how you should decide the defendant's guilt or innocence. If you believe that I have expressed or hinted at any opinion about the facts of this case, please disregard it. I have no opinion about the facts or what your verdict ought to be. That is solely and exclusively your duty and responsibility.

In short, you are to confine your deliberations to the evidence and nothing but the evidence.

Commonwealth v. Smith, 387 Mass. 900, 909-910, 444 N.E.2d 374, 381 (1982) (verdict must be based on evidence and not sympathy); *Commonwealth v. Fitzgerald*, 376 Mass. 402, 424, 381 N.E.2d 123, 138 (1978) (verdict may not be based on sympathy for victim or general considerations); *Commonwealth v. Clark*, 292 Mass. 409, 411, 198 N.E. 641, 643 (1935) (jury should be both impartial and courageous); *Commonwealth v. Anthes*, 5 Gray 185, 197-198 (1855) (jury's judgment is conclusive of facts in case); *Commonwealth v. Carney*, 31 Mass. App. Ct. 250, 254, 576 N.E.2d 691, 694 (1991) (approving charge not to use judge's questions or statements to determine how judge feels case should be decided, since judge has no right to interfere with jury's duty to find the facts and determine where the truth lies); *Commonwealth v. Ward*, 28 Mass. App. Ct. 292, 296, 550 N.E.2d 398, 401 (1990).

SUPPLEMENTAL INSTRUCTION

1. Prejudice. **Your verdict must be based solely on the evidence developed at trial. It would be improper for you to consider any personal feelings about the defendant's race, religion, national origin, sex or age.**

It would be equally improper for you to allow any feelings you might have about the nature of the crime to interfere with your decision. Any person charged with any crime is entitled to the same presumption of innocence, and the Commonwealth has the same burden of proof beyond a reasonable doubt, as I (have discussed) (will discuss in a moment).

The fact that the prosecution is brought in the name of the Commonwealth entitles the prosecutor to no greater consideration and no less consideration than any other litigant, since all parties are entitled to equal treatment before the law. The people of this Commonwealth always win when justice is done, regardless of whether the verdict is guilty or not guilty.

It must be clear to you that once you let prejudice or sympathy, or fear or bias, interfere with your thinking, there is a risk that you will not arrive at a true and just verdict. Your oath as jurors was that you will perform your duty of finding the facts without being swayed by bias or prejudice toward either side. The word "verdict" comes from two Latin words meaning "to tell the truth," and that is what the law looks to your verdict to do.

Portions of this instruction are adapted from L.B. Sand, J.S. Siffert, W.P. Loughlin and S.A. Reiss, Modern Federal Jury Instructions §§ 2-5, 2-11 and 2-12 (1985).

2. Sympathy. **In many criminal cases there is an element of sympathy which surrounds the trial. Many incidents elicit sympathy for the alleged victim. And when somebody is charged with a crime, that too elicits sympathy. Here at the trial there are people who are friends and family of the alleged victim, friends and family of the defendant. Obviously, these proceedings have a profound effect on both families. And it may well be that both families are deserving of sympathy, but not in a courtroom and not by a jury, because sympathy is grounded in emotion and a jury must consider only facts.**

You all know that this would be a pretty sad world without sympathy, but the courtroom is not the place for that sympathy. Even more important, your jury room is not the place for that sympathy. When you decide this case, you must decide this case on the basis of the facts as you find them. You must and facts alone.

The model instruction is drawn from *Commonwealth v. Harris*, 28 Mass. App. Ct. 724, 733 n.5, 555 N.E.2d 884, 889 n.5 (1990). It may be appropriate where the trial is for a particularly emotional offense, such as vehicular homicide.

3. Juror equality. **No juror is better qualified to determine the truth of the facts in controversy or to deliberate upon a verdict solely because of that juror's occupation or reputation.**

G.L. c. 234A, § 70 provides that this instruction must be given upon motion of either party or whenever the court deems it appropriate. *Commonweatlh v. Oram*, 17 Mass, App. Ct. 941, 942-943, 457 N.E.2d 284, 285-286 (1983).

4. Judge's questions. **I want to reemphasize my request that you draw no conclusions from the fact that on occasion I asked questions of some witnesses. I intended those questions only to clarify or expedite matters. They were not intended to suggest any opinions on my part about your verdict or about the credibility of any witness. You should understand that I have no opinion as to the verdict you should render in this case.**

5. Sentencing consequences. **Your function as the jury is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged. By contrast, my function as the judge is to impose sentence if the defendant is found guilty. You are not to consider the sentencing consequences of your verdict at all, so please put any issues about sentencing out of mind.**

Shannon v. United States, 512 U.S. 573, 579, 114 S.Ct. 2419, 2424 (1994); Rogers v. United States, 422 U.S. 35, 40, 95 S.Ct. 2091, 2095 (1975).

2.140 FUNCTION OF COUNSEL

2009 Edition

It was the duty of both lawyers in this case to object when the other side offered evidence which that lawyer believed was not admissible under our rules of evidence. They also had an obligation to ask to speak to me at the judge's bench about questions of law, which the law requires me to rule on out of your hearing.

The purpose of such objections and rulings is not to keep relevant information from you. Just the opposite: they are to make sure that what you hear is relevant to this case, and that the evidence is presented in a way that gives you a fair opportunity to evaluate its worth.

You should not draw any inference, favorable or unfavorable, to either attorney or his (her) client for objecting to proposed evidence or asking me to make such rulings. That is the function and responsibility of the attorneys here.

The model instruction is adapted in part from L.B. Sand, J.S. Siffert, W.P. Loughlin and S.A. Reiss, Modern Federal Jury Instructions §§ 2-10 and 2-9 (1985).

2.160 PRESUMPTION OF INNOCENCE; BURDEN OF PROOF; UNANIMITY

2009 Edition

The complaint against the defendant is only an accusation. It is not evidence. The defendant has denied that he (she) is guilty of the crime(s) charged in this complaint.

The law presumes the defendant to be innocent of (the charge) (all the charges) against him (her). This presumption of innocence is a rule of law that compels you to find the defendant not guilty unless and until the Commonwealth produces evidence, from whatever source, that proves that the defendant is guilty beyond a reasonable doubt. This burden of proof never shifts. The defendant is not required to call any witnesses or produce any evidence, since he (she) is presumed to be innocent.

The presumption of innocence stays with the defendant unless and until the evidence convinces you unanimously as a jury that the defendant is guilty beyond a reasonable doubt. It requires you to find the defendant not guilty unless his (her) guilt has been proved beyond a reasonable doubt.

Your verdict, whether it is guilty or not guilty, must be unanimous.

Commonwealth v. Boyd, 367 Mass. 169, 189, 326 N.E.2d 320, 332 (1975); *Commonwealth v. Devlin*, 335 Mass. 555, 569, 141 N.E.2d 269, 276-277 (1957); *Commonwealth v. DeFrancesco*, 248 Mass. 9, 142 N.E. 749 (1924).

NOTES:

1. **Function of charge.** The presumption of innocence is a doctrine that allocates the burden of proof and admonishes the jury to judge the defendant's guilt solely on the evidence and not on suspicions that may arise from the facts of arrest and charge. *Bell v. Wolfish,* 441 U.S. 520, 533, 99 S.Ct. 1861, 1870 (1979). It is not a true presumption, but a shorthand description of the right of the accused “to remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion” (citations omitted). *Taylor v. Kentucky,* 436 U.S. 478, 483 n.12, 98 S.Ct. 1930, 1934 n.12 (1978). It is “founded in humanity” and “upon the soundest principle of criminal law . . . that it is better that nine guilty persons should escape, than that one innocent man should suffer.” *Commonwealth v. Anthes,* 5 Gray 185, 230 (1855).

2. **Required formulation.** The judge need not give any particular definition of the presumption of innocence if the charge makes clear that the complaint does not imply guilt and that the jury's decision must be based solely on the evidence and not on suspicion or conjecture. The latter point is covered by Instruction 2.03. But Massachusetts practice requires the judge, on request, to instruct the jury in terms

that the defendant is "presumed to be innocent." *Commonwealth v. Blanchette,* 409 Mass. 99, 105, 564 N.E.2d 992, 996 (1991); *Commonwealth v. Drayton,* 386 Mass. 39, 46-47, 434 N.E.2d 997, 1003-1004 (1982).

3. **Impermissible formulations.** Embellishing the standard formulation is unnecessary and should be avoided. *Commonwealth v. Healy,* 15 Mass. App. Ct. 134, 138, 444 N.E.2d 957, 959 (1983). It is a "self-defeating qualification" and reversible error to explain that the presumption of innocence relates only to the government's burden and is unrelated to actual guilt. *Id.,* 15 Mass. App. Ct. at 135-138, 444 N.E.2d at 958-959. The judge should not describe the presumption of innocence as an initial "score of nothing to nothing." *Commonwealth v. Lutz,* 9 Mass. App. Ct. 357, 361-362, 401 N.E.2d 148, 151152 (1980).

An instruction on the "disappearing presumption of innocence" derived from *Commonwealth v. Powers,* 294 Mass. 59, 63, 200 N.E. 562 (1936), is reversible error if it implies that the presumption disappears as soon as any evidence of guilt is introduced, but is not error if it indicates that the presumption disappears only after the Commonwealth has presented evidence that has convinced the jury beyond a reasonable doubt of the defendant's guilt. *Commonwealth v. O'Brien,* 56 Mass. App. Ct. 170, 174-175 & n.5, 775 N.E.2d 798, 801-802 & n.5 (2002); *Commonwealth v. Kane,* 19 Mass. App. Ct. 129, 139, 472 N.E.2d 1343, 1350 (1985). "[T]he disappearing presumption formulation is 'not preferred' . . . . It is conspicuously absent from the Model Jury Instructions for Use in the District Court (1995) and might best be avoided as an unnecessary and potentially confusing embellishment on the standard charge." *O'Brien, supra.*

4. **Comparing criminal burden with certainty of private decisions**. Analogizing the Commonwealth's burden of proof beyond a reasonable doubt to the degree of certainty used to make certain important private decisions is strongly disfavored, *Commonwealth v. McGrath*, 437 Mass. 46, 48, 768 N.E.2d 1075, 1076 (2002), and will constitute error unless the analogy clearly stands alone and does not modify or suggest it is the equivalent to language about moral certainty and reasonable doubt. See, e.g., *Commonwealth v. Watkins*, 425 Mass. 830, 838, 683 N.E.2d 653, 659 (1997); *Commonwealth v. Rembiszewski*, 391 Mass. 123, 129-130, 461 N.E.2d 201, 206 (1984); *Commonwealth v. Fielding*, 371 Mass. 97, 116, 353 N.E.2d 719, 731 (1976); *Commonwealth v. Libby*, 358 Mass. 617, 621, 266 N.E.2d 641, 644 (1971).

5. **General and specific unanimity**. The above model instruction includes a general unanimity instruction. "A general unanimity instruction informs the jury that the verdict must be unanimous, whereas a specific unanimity instruction indicates to the jury that they must be unanimous as to which specific act constitutes the offense charged." *Commonwealth v. Keevan,* 400 Mass. 557, 566-567, 511 N.E.2d 534, 540 (1987). For a model instruction on specific unanimity, see Instruction 2.320 (Multiple Incidents or Theories in One Count).

6. **Timing of instruction**. A judge must, upon request, instruct the jury that the defendant is presumed to be innocent, but it is within the judge's discretion when to do so. Even if the defense requests that the judge do so at the start of trial, a judge may choose to give the instruction with the rest of the charge after closing arguments and prior to deliberations. *Commonwealth v. Nancy M. Cameron*, 70 Mass. App. Ct. 1114, 877 N.E.2d 641, 2007 WL 4303057 (No. 06-P-1148, Dec. 10, 2007) (unpublished opinion under Appeals Court Rule 1:28).

2.180 PROOF BEYOND A REASONABLE DOUBT

January 2015

[*This instruction must be given verbatim*]

The burden is on the Commonwealth to prove beyond a reasonable doubt that the defendant is guilty of the charge(s) made against him (her).

What is proof beyond a reasonable doubt? The term is often used and probably pretty well understood, though it is not easily defined. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt, for everything in the lives of human beings is open to some possible or imaginary doubt. A charge is proved beyond a reasonable doubt if, after you have compared and considered all of the evidence, you have in your minds an abiding conviction, to a moral certainty, that the charge is true. When we refer to moral certainty, we mean the highest degree of certainty possible in matters relating to human affairs -- based solely on the evidence that has been put before you in this case.

I have told you that every person is presumed to be innocent until he or she is proved guilty, and that the burden of proof is on the prosecutor. If you evaluate all the evidence and you still have a reasonable doubt remaining, the defendant is entitled to the benefit of that doubt and must be acquitted.

It is not enough for the Commonwealth to establish a probability, even a strong probability, that the defendant is more likely to be guilty than not guilty. That is not enough. Instead, the evidence must convince you of the defendant's guilt to a reasonable and moral certainty; a certainty that convinces your understanding and satisfies your reason and judgment as jurors who are sworn to act conscientiously on the evidence.

This is what we mean by proof beyond a reasonable doubt.

2.220 WHAT IS EVIDENCE; STIPULATIONS; JUDICIAL NOTICE

2009 Edition

You are to decide what the facts are solely from the evidence admitted in this case, and not from suspicion or conjecture. The evidence consists of the testimony of witnesses, as you recall it, any documents or other things that were received into evidence as exhibits, and any fact on which the lawyers have agreed or which I have told you that you may accept as proved.

Of course, the quality or strength of the proof is not determined by the sheer volume of evidence or the number of witnesses. It is the *weight* of the evidence, its strength in tending to prove the issue at stake, that is important. You might find that a smaller number of witnesses who testify to a particular fact are more believable than a larger number of witnesses who testify to the opposite.

Some things that occur during a trial are *not* evidence and you may *not* consider them as evidence in deciding the facts of this case. The complaint itself is not evidence. A question put to a witness is never evidence; only the answers are evidence. Also, you may not consider any answer that I struck from the record and told you to disregard. Do not consider such answers. You may not consider any item that was marked for identification but was never received in evidence as an exhibit. Anything that you may have seen or heard when the court was not in session is not evidence.

The opening statements and the closing arguments of the lawyers are not a substitute for the evidence. They are only intended to assist you in understanding the evidence and the contentions of the parties. My instructions and anything that I have said in passing during the trial are not evidence. If your memory of the testimony differs from the attorneys' or mine, you are to follow your own recollection.

Consider the evidence as a whole. Do not make up your mind about what the verdict should be until after you have gone to the jury room to decide the case, and you and your fellow jurors have discussed the evidence. Keep an open mind until then.

The model and supplemental instructions are based in part on Manual of Model Jury Instructions for the Ninth Circuit, Instructions 1.04, 1.05, 2.03, 2.04 and 2.05 (1985 ed.)

It is the jury's responsibility to determine the weight to be given testimonial evidence (see Instruction 2.260) or physical evidence. *Commonwealth v. LaCorte*, 373 Mass. 700, 702, 369 N.E.2d 1006, 1008 (1977). In defining what the jury may consider as evidence, the judge should avoid suggesting that only credible testimony constitutes evidence. See *Commonwealth v. Gaeten,* 15 Mass. App. Ct. 524, 531, 446 N.E.2d 1102, 1107 (1983). The judge must not discuss the exclusion of inadmissible evidence in a way that improperly vouches for the reliability of the evidence that is admitted, particularly where the defense does not offer any evidence. *Commonwealth v. Richards*, 53 Mass. App. Ct. 333, 338-341, 758 N.E.2d 1095, 1098-1100 (2001) (error to charge that admitted evidence is "reliable" and "high quality information").

SUPPLEMENTAL INSTRUCTIONS

1. Stipulations of fact. **The Commonwealth and the defendant have agreed, or stipulated, that _____ . This means that they both agree that this is a fact. You are therefore to treat this fact as undisputed and proved.**

2. Stipulated testimony. **The Commonwealth and the defendant have agreed, or stipulated, that if *[witness]* were called as a witness, he (she) would testify that _____. Both parties have agreed that *[witness]* would give that testimony if called as a witness. You should consider that testimony in the same way as if it had been given here in court. As with all witnesses, it is for you to determine how believable and how significant that testimony is.**

A stipulation of fact leaves that fact no longer at issue, and must be accepted by the jury. By contrast, a stipulation as to testimony does not compel the jury to accept as true all the facts within the stipulated testimony, but permits the jury to accept the stipulated evidence in whole, in part, or not at all. *Commonwealth v. Triplett*, 398 Mass. 561, 570, 500 N.E.2d 262, 267 (1986).

It is not necessary that a stipulation be formally entered as an exhibit. *Sierra Marketing, Inc. v. New England Wholesale Co*., 14 Mass. App. Ct. 976, 978, 438 N.E.2d 1101, 1103 (1982). The defendant's willingness to stipulate to a fact does not preclude the Commonwealth from introducing evidence on that issue. *Commonwealth v. Andrews*, 403 Mass. 441, 451, 530 N.E.2d 1222, 1227-1228 (1988); *Commonwealth v. Rhoades*, 379 Mass. 810, 820, 401 N.E.2d 342, 349 (1980).

Where a defendant is tried upon a stipulation as to either facts or evidence that is conclusive of guilt, the defendant in effect is relinquishing the same rights as one who pleads guilty, and the judge must offer the defendant "the same safeguards that surround the acceptance of a guilty plea" including a colloquy. *Commonwealth v. Lewis*, 399 Mass. 761, 506 N.E.2d 891 (1987); *Commonwealth v. Garrett*, 26 Mass. App. Ct. 964, 527 N.E.2d 240 (1988); *Commonwealth v. Feaster*, 25 Mass. App. Ct. 909, 514 N.E.2d 1336 (1987); *Commonwealth v. Hill*, 20 Mass. App. Ct. 130, 131-133, 478 N.E.2d 169, 169-171 (1985). A stipulation to evidence only warranting a guilty finding does not require such safeguards. *Commonwealth v. Garcia*, 23 Mass. App. Ct. 259, 264-265, 501 N.E.2d 527, 530-531 (1986).

3. Judicial notice. **The law permits me to take notice of certain facts that are not subject to reasonable dispute. I have decided to accept as proved the fact that _____. Therefore, you may accept this fact as true, even though no evidence has been introduced about it. You are not required to do so, but you may.**

All factual issues should be submitted to the jury, including matters of which the judge may take judicial notice. *Commonwealth v. Kingsbury*, 378 Mass. 751, 754-755, 393 N.E.2d 391, 393-394 (1979) (time of sunset). "It appears from our cases that the jury should be instructed that they may but are not required to accept any matter of which the judge has taken judicial notice." *Commonwealth v. Green*, 27 Mass. App. Ct. 762, 770, 543 N.E.2d 424, 428-429 (1990). See Mass. G. Evid. § 201(e) (2008-2009) ("In a criminal case, the court shall instruct the jury that they may, but are not required to, accept as conclusive any fact which the court has judicially noticed").

The general rule in Massachusetts is that courts do not take judicial notice of regulations; they must be put in evidence. *Shafnacker v. Raymond James & Assocs., Inc*., 425 Mass. 724, 730, 683 N.E.2d 662, 667 (1997). This rule has been overridden in part by G.L. c. 30A, § 6, which requires judicial notice of regulations published in the Code of Massachusetts Regulations. *Shafnacker*, supra, 425 Mass. at 730 n.7, 683 N.E.2d at 667 n.7.

4. Depositions. **A deposition is a transcript of testimony that was given out of court by a witness under oath, in response to questions asked by either of the attorneys. You are to treat a deposition in the same way as if the testimony had been given here in court. As with all witnesses, it is for you to determine how believable and how significant that testimony is.**

Mass. R. Crim. P. 35(g).

NOTES:

1. **Limiting instruction on character evidence not required sua sponte.** Although prompt cautionary instructions to the jury are critical to protecting a defendant against prejudice where character evidence is admitted, there is no requirement that the judge give limiting instructions sua sponte. *Commonwealth v. Sullivan*, 436 Mass. 799, 809, 768 N.E.2d 529, 537 (2002). Nor does the lack of a limiting instruction necessarily create a substantial likelihood of a miscarriage of justice. *Id.*

2. **Negative answer to leading question.** When a witness on cross-examination answers a leading question in the negative, the facts suggested by the question do not constitute evidence for the jury's consideration. *Commonwealth v. Judge*, 420 Mass. 433, 452 n.12, 650 N.E.2d 1242, 1254 n.12 (1995). See also *Commonwealth v. Bailey*, 12 Mass. App. Ct. 104, 106 n.2, 421 N.E.2d 791, 793 n.2 (1981).

2.240 DIRECT AND CIRCUMSTANTIAL EVIDENCE

2009 Edition

There are two types of evidence which you may use to determine the facts of a case: direct evidence and circumstantial evidence. You have direct evidence where a witness testifies directly about the fact that is to be proved, based on what he claims to have seen or heard or felt with his own senses, and the only question is whether you believe the witness. You have circumstantial evidence where the witness cannot testify directly about the fact that is to be proved, but you are presented with evidence of other facts and you are then asked to draw reasonable inferences from them about the fact which is to be proved.

Optional example: **Let me give you an example. Your daughter might tell you one morning that she sees the mailman at your mailbox. That is *direct* evidence that the mailman has been to your house. On the other hand, she might tell you only that she sees mail in the mailbox. That is *circumstantial* evidence that the mailman has been there; no one has seen him, but you can reasonably infer that he has been there since there is mail in the box.**

The law allows either type of proof in a criminal trial. There are two things to keep in mind about circumstantial evidence:

The first one is that you may draw inferences and conclusions only from facts that have been proved to you.

The second rule is that any inferences or conclusions which you draw must be reasonable and natural, based on your common sense and experience of life. In a chain of circumstantial evidence, it is not required that every one of your inferences and conclusions be inevitable, but it is required that each of them be reasonable, that they all be consistent with one another, and that together they establish the defendant's guilt beyond a reasonable doubt.

If the Commonwealth's case is based solely on circumstantial evidence, you may find the defendant guilty only if those circumstances are conclusive enough to leave you with a moral certainty, a clear and settled belief, that the defendant is guilty and that there is no other reasonable explanation of the facts as proven. The evidence must not only be consistent with the defendant's guilt, it must be inconsistent with his (her) innocence.

Whether the evidence is direct or circumstantial, the Commonwealth must prove the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

There is no difference in probative value between direct and circumstantial evidence. *Commonwealth v. Corriveau*, 396 Mass. 319, 339, 486 N.E.2d 29, 43 (1986). Circumstantial evidence is competent to establish guilt beyond a reasonable doubt. *Commonwealth v. Nadworny*, 396 Mass. 342, 354, 486 N.E.2d 675, 682 (1985); *Commonwealth v. Anderson*, 396 Mass. 306, 311, 486 N.E.2d 19, 22 (1985); *Commonwealth v. McGahee*, 393 Mass. 743, 750, 473 N.E.2d 1077, 1082 (1985). Physical evidence may be valid circumstantial evidence if it is authenticated. *Commonwealth v. Drayton*, 386 Mass. 39, 48, 434 N.E.2d 997, 1005 (1982).

The language of the model instruction defining direct and circumstantial evidence and requiring inferences to be consistent with each other is a paraphrase of the charges in *Commonwealth v. Tucker*, 189 Mass. 457, 461 (1905), and *Commonwealth v. Webster*, 5 Cush. 295, 310-320 (1878). The language that "any inferences or conclusions which you draw must be reasonable and natural, based on your common sense and experience of life" was affirmed in *Commonwealth v. Cordle*, 412 Mass. 172, 178, 587 N.E.2d 1372, 1376 (1992). The language that individual inferences in a circumstantial web need not be necessary ones is based on *Commonwealth v. Best*, 381 Mass. 472, 473, 411 N.E.2d 442, 449 (1980), and *Commonwealth v. Walter*, 10 Mass. App. Ct. 255, 257, 406 N.E.2d 1304, 1306 (1980), and *Commonwealth v. Mezzanotti,* 25[26] Mass. App. Ct. 522, 525-526, 529 N.E.2d 1351, 1354 (1988). The first sentence of the penultimate paragraph of the model instruction is a paraphrase of *Commonwealth v. Russ*, 232 Mass. 58, 68, 122 N.E. 176, 180 (1919). See also *Commonwealth v. Helfant*, 398 Mass. 214, 226 n.9, 496 N.E.2d 433, 442 n.9 (1986), and *Commonwealth v. Hicks*, 377 Mass. 1, 8-9, 384 N.E.2d 1206, 1211-1212 (1979). For another example illustrating circumstantial evidence, see *Commonwealth v. Shea*, 398 Mass. 264, 270 n.3, 496 N.E.2d 631, 635 n.3 (1986). See generally *Commonwealth v. Medeiros*, 354 Mass. 193, 197, 235 N.E.2d 642, 644 (1968), cert. denied sub nom. *Bernier v. Mass*., 393 U.S. 1058 (1969); *Commonwealth v. Croft*, 345 Mass. 143, 144-145, 186 N.E.2d 468, 468-469 (1962); *Commonwealth v. Shea*, 324 Mass. 710, 713, 88 N.E.2d 645, 647 (1949).

See also Instruction 3.100 (Inferences).

SUPPLEMENTAL INSTRUCTION

Advantages and disadvantages of each. **Each type of evidence has certain advantages and disadvantages:**

The advantage of direct evidence is that, if it is accurate, it deals directly and specifically with the fact to be proved. Its disadvantage is that its value depends entirely on whether that witness is truthful and accurate or whether that item of physical evidence is authentic.

Circumstantial evidence — whether it is in the form of testimony or physical evidence — may have an advantage because it comes from several different sources, which can be used as a check on each other. Its disadvantage is that it is indirect: you must piece it all together and then determine whether or not it leads to a reasonable conclusion about the fact which is to be proved.

Webster, 5 Cush. at 311-312.

NOTES:

1. **Subsidiary facts need not be proved beyond reasonable doubt.** The defendant is not entitled to an instruction that the jury may draw an inference only if the Commonwealth has proved beyond a reasonable doubt the subsidiary facts on which it rests. *Commonwealth v. Lawrence,* 404 Mass. 378, 394, 536 N.E.2d 571, 581 (1989).

2. **Subsidiary inferences need not be proved beyond reasonable doubt.** There is no requirement that every inference must be proved beyond a reasonable doubt. *Commonwealth v. Ruggerio,* 32 Mass. App. Ct. 964, 966, 592 N.E.2d 753, 755 (1992); *Commonwealth v. Azar,* 32 Mass. App. Ct. 290, 309, 588 N.E.2d 1352, 1364 (1992). It appears that *Commonwealth v. Niziolek*, 380 Mass. 513, 522, 404 N.E.2d 643, 648 (1980), habeas corpus denied sub nom. *Niziolek v. Ashe*, 694 F.2d 282 (1st Cir. 1982), entitles the defense to an instruction that the jury may not draw an inference unless they are persuaded of the truth of the inference beyond a reasonable doubt only in the case of an inference that directly establishes an element of the crime, and not to subsidiary inferences in the chain of reasoning.

3. **"Two possible inferences."** If the judge correctly charges on reasonable doubt and the burden of proof, the judge is not required to charge on request that if the evidence is susceptible of two reasonable interpretations, the jury must adopt that favoring the defendant.

Commonwealth v. Rhoades, 379 Mass. 810, 822, 401 N.E.2d 342, 349-350 (1980). Such a charge might be open to objection that it suggests that the Commonwealth could prevail on a standard less than proof beyond a reasonable doubt. See *Id.,* 379 Mass. at 822 n.11, 401 N.E.2d at 350 n.11. Where the judge correctly charges on reasonable doubt, the judge is not required to charge on request that if the evidence sustains either of two inconsistent propositions, neither has been established. *Commonwealth v. Basch*, 386 Mass. 620, 625-626, 437 N.E.2d 200, 205 (1982).

2.260 CREDIBILITY OF WITNESSES

2009 Edition

It will be your duty to decide any disputed questions of fact. You will have to determine which witnesses to believe, and how much weight to give their testimony. You should give the testimony of each witness whatever degree of belief and importance that you judge it is fairly entitled to receive. You are the sole judges of the credibility of the witnesses, and if there are any conflicts in the testimony, it is your function to resolve those conflicts and to determine where the truth lies.

You may believe everything a witness says, or only part of it or none of it. If you do not believe a witness's testimony that something happened, of course your disbelief is not evidence that it did *not* happen. When you disbelieve a witness, it just means that you have to look elsewhere for credible evidence about that issue.

In deciding whether to believe a witness and how much importance to give a witness's testimony, you must look at all the evidence, drawing on your own common sense and experience of life. Often it may not be *what* a witness says, but *how* he says it that might give you a clue whether or not to accept his version of an event as believable. You may consider a witness's appearance and demeanor on the witness stand, his frankness or lack of frankness in testifying, whether his testimony is reasonable or unreasonable, probable or improbable. You may take into account how good an opportunity he had to observe the facts about which he testifies, the degree of intelligence he shows, whether his memory seems accurate. You may also consider his motive for testifying, whether he displays any bias in testifying, and whether or not he has any interest in the outcome of the case.

The credibility of witnesses is always a jury question, *Commonwealth v. Sabean*, 275 Mass. 546, 550, 176 N.E. 523, 524 (1931); *Commonwealth v. Bishop*, 9 Mass. App. Ct. 468, 471, 401 N.E.2d 895, 898 (1980), and no witness is incredible as a matter of law, *Commonwealth v. Hill*, 387 Mass. 619, 623-624, 442 N.E.2d 24, 27-28 (1982); *Commonwealth v. Haywood*, 377 Mass. 755, 765, 388 N.E.2d 648, 654-655 (1979). Inconsistencies in a witness's testimony are a matter for the jury, *Commonwealth v. Clary*, 388 Mass. 583, 589, 447 N.E.2d 1217, 1220-1221 (1983); *Commonwealth v. Dabrieo*, 370 Mass. 728, 734, 352 N.E.2d 186, 190 (1976), which is free to accept testimony in whole or in part, *Commonwealth v. Fitzgerald*, 376 Mass. 402, 411, 381 N.E.2d 123, 131 (1978). Disbelief of a witness is not affirmative evidence of the opposite proposition. *Commonwealth v. Swartz*, 343 Mass. 709, 713, 180 N.E.2d 685, 687 (1962).

The credibility of witnesses turns on their ability and willingness to tell the truth. *Commonwealth v. Widrick*, 392 Mass. 884, 888, 467 N.E.2d 1353, 1356 (1984). The third paragraph of the model instruction lists those factors that have been recognized as relevant to this determination. See *Commonwealth v. Owens*, 414 Mass. 595, 608, 609 N.E.2d 1208, 1216 (1993); *Commonwealth v. Coleman*, 390 Mass. 797, 802, 461 N.E.2d 157, 160 (1984). These were affirmed as correct and adequate in *Commonwealth v. A Juvenile*, 21 Mass. App. Ct. 121, 124 & n.5, 485 N.E.2d 201, 203 & n.5 (1985). But see *Commonwealth v. David West*, 47 Mass. App. Ct. 1106, 711 N.E.2d 951 (No. 98-P-783, June 28, 1999) (unpublished opinion under Appeals Court Rule 1:28) (characterizing reference in prior version of model instruction to witness's "character" as "inartful," and suggesting that instruction be rephrased). However, the judge is not required to mention the witnesses' capacity to recall and relate, since that approaches the matter of competence, which is for the judge. *Commonwealth v. Whitehead*, 379 Mass. 640, 657 n.20, 400 N.E.2d 821, 834 n.20 (1980).

In charging on credibility, the judge should avoid any suggestion that only credible testimony constitutes evidence. See *Commonwealth v. Gaeten*, 15 Mass. App. Ct. 524, 531, 446 N.E.2d 1102, 1107 (1983).

SUPPLEMENTAL INSTRUCTIONS

1. Jurors' experience. **You are going to have to decide what evidence you believe and what evidence you do not believe. This is where you as jurors have a great contribution to make to our system of justice. All six of you who will decide this case have had a great deal of experience in life and with human nature, and you can size up people. Without thinking much about it, you have been training yourself since childhood to determine whom to believe, and how much of what you hear to believe. You are to use all of your common sense, experience and good judgment in filtering all of this testimony, and in deciding what you believe and what you don't believe.**

2. Interested witnesses. **The fact that a witness may have some interest in the outcome of this case doesn't mean that the witness isn't trying to tell you the truth as that witness recalls it or believes it to be. But the witness's interest is a factor that you may consider along with all the other factors.**

3. Number of witnesses. **The weight of the evidence on each side does not necessarily depend on the number of witnesses testifying for one side or the other. You are going to have to determine the credibility of each witness who has testified, and then reach a verdict based on all the believable evidence in the case. You may come to the conclusion that the testimony of a smaller number of witnesses concerning some fact is more believable than the testimony of a larger number of witnesses to the contrary.**

Commonwealth v. McCauley, 391 Mass. 697, 703 n.5, 464 N.E.2d 50, 54 n.5 (1984); Committee on Pattern Jury Instructions, District Judges Ass'n of the Eleventh Circuit, Pattern Jury Instructions—Criminal Cases § 5 (1985 ed.).

4. Discrepancies in testimony. **Where there are inconsistencies or discrepancies in a witness's testimony, or between the testimony of different witnesses, that may or may not cause you to discredit such testimony.**

Innocent mistakes of memory do happen — sometimes people forget things, or get confused, or remember an event differently. In weighing such discrepancies, you should consider whether they involve important facts or only minor details, and whether the discrepancies result from innocent lapses of memory or intentional falsehoods.

United States v. Jones, 880 F.2d 55, 67 (8th Cir. 1989); Charrow & Charrow, "Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions," 79 Colum. L. Rev. 1306, 1345-1346 (1979); Manual of Jury Instructions for the Ninth Circuit, Instruction 3.08 (1985 ed.). In acknowledging the possibility of good faith mistakes by witnesses, the judge should not suggest how often this occurs. *Commonwealth v. Caramanica*, 49 Mass. App. Ct. 376, 379-380, 729 N.E.2d 656, 660 (2000) (judge intruded on jury's role by suggesting that "very few people come into court with an intention to mislead").

5. Prosecution witness with plea agreement contingent on truthful testimony. **In this case, you heard the testimony of *[prosecution witness]* , and you heard that he (she) is testifying under an agreement with the Commonwealth that in exchange for his (her) truthful testimony the Commonwealth will *[summarize plea agreement]* . You should examine that witness's testimony with particular care. In evaluating his (her) credibility, along with all the other factors I have already mentioned, you may consider that agreement and any hopes that he (she) may have about receiving future advantages from the Commonwealth. You must determine whether the witness's testimony has been affected by his (her) interest in the outcome of the case and any benefits that he (she) has received or hopes to receive.**

When a prosecution witness testifies under a plea agreement that is disclosed to the jury and which makes the prosecution's promises contingent on the witness's testifying truthfully, the judge must "specifically and forcefully" charge the jury to use particular care in evaluating such testimony, in order to dissipate the vouching inherent in such an agreement. "We do not prescribe particular words that a judge should use. We do expect, however, that a judge will focus the jury's attention on the particular care they must give in evaluating testimony given pursuant to a plea agreement that is contingent on the witness's telling the truth." *Commonwealth v. Ciampa*, 406 Mass. 257, 266, 547 N.E.2d 314, 320-321 (1989). See *Commonwealth v. Marrero*, 436 Mass. 488, 500, 766 N.E.2d 461, 471 (2002) (construing Ciampa). See also *Cool v. United States*, 409 U.S. 100, 103, 93 S.Ct. 354, 357 (1972) (per curiam) (usually accomplice instructions are "no more than a commonsense recognition that an accomplice may have a special interest in testifying, thus casting doubt upon his veracity . . . . No constitutional problem is posed when the judge instructs a jury to receive the prosecution's accomplice testimony 'with care and caution'").

The *Ciampa* rule is not triggered where the prosecution's promises were already fully performed prior to the testimony, and there is nothing before the jury suggesting that the plea agreement was contingent on the witness's veracity or the Commonwealth's satisfaction. *Commonwealth v. James,* 424 Mass. 770, 785-787, 678 N.E.2d 1170, 1181-1182 (1997).

In non-Ciampa situations, a cautionary instruction to weigh an accomplice's testimony with care is discretionary with the judge. Although some cases encourage the giving of such a charge, *Commonwealth v. Andrews*, 403 Mass. 441, 458-459, 530 N.E.2d 1222, 1231-1232 (1988) ("judge should charge that the testimony of accomplices should be regarded with close scrutiny"); *Commonwealth v. Beal*, 314 Mass. 210, 232, 50 N.E.2d 14, 26 (1943) (describing the giving of such a charge as "the general practice"), in most circumstances such a charge is entirely in the judge's discretion. *Commonwealth v. Brousseau*, 421 Mass. 647, 654-655, 659 N.E.2d 724, 728-729 (1996) (no error in failing to fail to instruct specifically on witnesses testifying under immunity grant or plea bargain where judge adequately charged on witness credibility generally); *Commonwealth v. Allen*, 379 Mass. 564, 584, 400 N.E.2d 229, 241-242 (1980); *Commonwealth v. Watkins*, 377 Mass. 385, 389-390, 385 N.E.2d 1387, 1390-1391, cert. denied, 442 U.S. 932 (1979); *Commonwealth v. French*, 357 Mass. 356, 395-396, 259 N.E.2d 195, 225 (1970), judgments vacated as to death penalty sub nom. *Limone v. Massachusetts*, 408 U.S. 936 (1972). *Commonwealth v. Luna*, 410 Mass. 131, 140, 571 N.E.2d 603, 608 (1991) (involving a prosecution witness with only a contingent possibility of receiving a finder's fee in a future forfeiture proceeding), directed that "[i]n the future, a specific instruction that the jury weigh [an accomplice's] testimony with care should be given on request." However, *Commonwealth v. Daye*, 411 Mass. 719, 739, 587 N.E.2d 194, 206 (1992), subsequently held that it is not error to refuse such an instruction unless the "vouching" that triggers the Ciampa rule is present.

The model instruction is based in part on the instruction affirmed in *United States v. Silvestri*, 790 F.2d 186, 191 192 (1st Cir. 1986). See also Ninth Circuit Jury Instructions Committee, Ninth Circuit Manual of Model Criminal Jury Instructions § 4.9 (2003) (model instruction to effect that if a witness has received immunity or other benefits in exchange for his or her testimony, or is an accomplice, in evaluating the witness's testimony, you should consider the extent to which or whether his or her testimony may have been influenced by such factors. In addition, you should examine that witness's testimony with greater caution than that of other witnesses); Judicial Council of the Eleventh Circuit, *Eleventh Circuit Pattern Jury Instructions* (Criminal Cases) Special Instruction 1.2 (2003) ("The testimony of some witnesses must be considered with more caution than the testimony of other witnesses. [An accomplice who has pleaded guilty in hopes of receiving leniency in exchange for his testimony] may have a reason to make a false statement because the witness wants to strike a good bargain with the Government. So, while a witness of that kind may be entirely truthful when testifying, you should consider such testimony with more caution than the testimony of other witnesses"); Committee on Standard Jury Instructions, *California Jury Instructions Criminal Instruction* 3.13 (2004) ("You may consider the testimony of a witness who testifies for the State as a result of [a plea agreement] [a promise that he will not be prosecuted] [a financial benefit]. However, you should consider such testimony with caution, because the testimony may have been colored by a desire to gain [leniency] [freedom] [a financial benefit] by testifying against the defendant").

Should the judge give a cautionary instruction when a former accomplice testifies as a defense witness? California has held that when an accomplice is called solely as a defense witness, it is error to instruct the jury sua sponte that it should view the testimony with distrust "since it is the accomplice's motive to testify falsely in return for leniency that underlies the close scrutiny given accomplice testimony offered against a defendant . . . . A defendant is powerless to offer this inducement." *People v. Guiuan*, 18 Cal. 4th 558, 567, 957 P.2d 928, 933-34 (Cal. 1998). See also Fishman, "Defense witness as 'accomplice': should the trial judge give a 'care and caution' instruction?," 96 J. Crim. L. & Criminology 1 (Fall 2005).

NOTES:

1. **Specific classes of witnesses.** Generally it is in the judge's discretion whether to include additional instructions about specific classes of witnesses, such as police officers, *Commonwealth v. Anderson,* 396 Mass. 306, 316, 486 N.E.2d 19, 25 (1985); *A Juvenile,* 21 Mass. App. Ct. at 125, 485 N.E.2d at 204, or children, *Id.* While an exceptional case "may be

conceived of where the judge would be bound to particularize on the issue of credibility," no such case has been reported in Massachusetts. *Id.* If additional, specific instructions are given in the judge's discretion, they must not create imbalance or indicate the judge's belief or disbelief of a particular witness. *Id.,* 21 Mass. App. Ct. at 125, 485 N.E.2d at 203.

See Instruction 3.540 (Child Witness) for an optional charge on a child's testimony.

2. **Police witnesses.** "[O]rdinarily a trial judge should comply with a defendant's request to ask prospective jurors whether they would give greater credence to police officers than to other witnesses, in a case involving police officer testimony," but a judge is required to do so only there is a substantial risk that the case would be decided in whole or in part on the basis of extraneous issues, such as "preconceived opinions toward the credibility of certain classes of persons." *Commonwealth v. Sheline,* 391 Mass. 279, 291, 461 N.E.2d 1197, 1205-1206 (1983).

See *Anderson, supra*; *Commonwealth v. Whitlock,* 39 Mass. App. Ct. 514, 521, 658 N.E.2d 182, 187 (1995); *A Juvenile, supra.*

The judge may not withdraw the credibility of police witnesses from the jury's consideration. "The credibility of witnesses is obviously a proper subject of comment. Police witnesses are no exception . . . . With a basis in the record and expressed as a conclusion to be drawn from the evidence and not as a personal opinion, counsel may properly argue not only that a witness is mistaken but also that a witness is lying . . . . [T]he motivations of a witness to lie because of his or her occupation and involvement in the matter on trial can be the subject of fair comment, based on inferences from the evidence and not advanced as an assertion of fact by counsel." *Commonwealth v. Murchison,* 419[418] Mass. 58, 60-61, 634 N.E.2d 561, 563 (1994).

3. **Interested witnesses.** The defense is not entitled to require the judge to refrain from instructing the jury that, in assessing the credibility of a witness, they may consider the witness's interest in the outcome of the case.

It is appropriate for a judge to mention that interest in the case is one of the criteria for assessing the credibility of witnesses, as long as the judge does so evenhandedly. *Commonwealth v. Ramos,* 31 Mass. App. Ct. 362, 368-369, 577 N.E.2d 1012, 1016 (1991).

4. **Defendant as witness.** It is permissible to charge the jury that they may consider the defendant's inherent bias in evaluating his or her credibility as a witness, but it is better not to single out the defendant for special comment. *United States v. Rollins*, 784 F.2d 35 (1st Cir. 1986); *Carrigan v. United States*, 405 F.2d 1197, 1198 (1st Cir. 1969). See *Reagan v. United States*, 157 U.S. 301, 15 S.Ct. 610 (1895).

5. **Witness's violation of sequestration order.** See *Commonwealth v. Sullivan,* 410 Mass. 521, 528 n.3, 574 N.E.2d 966, 971 n.3 (1991), for a charge on a witness's violation of a sequestration order.

2.280 LESSER INCLUDED OFFENSES

2009 Edition

The offense of _____ includes the lesser offense of _____ . As a matter of law, the complaint that is before you which charges the defendant with _____ also charges him (her) with that lesser included offense.

The Commonwealth may prove the lesser included charge of _____ even if it fails to prove the greater charge of _____ . You may find the defendant guilty of *[lesser included offense]* only if you are *not* convinced beyond a reasonable doubt that the defendant is guilty of *[greater offense]* , and you *are* convinced beyond a reasonable doubt that the defendant *is* guilty of *[lesser included offense]* .

Here instruct on elements of lesser included offense.

The model charge is adapted in part from Recommended Arizona Jury Instructions (Criminal) § 1.03 (1980), and from *Manual of Model Jury Instructions for the Ninth Circuit* § 3.03 (1985 ed.).

NOTES:

1. **Subsumed in greater charge.** The jury may render a verdict convicting the defendant of a lesser included offense and acquitting the defendant of the greater offense charged. G.L. c. 278, § 12 (felonies). *Commonwealth v. Gosselin,* 365 Mass. 116, 118-120, 309 N.E.2d 884, 886-887 (1974) (misdemeanors). One crime is a lesser included offense of another if each of its elements is also an element of the other crime. *Commonwealth v. Perry,* 391 Mass. 808, 813, 464 N.E.2d 389, 393 (1984); *Commonwealth v. Parenti,* 14 Mass. App. Ct. 696, 704, 442 N.E.2d 409, 413 (1982). Conversely, if each crime requires proof of an additional fact that the other does not, neither is a lesser included offense of the other. *Commonwealth v. Jones,* 382 Mass. 387, 393, 416 N.E.2d 502, 506 (1981). See *Morey v. Commonwealth,* 108 Mass. 433, 434 (1981).

2. **When charge required or permitted.** The judge must, on request, charge the jury concerning a lesser included offense if the evidence provides a rational basis for acquitting the defendant of the greater crime charged and convicting on the lesser included offense.

Commonwealth v. Hawkins, 388 Mass. 1014, 447 N.E.2d 665 (1983); *Commonwealth v. Costa,* 360 Mass. 177, 184, 274 N.E.2d 802, 807 (1971); *Commonwealth v. Thomas,* 21 Mass. App. Ct. 183, 187, 486 N.E.2d 66, 69 (1985); *Commonwealth v. Dreyer,* 18 Mass. App. Ct. 562, 566, 468 N.E.2d863, 867 (1984). The judge need not consider all possible factual scenarios subsumed in the evidence, no matter how unreasonable, but only whether the proof on the element that distinguishes the greater from the lesser crime was sufficiently in dispute at the trial so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser offense. *Commonwealth v. Egerton,* 396 Mass. 499, 502-505, 487 N.E.2d 481, 485-486 (1986); *Commonwealth v. Lashway,* 36 Mass. App. Ct. 677, 683, 634 N.E.2d 930, 934 (1994); *Commonwealth v. Thayer,* 35 Mass. App. Ct. 599, 602, 624 N.E.2d 572, 575 (1993), aff'd, 418 Mass. 130, 634 N.E.2d 576 (1994).

Even if supported by the evidence, such an instruction is not required if neither party requests it. *Commonwealth v. Roberts,* 407 Mass. 731, 737, 555 N.E.2d 588, 592 (1990). If the judge is inclined to give such an instruction sua sponte, neither the Commonwealth nor the defense have any right to object to the instruction in order to pursue an "all or nothing" strategy, *Thayer,* 35 Mass. App. Ct. at 603 n.9, 624 N.E.2d at 575 n.9; *Commonwealth v. Vasquez,* 27 Mass. App. Ct. 655, 660, 542 N.E.2d 296, 299 (1989); *Commonwealth v. Pizzotti,* 27 Mass. App. Ct. 376, 384-385, 538 N.E.2d 69, 74 (1989), but neither does the judge have any duty to undercut an "all or nothing" strategy by giving the instruction, *Commonwealth v. Matos,* 36 Mass. App. Ct. 958, 962, 634 N.E.2d 138, 142 (1994). The parties are entitled to know at the charge conference whether the judge will give such an instruction. See Mass. R. Crim. P. 24(b); *Thayer,* 418 Mass. at 134, 634 N.E.2d at 579.

It is error to charge over defense objection on a lesser included offense not supported by the evidence. *Commonwealth v. Lee,* 383 Mass. 507, 513-514, 419 N.E.2d 1378, 1383 (1981); *Commonwealth v. Caine,* 366 Mass. 366, 374-375, 318 N.E.2d 901, 908 (1974). The judge should not charge on a lesser included offense not supported by the evidence even when the defense requests such a charge, since doing so improperly invites the jury to pick between offenses so as to determine the degree of punishment, a matter reserved to the judge. *Thayer,* 35 Mass. App. Ct. at 603, 624 N.E.2d at 575-576; *Commonwealth v. Santo,* 375 Mass. 299, 305-306, 376 N.E.2d 866, 871 (1978); *Commonwealth v. McKay,* 363 Mass. 220, 228, 294 N.E.2d 213, 219 (1973).

The judge cannot rely on a defense assertion that one offense is a lesser included offense of another, since "the parties may not by consent, conduct, or waiver confer jurisdiction on the court" over an offense that is not in law a lesser included offense of a crime charged. *Commonwealth v. Rowe,* 18 Mass. App. Ct. 926, 927, 465 N.E.2d 1220, 1221 (1984).

3. **Jury nullification.** When the judge charges as to a lesser included offense, the judge should also charge the jury that they have a duty, if they conclude that the defendant is guilty, to return a verdict of guilty of the highest crime which has been proved beyond a reasonable doubt. *Commonwealth v. Fernette,* 398 Mass. 658, 667- 668, 500 N.E.2d 1290, 1296 (1986); *Commonwealth v. Dickerson,* 372 Mass. 783, 397, 364 N.E.2d 1052, 1061 (1977).

4. **When charged in separate count.** If greater and lesser included offenses are charged in separate counts, generally the Commonwealth is not required to elect among them before trial. If guilty verdicts are returned on more than one, the judge should then dismiss the lesser included count(s). *Commonwealth v. Crocker,* 384 Mass. 353, 358 n.6, 424 N.E.2d 524, 528 n.6 (1981); *Jones,* 382 Mass. at 395 n.10, 416 N.E.2d at 507 n.10.

See generally Jury Trial Manual for Criminal Offenses Tried in the District Court §§ 2.01, 2.75 and 2.86.

2.300 MULTIPLE CHARGES

2009 Edition

The complaint contains a total of _____ charges. Each charge in the complaint is an accusation of a different crime. You must consider each charge separately and return a separate verdict of guilty or not guilty for each charge.

2.320 MULTIPLE INCIDENTS OR THEORIES IN ONE COUNT (SPECIFIC UNANIMITY)

I. MULTIPLE INCIDENTS IN ONE COUNT

The Commonwealth has charged that the defendant committed this offense on several different occasions. You may find the defendant guilty only if you unanimously agree that the Commonwealth has proved beyond a reasonable doubt that the defendant committed the offense on at least one, specific occasion.

It is not necessary for the Commonwealth to prove, or for you all to be agreed, that the offense was also committed on other occasions. But you must unanimously agree that the Commonwealth has proved that the defendant committed the offense on at least one of the specific occasions (charged in the complaint) (specified in the bill of particulars).

Where there are several, alternative methods for committing an offense (e.g., type of weapon or mental state), jurors need not agree unanimously on the method. But where specific alternative incidents (e.g., "divers" dates or times) are charged in a single count, the judge is required on defense request to give a "specific unanimity instruction," charging the jurors that they must agree unanimously as to at least one of those acts or episodes; jurors may not mix non-unanimous findings about several incidents to come up with a general verdict of guilty. *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491 (1991); *Commonwealth v. Conefrey*, 420 Mass. 508, 650 N.E.2d 1268 (1995) (reversible error to refuse instruction where defendant charged with offense "at divers times and dates during 1986" and evidence of several such incidents); *Commonwealth v. Comtois*, 399 Mass. 668, 675-677 & n.11, 506 N.E.2d 503, 508-509 & n.11 (1987); *Commonwealth v. Ramos*, 47 Mass. App. Ct. 792, 798, 716 N.E.2d 676, 680 (1999) (construing Conefrey, supra); *Commonwealth v. Lemar*, 22 Mass. App. Ct. 170, 172, 492 N.E.2d 105, 106 (1986). Such an instruction is required "only if there are separate events or episodes and the jurors could otherwise disagree concerning which act a defendant committed and yet convict him of the crime charged"; it is not required "where the spatial and temporal separations between acts are short, that is, where the facts show a continuing course of conduct, rather than a succession of clearly detached incidents." *Commonwealth v. Thatch*, 39 Mass. App. Ct. 904, 653 N.E.2d 1121 (1995) (instruction required where jurors might convict while disagreeing about specific act committed out of separate events or episodes; not required where spatial and temporal separation between acts is short and a continuing course of conduct is charged in a single count rather than a succession of detached incidents). See also *Commonwealth v. Sanchez*, 423 Mass. 591, 598-600, 670 N.E.2d 377, 382-383 (1996) (instruction not required where child complainant testified to continuous pattern of abuse but was unable to isolate discrete instances); *Commonwealth v. Medina*, 64 Mass. App. Ct. 708, 835 N.E.2d 300 (2005) (instruction not required in trial of multiple counts of rape of a child where a repetitive pattern of abuse over time and not discrete incidents); *Commonwealth v. Erazo*, 63 Mass. App. Ct. 624, 631, 827 N.E.2d 1288, 1293 (2005) (instruction not required when complainant of indecent assault and battery cannot separate the alleged criminal episodes by giving specific dates and that they are so closely connected as to amount to a single criminal episode); *Commonwealth v. Pimental*, 54 Mass. App. Ct. 325, 329, 764 N.E.2d 940, 946 (2002) (instruction not required in larceny case where there was ample evidence that defendant stole four guns as part of a common scheme or plan).

"A general unanimity instruction informs the jury that the verdict must be unanimous, whereas a specific unanimity instruction indicates to the jury that they must be unanimous as to which specific act constitutes the offense charged." *Commonwealth v. Keevan*, 400 Mass. 557, 566-567, 511 N.E.2d 534, 540 (1987). For a general unanimity instruction, see Instruction 2.160 (Presumption of Innocence; Burden of Proof; Unanimity).

II. MULTIPLE THEORIES OF CULPABILITY IN ONE COUNT

This instruction is not applicable to the offense of assault. *Commonwealth v. Porro*, 458 Mass. 526, 393 N.E.2d 1157 (2010); *Commonwealth v. Arias*, 78 Mass. App. Ct. 429, 433, 939 N.E.2d 1169, 1173 (2010).

The offense of ____*[offense]*____may be committed in two different ways. ___*[Describe different theories of culpability.]*___You may find the defendant guilty only if you all unanimously agree that the Commonwealth has proved beyond a reasonable doubt that the defendant committed the offense in one of those two ways. So you may not find the defendant guilty unless you all agree that the Commonwealth has proved beyond a reasonable doubt that the defendant ___*[indicate first theory of culpability]*___, or you all agree that the Commonwealth has proved beyond a reasonable doubt that the defendant ___*[indicate second theory of culpability]*___.

In the jury room you will have a verdict slip on which to record your verdict. Your foreperson will mark the verdict slip to indicate either that you have unanimously found the defendant not guilty, or that you have unanimously found the defendant guilty because ___*[indicate first theory of culpability]*___, or that you have unanimously found the defendant guilty because ___*[indicate second theory of culpability]*___.

"[I]n cases involving more than one theory on which the defendant may be found guilty of a crime, separate verdicts on each theory should be obtained" on the verdict slip, and the judge must, on request, instruct the jury that they must agree unanimously on the theory of culpability. *Commonwealth v. Accetta*, 422 Mass. 642, 646-647, 664 N.E.2d 830, 833 (1996); *Commonwealth v. Plunkett*, 422 Mass. 634, 640, 664 N.E.2d 833, 837 (1996). See also *Commonwealth v. Barry*, 420 Mass. 95, 112, 648 N.E.2d 732, 742 (1995) (adopting rule for murder cases).

For samples of such verdict slips, see those appended to Instruction 5.300 (OUI-Liquor or with .08% Blood Alcohol Level), Instruction 5.500 (OUI Causing Serious Injury), Instruction 6.140 (Assault and Battery), and Instruction 6.300 (Assault and Battery by Means of a Dangerous Weapon).

The model instruction and the sample verdict slips referenced above are drafted for the common situation in which the alternate legal theories are logically exclusive of one another (e.g., liability as a principal or as an accessory). In a situation where the jury could properly find the defendant guilty under both theories (e.g. both receiving and concealing a stolen motor vehicle under G.L. c. 266, § 28), the instruction should be appropriately adapted.

NOTES:

1. **Appellate standard where specific unanimity instruction omitted**. If several offenses occur on divers dates or are otherwise clearly separate incidents, and a specific unanimity instruction has been requested and its omission objected to, the conviction will be reversed, possibly without application of the harmless error analysis. *Commonwealth v. Black*, 50 Mass. App. Ct. 477, 478, 738 N.E.2d 751, 752 (2000). When no objection is made, no risk of a miscarriage of justice will be found if the several offenses transpire in the context of a single criminal episode. The same result is often reached even when the evidence shows multiple acts of the same nature on divers dates. *Id.,* citing, inter alia, *Commonwealth v. Comtois*, 399 Mass. 668, 675-677, 506 N.E.2d 503, 507-509 (1987).

2. **Joint venturer or principal.** When a judge instructs the jury on the defendant's potential liability either as a principal or as a joint venturer, but does not require the jury to specify the theory of liability on which they rest their verdict, a new trial is required if the evidence supports a finding of either principal or joint venture liability, but not both. However, if the evidence fails to establish who was the principal and who was the joint venturer, the verdict may stand, since the jury would be warranted in convicting the defendant either as the principal or the joint venturer. *Commonwealth v. Williams*, 450 Mass. 894, 898, 882 N.E.2d 850, 854-855 (2008).

2.340 JOINT REPRESENTATION

2009 Edition

In this case several defendants are being represented by the same attorney. That does not mean that you are to regard them as if they were one person. Each of these defendants is entitled to your separate consideration of the evidence concerning him (or her), even if they are represented by the same counsel. The question of whether guilt has been proven beyond a reasonable doubt is personal to each defendant, and you must decide it as to each defendant individually. It is completely irrelevant how many lawyers there are in the case.

> "In criminal cases, the potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one codefendant . . . . On the other hand, common representation of persons having similar interests is proper if the lawyer reasonably believes the risk of adverse effect is minimal and all persons have given their informed consent to the multiple representation, as required by [1.7](b)." Comment 7 to Mass. R. Prof. C. 1.7, 430 Mass. 1301 (1999).
>
> This model instruction is not offered to encourage joint representation of multiple defendants, but to acknowledge that it sometimes occurs in the District Court for minor offenses, where counsel has investigated and found no potential conflict of interest.
>
> Judges have an affirmative duty to assure themselves by due inquiry of counsel and/or defendants that no conflict exists, including a colloquy with jointly represented defendants "to assure that each defendant is adequately informed of the risks and potential dangers of joint representation and that each acknowledges an understanding of this information." *Commonwealth v. Davis*, 376 Mass. 777, 784-785, 384 N.E.2d 181, 188 (1978). See District Court Committee on Criminal Proceedings, Model Colloquies at 7-11 (rev. June 2007).

2.360 REPRIMAND OF COUNSEL

2009 Edition

During the course of this trial, I have had occasion to admonish or reprimand an attorney. You are to draw no inference against him (her) or his (her) client because of that. It is the duty of the attorneys to offer evidence, to object, and to argue to you on behalf of their side. It is *my* function to exclude evidence or argument that is inadmissible under our rules, and to admonish attorneys when I feel that is necessary for an orderly trial. But you should draw no inference from that. It is irrelevant whether you like a lawyer or whether you believe I do or don't like a lawyer.

The issue is not which attorney is more likeable; the issue is whether the Commonwealth has proved the defendant's guilt beyond a reasonable doubt.

In fact, in this case, I would like to express my thanks to each of the attorneys for their conscientious efforts on behalf of their clients and for the assistance that they have given me during this trial.

Your verdict must be based solely on the facts as you find them from the evidence, and on the law as I explain it to you. Nothing else that may have happened in this courtroom is relevant to the truth of your verdict.

The model instruction is adapted from L.B. Sand, J.S. Siffert, W.P. Loughlin & S.A. Reiss, Modern Federal Jury Instructions § 2-9 (1985).

2.380 PRO SE DEFENDANT; DISCHARGE OF COUNSEL

2009 Edition

I. PRO SE DEFENDANT

The defendant has decided to represent himself (herself) in this trial, and not to use a lawyer. He (she) has a perfect right to do that. His (her) decision has no bearing on whether he (she) is guilty or not guilty, and it should have no effect on your consideration of the case.

II. DISCHARGE OF COUNSEL

Even though the defendant was at first represented by a lawyer, he (she) has decided to continue this trial representing himself (herself), and not use the services of a lawyer. He (she) has a perfect right to do that. His (her) decision has no bearing on whether he (she) is guilty or not guilty, and it should have no effect on your consideration of the case.

The model instructions are adapted from Federal Judicial Center, Pattern Criminal Jury Instructions § 6 (1983 ed.)

2.400 ANNOUNCED WITNESS DOES NOT TESTIFY

2009 Edition

I. WHERE ANNOUNCED WITNESS DOES NOT APPEAR

When you were being impaneled as the jury in this case, you were told the names of the potential witnesses for this trial. This was done solely for the purpose of screening out any potential jurors who might know any of the possible witnesses, or might be related to any of them.

The fact that someone's name appeared on that list does not mean that they were definitely going to be a witness in this case. If someone was named at that point but has not appeared as a witness, you are to draw no inferences from that fact. You are to decide this case solely on the evidence that is before you.

It is common to give the jury venire the names and municipalities of prospective witnesses. The jury should not be told whether a witness will appear for the Commonwealth or the defense. *Commonwealth v. Nawn*, 394 Mass. 1, 3-4, 474 N.E.2d 545, 548 (1985); *Commonwealth v. Hesketh*, 386 Mass. 153, 159-160, 434 N.E.2d 1238, 1242-1243 (1982); *Commonwealth v. Bolduc*, 383 Mass. 744, 745-748, 422 N.E.2d 764, 765-766 (1981); *Commonwealth v. Pasciuti*, 12 Mass. App. Ct. 833, 834-838, 429 N.E.2d 374, 375-376 (1981).

This cautionary instruction may be used if an announced witness does not appear, although often it may be preferable to let it pass silently unless a particular witness's potential appearance was somehow highlighted before the jury. See also the supplementary instruction to Instruction 3.500 (Absent Witness).

II. WHERE WITNESS INVOKES TESTIMONIAL PRIVILEGE

In this case a witness has claimed his (her) (constitutional) (statutory) privilege not to testify. The witness has a legal right to do so, and you are not to draw any inferences, favorable or unfavorable to either the defense or the Commonwealth, because the witness has done so.

You are not to speculate about what the witness's testimony might have been. You must decide this case solely on the evidence that is before you.

Where it is known that a witness will invoke a testimonial privilege, this should be done on voir dire and not before the jury. *Commonwealth v. Martin*, 372 Mass. 412, 413, 421 n.17, 362 N.E.2d 507, 508, 512 n.17 (1977) (privilege against self-incrimination); *Commonwealth v. Lewis*, 12 Mass. App. Ct. 562, 574, 427 N.E.2d 934, 941 (1981) (same); *United States v. Johnson*, 488 F.2d 1206, 1211 (1st Cir. 1973) (same); *Commonwealth v. Labbe*, 6 Mass. App. Ct. 73, 79-80, 373 N.E.2d 227, 232 (1978) (spousal privilege). A mistrial may be required if the prosecutor elicits a claim of privilege before the jury if this (1) was done intentionally to prejudice the defendant or (2) does in fact materially prejudice the defendant. *Namet v. United States*, 373 U.S. 179, 185-191, 83 S.Ct. 1151, 1154-1157 (1963); *Martin*, 372 Mass. at 414 & n.4, 362 N.E.2d at 508 & n.4; *Commonwealth v. Fazio*, 375 Mass. 451, 460 n.3, 378 N.E.2d 648, 654 n.3 (1978).

When a witness invokes a testimonial privilege before the jury where it was not known in advance that the witness would definitely do so, the judge should give a forceful cautionary instruction not to draw any adverse inferences against the defendant. *Hesketh*, 386 Mass. at 157, 434 N.E.2d at 1242 (privilege against self-incrimination); *Commonwealth v. Granito*, 326 Mass. 494, 497-499, 95 N.E.2d 539, 542 (1951) (same); *Commonwealth v. DiPietro*, 373 Mass. 369, 388-391, 367 N.E.2d 811, 823 (1977) (spousal privilege).

See generally Jury Trial Manual for Criminal Offenses Tried in the District Court § 4.07.

2.420 REDUCING AND SENDING OUT THE JURY

2009 Edition

In the following instruction, appropriate words should be pluralized or changed as necessary if two alternate jurors were impaneled, or if the jury consists of twelve jurors.

Judge: **Ladies and gentlemen, when we impanel a jury at the beginning of a trial, we never know whether some personal emergency will arise during the course of the trial which will require that one of the jurors be excused from further jury duty. To avoid having to start the trial over again if that should occur, we impanel seven jurors, even though the case will eventually be decided by only six of you.**

The time has now come to reduce your number to that six. The clerk will draw one of your names at random. That juror will be designated as an alternate juror, and will not take part in your deliberations unless it is necessary to provide a substitute for one of the other jurors.

If fate makes you the alternate juror, please don't take it personally. Your presence up to this point, and your continuing availability if you should be needed, is itself an important contribution to the administration of justice. The court officer will make you as comfortable as possible while the jury deliberates.

The clerk will now reduce the jury to six jurors.

The clerk should place the names of all the jurors except the foreperson in the drum, draw the names of the one or two alternates, and address them as follows:

Clerk: **Juror No. ___ in seat no. ___, you are hereby designated as an alternate juror. [*Repeat the prior sentence if there is a second alternate juror.*] You will be kept separate and apart in the attendance of the court officer unless you are later drawn to replace a sitting juror. Would you sit over here, please?**

Judge: **(Mr. Foreman) (Madam Forelady), the clerk will now give you the verdict slip that you will use.**

<u>If several offenses are charged:</u> **There is one verdict slip for each charge.**

Explain verdict slips as necessary.

(Mr. Foreman) (Madam Forelady), when all six jurors have agreed unanimously upon a verdict, you should record that verdict on the verdict slip, and date and sign it. Then inform the court officer that you have reached a verdict, and you will be brought back into court.

If the jury has any questions during your deliberations, the (foreman) (forelady) should write out the question on a piece of paper, fold it up and give it to the court officer to bring to me.

You are not to make any use of cellular telephones or any other personal wireless device during deliberations. Incoming or outgoing calls or other electronic communications may disrupt the deliberative process or allow for the receipt of improper extraneous information.

You are not to conduct any outside research or investigation, by means of the internet or otherwise, about the law or facts of this case.

The clerk will now swear the court officer(s) who will escort you to your deliberations.

Clerk swears court officer(s): **You solemnly swear or affirm that you will take charge of this jury and keep them together in some convenient place until they have agreed, that you will not speak to them nor suffer anyone else to speak to them, except by order of Court or to ask them if they have agreed, so help you God.**

Judge: **Members of the jury, you may now retire to consider your verdict(s).**

NOTES:

1. **Alternate jurors not permitted in deliberations room**. Even with the defendant's consent, it is reversible error for a judge to permit alternate jurors to remain with the other jurors during deliberations (contrary to Mass. R. Crim. P. 20[d][2]), even under a cautionary instruction not to participate. *Commonwealth v. Sheehy*, 412 Mass. 235, 588 N.E.2d 10 (1992); *Commonwealth v. Smith*, 403 Mass. 489, 490-497, 531 N.E.2d 556, 557-561 (1988).

2. **Information sometimes found in complaints that must not be disclosed to the jury**. Judges and session clerks must be vigilant that criminal complaints do not contain information that must not be disclosed to the jury. For the convenience of counsel and the sentencing judge, District Court criminal complaints, in addition to the charging language for each offense, indicate the ***potential penalties*** for the offense, but these must not be disclosed to the jury. *Commonwealth v. Bart B.*, 424 Mass. 911, 913, 679 N.E.2d 531, 533-534 (1997); *Commonwealth v. Smallwood*, 379 Mass. 878, 882-883, 401 N.E.2d 802, 805 (1980); *Commonwealth v. Buckley*, 17 Mass. App. Ct. 373, 375-377, 458 N.E.2d 781, 783-784 (1984). For complaints charging ***subsequent offenses***, the jury must not know during the initial trial that the defendant is charged as a subsequent offender. G.L. c. 278, § 11A. Similarly, the jury should not be informed of any ***alias*** that is unconnected to the crime and unnecessary to establish the defendant's identity as the perpetrator, *Commonwealth v. Martin*, 57 Mass. App. Ct. 272, 275, 782 N.E.2d 547, 550 (2003), or of any ***alternative ways of committing the offense*** that are charged in the complaint but inapplicable to the case being tried, *Commonwealth v. Johnson*, 45 Mass. App. Ct. 473, 477 n.3, 700 N.E.2d 270, 272 n.3 (1998).

Since it is discretionary whether or not to send the complaint to the jury, *Commonwealth v. Johnson*, 43 Mass. App. Ct. 509, 513, 684 N.E.2d 627, 629 (1997), it appears that the simplest way to handle such situations is for the judge not to send the complaint to the jury room, and instead to rely on properly-drafted verdict slips to structure the jury's deliberations. Alternately, the clerk may be instructed to prepare a properly-redacted version of the complaint to be given to the jury.

It may also be necessary to redact evidence if it is to be sent to the jury room. See, e.g., *Commonwealth v. Blake*, 52 Mass. App. Ct. 526, 755 N.E.2d 290 (2001) (extraneous entries in Registry of Motor Vehicles suspension letter showing prior motor vehicle violations other than current triggering offense).

3. **Cellular phones and internet research during deliberations**. Judges should not allow the use of cellular telephones and other personal wireless devices during jury deliberations since they “may disrupt the deliberative process of the jury or allow for the receipt of improper extraneous information." *Commonwealth v. Rodriguez*, 63 Mass. App. Ct. 660, 676 n.9, 828 N.E.2d 556, 566 n.9 (2005). In addition, “given the simplicity, speed, and scope of Internet searches, allowing a juror to access with ease extraneous information about the law and the facts, trial judges are well advised to reference Internet searches specifically when they instruct jurors not to conduct their own research or investigations.” *Rodriguez*, 63 Mass. App. Ct. at 678 n.11, 828 N.E.2d at 568 n.11.

2.440 BEFORE AND AFTER SUPPLEMENTAL INSTRUCTIONS

2009 Edition

I. BEFORE SUPPLEMENTAL INSTRUCTIONS

Members of the jury, I am about to give you some additional instructions. (In response to your question,) I am going to try to further clarify some areas of the law for you.

These new instructions are no more or less important than those I gave you originally. When you (begin) (resume) deliberations, you are to consider all of my instructions together, as a whole.

II. AFTER SUPPLEMENTAL INSTRUCTIONS

Remember, in your deliberations you are to consider all of my instructions together as a whole — those I gave you before and those I have just given you.

> "Although it has been stated that 'a judge in giving further instructions is not required to repeat all aspects of his [or her] prior charge,' a considerable number of cases cite errors of omission in supplemental instructions as a ground for an appeal. It would be helpful to us for trial judges to adopt the following practice when giving supplemental instructions to the jury. At the beginning and again at the end of the supplemental instructions, the judge should advise the jurors that all of the instructions are to be considered as a whole and that the supplemental instructions are to be considered along with the main charge, unless, of course, the supplemental instructions are given to correct an error in the main charge" (citation omitted). *Commonwealth v. Hicks*, 22 Mass. App. Ct. 139, 144-145, 491 N.E.2d 651, 655 (1986).
>
> See Jury Trial Manual for Criminal Offenses Tried in the District Court § 2.84.

2.460 WHEN JURORS CANNOT AGREE

2009 Edition

Our constitution and laws provide that in a criminal case the principal way for deciding questions of fact is the verdict of a jury. In most cases — and perhaps, strictly speaking, in all cases — absolute certainty cannot be attained or expected.

The verdict to which each juror agrees must of course be his or her own verdict, the result of his or her own convictions, and not merely an acquiescence in the conclusion of the other jurors. Still, in order to bring six minds to a unanimous result, you must examine the issues you have to decide with candor and with a proper regard and respect for each other's opinions. You should consider that it is desirable that the case be decided. You should consider that you have been selected in the same manner, and from the same source, as any future jury would be. There is no reason to suppose that the case will ever be submitted to six persons who are more intelligent, more impartial, or more competent to decide it than you are, or that more or clearer evidence will be produced on one side or the other. With all this in mind, it is your duty to decide this case if you can do so conscientiously.

In order to make a decision more attainable, the law always imposes the burden of proof on one side or the other. In this criminal case, the burden of proof is on the Commonwealth to establish every part of it, every essential element, beyond a reasonable doubt. If you are left in doubt as to any essential element, the defendant is entitled to the benefit of that doubt, and must be acquitted.

In conferring together, you ought to give proper respect to each other's opinions, and listen with an open mind to each other's arguments. Where there is disagreement, those jurors who are for acquittal should consider whether a doubt in their own minds is a reasonable one, if it makes no impression on the minds of other jurors who are equally honest, equally intelligent, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and who have taken the same oath as jurors. On the other hand, those jurors who are for conviction ought seriously to ask themselves whether they may not reasonably doubt the correctness of their judgment, if it is not shared by other members of the jury. They should ask themselves whether they should distrust the weight or adequacy of the evidence if it has failed to convince the minds of their fellow jurors.

I would ask you now to return to your deliberations with these thoughts in mind.

The model instruction above and the alternate instruction below are adapted from the two alternative models set out in *Commonwealth v. Rodriguez*, 364 Mass. 87, 101-103, 300 N.E.2d 192, 202-203 (1973). The first is an amended version of a traditional charge developed from *Commonwealth v. Tuey*, 8 Cush. 1, 2-3 (1851); the second, a model charge recommended by the American Bar Association. Judges have been urged not to stray from the language in the recommended model instructions. *Commonwealth v. Sosnowski*, 43 Mass. App. Ct. 367, 374, 682 N.E.2d 944, 949 (1997).

It is appropriate for the judge to give such a charge when the jury is deadlocked, but because it "has a certain 'sting' to it," it should not be given prematurely, and digression from the recommended language is discouraged. *Commonwealth v. O'Brien*, 65 Mass. App. Ct. 291, 839 N.E.2d 845 (2005). As to when such a charge is appropriate, see Jury Trial Manual for Criminal Offenses Tried in the District Court § 2.85. Subject to the limitations of G.L. c. 234, § 34 (see note 1 below), there is no per se rule that giving such a charge more than once is inherently coercive. *Commonwealth v. Connors*, 13 Mass. App. Ct. 1005, 1006, 433 N.E.2d 454, 455-456 (1982).

The judge should not mention to the jury the possible expense or inconvenience of a second trial. *Commonwealth v. Pleasant*, 366 Mass. 100, 105-106, 315 N.E.2d 874, 877-878 (1974); *Commonwealth v. Resendes*, 30 Mass. App. Ct. 430, 434, 569 N.E.2d 413, 416 (1991).

ALTERNATE INSTRUCTION

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree to that verdict. Your verdict must therefore be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violating your individual judgment and conscience. Each of you must decide the case for yourself, but you should do so only after considering the evidence impartially with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if you become convinced that it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans for one side or the other. You are judges, the judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

I would ask you now to return to your deliberations with these thoughts in mind.

Rodriguez, 364 Mass. at 102, 300 at 203 (Appendix B); 3 ABA Standards for Criminal Justice, Trial by Jury, commentary to § 15-4.4(a) (2d ed. 1980).

NOTES:

1. **Restriction on sending out jury more than twice.** "If a jury, after due and thorough deliberation, return to court without having agreed on a verdict, the court may state anew the evidence or any part thereof, explain to them anew the law applicable to the case and send them out for further deliberation; but if they return a second time without having agreed on a

verdict, they shall not be sent out again without their own consent, unless they ask from the court some further explanation of the law." G.L. c. 234, § 34.

2. **"Pre–*Tuey-Rodriguez*" charge.** When the jury prematurely suggests that it may be at an impasse, but the judge concludes that the jury is not yet deadlocked and that a full *Tuey-Rodriguez* charge is not yet called for, the Appeals Court recommends that the judge instruct the jury using the ABA-recommended language in the first two paragraphs of the alternate instruction. "It seems reasonable to us that the jury's perception be acknowledged in some fashion. In so doing, a judge must exercise caution that the jury not be encouraged to give up the effort to reach unanimity, while at the same time ensuring that the jurors understand that conscientious disagreement is nevertheless acceptable . . . . The [ABA's] language is plainly intended to serve the useful function of communicating to jurors the nature of their obligations in circumstances short of the true deadlocks that require use of the *Tuey-Rodriguez* charge, and there should be resort to it at appropriate times." *Commonwealth v. O'Brien,* 65 Mass. App. Ct. 291, 296, 839 N.E.2d 845, 849 (2005).

Regardless of which instruction is utilized, after the jury has twice engaged in "due and thorough deliberation" the judge may not send them out again without their consent. G.L. c. 234, § 34 (see note 1, *supra*). To avoid subsequent problems with § 34, it is suggested that the judge state clearly for the record whenever the judge determines that a potential impasse has not occurred "after due and thorough deliberation."

2.480 SEATING OF ALTERNATE JUROR

2009 Edition

Members of the jury, one of your fellow jurors has been excused from this jury and replaced with an alternate juror. The reasons for this are entirely personal to him (her) and have nothing to do with his (her) views on the case or his (her) relationship with the other jurors. You are not to speculate about the reasons why that juror has been excused, or to consider it for any purpose.

Both the prosecution and the defendant have the right to a verdict that has been reached with the full participation of all the jurors who return that verdict. This right will be assured in this case only if the jury begins its deliberations again from the beginning.

I therefore instruct you to set aside and disregard all your past deliberations and to begin deliberations anew. This means that each of you remaining jurors must put aside and disregard the earlier deliberations, just as if they had not taken place.

You will kindly now retire for your deliberations in accordance with all the instructions that I have previously given you.

This instruction is adapted from Richards, California Jury Instructions —Criminal § 17.51(1978 supp. pamphlet No. 2), which was cited in *Commonwealth v. Haywood*, 377 Mass. 755, 770 n.15, 388 N.E.2d 648, 657 n.15 (1979). See also *Commonwealth v. Webster*, 391 Mass. 271, 461 N.E.2d 1175 (1984). See generally Jury Trial Manual for Criminal Offenses Tried in the District Court § 2.65.

NOTES:

1. **Discharging a juror.** When a problem develops with a deliberating juror, the judge may not discharge the juror pursuant to G.L. c. 234, § 26B without having conducted "with utmost caution" a hearing to determine whether there is good cause to discharge the juror. Both counsel and the defendant have a right to be present at such a hearing. The judge must scrupulously avoid any questions that may affect the juror's judgment or convey an improper silent message to other jurors. Good cause for discharge does not include unreasonable stubbornness or eccentricity, but "only reasons personal to a juror, having nothing whatever to do with the issues of the case or with the juror's relationship with his fellow jurors." The judge should so inform the juror, and avoid discussing the issues in the case or the juror's relationship to other jurors. When a juror is replaced, the jury should be instructed to begin deliberations anew, and also told that the replacement is for entirely personal reasons and has nothing to do with the discharged juror's views of the case or relationship with the other jurors. *Commonwealth v. Connor,* 392 Mass. 838, 845-846, 467 N.E.2d 1340, 1346-1347 (1984). In practice, it can be difficult to distinguish between a juror's personal problem, on the one hand, and the issues in the case or the relationship among jurors, on the other, since these may intersect. Since, in interviewing a juror, a judge must focus on whether the juror has a problem personal to that juror that would be a valid ground for discharge and must be cautious not to inquire into the jury's deliberative process, "sometimes the risk of an unreasonably stubborn or eccentric juror is unavoidable." *Commonwealth v. Torres,* 71 Mass. App. Ct. 723, 730-731, 886 N.E.2d 732, 738-739 (2008).

When a juror is discharged for introducing extraneous information, it is appropriate to ask the remaining jurors "Would you be able to disregard what this juror told you about the law and decide the case based upon what I tell you the law is?" If the discharged juror was the sole hold-out, "it would be prudent in the future for a judge to take additional precaution, when individually questioning the remaining jurors, by explaining the reason for the need to commence deliberations from the beginning, and by including a question whether the juror could begin his or her deliberations anew and could disregard the earlier deliberations." *Commonwealth v. Olavarria,* 71 Mass. App. Ct. 612, 885 N.E.2d 139 (2008).

2. **Non-appearing juror.** A judge may not replace an allegedly ill juror without conducting a hearing into the illness. *Commonwealth v. Perez,* 30 Mass. App. Ct. 934, 935, 569 N.E.2d 836, 837 (1991). General Laws c. 234A, § 39 gives a judge discretion to dismiss an absent juror after gathering enough information from available sources to make a finding that there is "a strong likelihood [of] unreasonable delay" from waiting for the juror. *Commonwealth v. Robinson,* 449 Mass. 1, 8-11, 864 N.E.2d 1186 (2007) (judge properly discharged juror who twice telephoned that she would not appear because she was unable to arrange caregiver for her sick child; arresting juror would cause additional delay and probably result in discharge anyway).

2.500 TAKING THE VERDICT AND DISCHARGING THE JURY

2009 Edition

When the defendant, the attorneys and the jury have all reassembled in the courtroom:

Clerk: **Will the jury please rise. Will the defendant also please rise and face the jury. Mr. Foreman (Madam Forelady), has your jury agreed upon a verdict (your verdicts)?**

Foreperson: **"Yes"** ***or*** **"We have."**

Clerk: **What say you, Mr. Foreman (Madam Forelady), as to complaint number _____, wherein the defendant is charged with _____, is he (she) guilty or not guilty?**

If the verdict is guilty and the judge has submitted a lesser-included offense to the jury:

Guilty of what?

Members of the jury, hearken to your verdict as the court will record it. You, upon your oath, do say that the defendant is (guilty) (not guilty) of ***[offense]*** **on complaint number _____ . So say you, Mr. Foreman (Madam Forelady). So say you all, members of the jury.**

If there are multiple charges: **And as to complaint number _____, wherein the defendant is charged with . . . .**

Continue as above for each additional charge.

If defendant has been acquitted on all charges: ***[Name of defendant]*** **, the jury having returned (a) verdict(s) of not guilty on this (these) complaint(s), the Court orders that you be discharged and go without day on this (these) complaint(s).**

See Jury Trial Manual for Criminal Offenses Tried in the District Court, Appendix VIII.

"A judge should observe the jury while they affirm their verdict in open court. If it appears that a juror does not agree with the verdict, inquiry should be made or the jury should be polled." *Commonwealth v. Floyd P*., 415 Mass. 826, 829 n.5, 615 N.E.2d 938, 941 n.5 (1993). See supplemental instruction 1, infra, for a formulary for polling the jury. A verdict should not be recorded if any juror expresses dissent from the verdict. *Commonwealth v. Nettis*, 418 Mass. 715, 718 n.3, 640 N.E.2d 468, 471 n.3 (1994). If there is such dissent, the judge may either direct the jury to continue their deliberations, or declare a mistrial. *Commonwealth v. Fernandes*, 30 Mass. App. Ct. 335, 345, 568 N.E.2d 604, 610 (1991). See supplemental instruction 2, infra, for a charge directing the jury to return to deliberations.

DISCHARGING THE JURY

Judge: **Members of the jury, during this trial I told you in my instructions that the verdict was your responsibility and your responsibility alone. For that reason, I never comment to the jury on the verdict they have reached. I will say to you, though, that it is clear that you took your responsibilities very seriously, and that you approached your decision carefully and conscientiously.**

Your jury service is now complete. On behalf of all the people of the Commonwealth, as well as the parties involved in this case, I thank you for that public service.

Jury service is not only one of the burdens of citizenship, it is also one of its privileges. As a foreign visitor observed almost 175 years ago, in the United States jury service "invests the people . . . with the direction of society." I hope that your time here has increased your understanding of how important jury service is to the workings of a democracy. I hope also that you have learned something about how our courts function, and how much they need your interest and your support as citizens.

The court officer will now escort you back to the jury assembly room, where you will be discharged. Thank you again.

When discharging the jury, the judge may thank the jurors for their public service, but should not praise or criticize the jury's verdict. 2 ABA Standards for Criminal Justice, Trial by Jury § 15-4.6 (2d ed. 1980). See *Commonwealth v. McGrath*, 364 Mass. 243, 246, 303 N.E.2d 108, 111 (1973); *Commonwealth v. Dane Entertainment Servs., Inc*., 18 Mass. App. Ct. 446, 450, 467 N.E.2d 222, 226 (1984).

The first paragraph of the model instruction is drawn from L.B. Sand, J.S. Siffert, W.P. Loughlin & S.A. Reiss, 1 Modern Federal Jury Instructions 9-13 (Nov. 1990 supp.). The reference in the third paragraph is to Alexis DeTocqueville, Democracy in America (1835) ("[T]he institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority [and] invests the people, or that class of citizens, with the direction of society"), quoted in *Powers v. Ohio,* 499 U.S. 400, 407, 111 S.Ct. 1364, 1368 (1991).

SUPPLEMENTAL INSTRUCTIONS

1. *Polling the jury.* ***Clerk:*** **Juror No. _____ , what say you, is the defendant guilty or not guilty?** ***or*** **Juror No. ____ , is the verdict announced by the (foreman) (forelady) your verdict?**

Any request to poll the jury must be made "before the verdict is recorded" (Mass. R. Crim. P. 27[d]). After the verdict has been recorded, a judge should not allow a request for polling unless a juror has expressed a public disagreement with the verdict as it is being taken or recorded. Once a verdict is received, affirmed and recorded, "neither a juror's change of heart nor a juror's subsequent disclosure of a subjective disagreement with her apparent vote provides a basis for vacating the verdict." *Commonwealth v. Reaves*, 434 Mass. 383, 395, 750 N.E.2d 464 (2001). Whether the jury should be polled is within the judge's discretion. Mass. R. Crim. P. 27(d). See Jury Trial Manual for Criminal Offenses Tried in the District Court § 2.87.

2. Return to deliberations after polling. **The clerk has just polled each of you, asking whether the verdict read to me was the decision reached by each and every one of you. It is apparent that the verdict in this case may not be unanimous; that one or more of you may not have agreed with it. Please return to the jury room, talk with one another, and try to deliberate there. Try to reach an agreement if you can. Do not hesitate to reexamine your own opinions and change your mind, but do not give up your honest beliefs just because others disagree with you or just to get the case over with. Your verdict in a criminal case, whatever it is, must be unanimous.**

The model instruction is based on Federal Judicial Center, Pattern Criminal Jury Instructions § 59 (1983 ed.).

3. Where jury is permitted to remain for sentencing. **Now that your term of service as jurors is ended, I invite you to remain in the courtroom for a few more minutes while I impose sentence.**

It is often said that there are several goals of sentencing: to protect the public in the future, to punish the defendant for breaking the law, to rehabilitate the defendant to live within the law, to deter others from breaking the law, and in some cases to make restitution available to the victim.

The Legislature has set the outside parameters within which the sentence for this offense must fall. Within those parameters, it is my responsibility as a judge — and often not an easy one — to try to balance those differing goals with each other in a sentence that does justice both for the defendant and for our society.

See District Court Standards of Judicial Practice, Sentencing and Other Dispositions § 1.01 (September, 1984).

4. Not discussing details of deliberations. **Before I dismiss you, I want to say a few words about any inquiries you might receive about this case. Now that the case is over, my authority to give you instructions is also over. But I want to offer you some suggestions which I will simply ask you to think about.**

You are not obliged to answer any questions that anyone may ask you about this case. There is no rule that prohibits you, once you are discharged, from discussing your jury service with anyone you choose to. But it is my recommendation that you not discuss with outsiders the details of your deliberations and how you came to reach your verdict.

From where you sit, you can see that rail in front of you which separates you jurors from the rest of us and from the public. That rail is a symbol of the privacy that jurors have traditionally accorded each other, and have been entitled to from the rest of us. Obviously, it is crucial, in order for our jury system to work, that jurors feel completely free to speak their mind during deliberations, without worrying about being embarrassed or pestered after their term of service is over. Former jurors must be able to resume their private lives without owing an explanation or justification to anyone. For that reason, it is normally in the best interests of future jurors for you to continue the longstanding tradition that jury deliberations remain private, even after the verdict.

If a situation ever arises where justice requires that former jurors be interviewed, that can always be done under the supervision of the Court. In that way, the integrity of the jury system is preserved and former jurors are not bothered unnecessarily.

Particularly in a case of public notoriety, it may be appropriate to explain to jurors that, although they have the right to speak with the press and others about the details of their deliberations, the confidentiality of jury deliberations is essential to the freedom and independence of future juries, in order to avoid the embarrassment and chilling effect that expected publication of deliberations would cause, and in order to discourage the harassment of jurors by defeated parties. *Clark v. United States*, 238[289] U.S. 1, 12-13, 53 S.Ct. 465, 468-469 (1933); *Commonwealth v. Smith*, 403 Mass. 489, 499, 531 N.E.2d 556, 562 (1988) (Abrams, J., concurring); *Woodward v. Leavitt*, 107 Mass. 458, 460 (1871); *Cook v. Castner*, 9 Cush. 266, 278 (1852); *Hannum v. Belchertown*, 19 Pick. 311, 313 (1837).

A post-verdict "searching or pointed examination of jurors in behalf of a party to a trial is to be emphatically condemned. It is incumbent upon the court to protect jurors from it." *Commonwealth v. Fidler*, 377 Mass. 192, 202-204, 385 N.E.2d 513, 519-520 (1979), quoting from *Rakes v. United States*, 169 F.2d 739, 745-746 (4th Cir.), cert. denied, 335 U.S. 826 (1948).
The model instruction is based in part upon a traditional instruction utilized for jury pools and cited favorably by the Supreme Judicial Court, *Fidler*, 377 Mass. at 201 n.9 & 204 n.12, 385 N.E.2d at 519 n.9 & 520 n.12; see Jury Trial Manual for Criminal Offenses Tried in the District Court § 2.88, in part upon R. L. McBride, The Art of Instructing the Jury §§ 3.69-3.71 (1969), and also upon L.B. Sand, J.S. Siffert, W.P. Loughlin & S.A. Reiss, 1 Modern Federal Jury Instructions 9-13 (Nov. 1990 supp.).

NOTES:

1. **Judge privately conferring with jury before sentencing.** It is "imprudent" for the judge to confer privately with the jury prior to discharging them, unless the judge has already imposed sentence. *Commonwealth v. Leavey*, 60 Mass. App. Ct. 249, 253, 800 N.E.2d 1073, 1076 (2004).

2. **Recommendation for leniency.** Federal judges may not accept a verdict accompanied by a jury recommendation for leniency. They are instead to admonish the jury that it has no sentencing function. *Rogers v. United States*, 422 U.S. 35, 40, 95 S.Ct. 2091, 2095 (1975).

2.520 IMPOSING SENTENCE

2009 Edition

Clerk: ***[Name of defendant]*** **, hearken to the sentence of the Court. The Court, having duly considered your offense, on complaint number _____ sentences you:**

INCARCERATION

House of correction. **to be imprisoned in the house of correction in (our) (the) County of _____ for the term of _____ ,**

Jail. **to be imprisoned in the common jail in (our) (the) County of _____ , for the term of _____ ,**

Weekend sentence in house of correction or jail. **to be imprisoned in the (house of correction) (common jail) in (our) (the) County of _____ for the term of _____ days. The Court further orders that such sentence be served (in whole) (in part) (on weekends and legal holidays) (at periodic intervals, as follows: _____), in accordance with the "Special Sentencing Form" of the Court, which will be given to you by the probation officer.**

If sentence suspended. **and the Court further orders that the execution of this sentence be suspended and that you be placed on probation for a term of *[time]* . The Court further orders that you (pay a probation supervision fee of _____ dollars) (engage in _____ hours of community work service in lieu of a probation supervision fee) during each month of such probation. You must see the probation officer before you leave today.**

If defendant committed. **and you stand committed in pursuance of this sentence. The Court further orders that you be deemed to have served _____ days of this sentence.**

To impose consecutive ("from and after") sentences. **The Court further orders that the sentence imposed on complaint number _____ shall take effect from and after the expiration of the sentence imposed on complaint number _____.**

To impose a consecutive sentence where defendant is already serving a sentence **The Court further orders that the sentence imposed on complaint number _____ shall take effect from and after the expiration of all sentences previously imposed.**

To impose concurrent sentences. **The Court further orders that the sentence imposed on complaint number _____ shall be served concurrently with the sentence imposed on complaint number _____.**

To impose a concurrent sentence where defendant is already serving a sentence. **The Court further orders that the sentence imposed on complaint number _____ shall be served concurrently with the sentence you are now serving at *[where]* .**

PROBATION

Straight probation. **to be placed on probation for a term of *[time]* , subject to the rules and regulations of the probation department. The Court further orders that you (pay a probation supervision fee of _____ dollars) (engage in _____ hours of community work service in lieu of a probation supervision fee) during each month of such probation. You must see the probation officer before you leave today.**

MONEY PAYMENTS

Fine and surfine. **to pay a fine of _____ dollars (plus a surfine of _____ dollars),**

Victim/witness assessment. **and the Court further orders that you pay a victim/witness assessment of _____ dollars,**

O.U.I. or Negligent Operation head injury assessment. **and the Court further orders that you pay an assessment of $___ for the Head Injury Treatment Services Trust Fund,**

O.U.I. victims assessment. **and the Court further orders that you pay an assessment of $___ for the Victims of Drunk Driving Trust Fund,**

O.U.I. § 24D fee. **and the Court further orders that you pay a fee of $___ to support efforts to reduce drunk driving,**

Batterers intervention program assessment. **and the Court further orders that you pay an assessment of $___ because of your referral to a certified batterers intervention program,**

Drug analysis fee. **and the Court further orders that you pay a fee of _____ dollars for the Drug Analysis Fund,**

GPS fee. **and the Court further orders that you pay a fee of _____ dollars monthly for the cost of monitoring your whereabouts with a global positioning system device,**

Restitution. **and the Court further orders that you pay restitution to *[victim's name]* in the amount of $ _____ ,**

If any required amount must be paid forthwith. **and you stand committed until such sum is paid.**

If all required amounts are suspended. **and the Court further orders that payment of such sum be suspended until *[date]* .**

RIGHT OF APPEAL

After imposition of any sentence. **You have a right of appeal to the Appeals Court within thirty days.**

DISPOSITIONS NOT INVOLVING A SENTENCE

Filing. **The Court orders that complaint number _____ be filed upon your consent. Do you consent?**

Mental health commitment for examination to aid sentencing. **On complaint number ____ , the Court orders that you be committed to (a facility of the Department of Mental Health) (the Bridgewater State Hospital) for a period not to exceed forty days for observation and examination to aid the Court in sentencing, pursuant to General Laws chapter 123, section 15(e).**

Mental health commitment after verdict of not guilty by reason of lack of criminal responsibility. **On complaint number _____, the Court orders that you be committed to (a facility of the Department of Mental Health) (the Bridgewater State Hospital) for a period not to exceed forty days for observation and examination as to your present mental condition, pursuant to General Laws chapter 123, section 16(a).**

These sentencing formularies are adapted from Jury Trial Manual for Criminal Offenses Tried in the District Court, Appendix VIII. Some of the language was originally drawn from T.S. Bakas, Trial Clerk's Manual (Superior Court Criminal Sessions) (1979).

NOTES:

1. **Not incarcerating for crimes against the person requires a statement of reasons.** A jury session judge sentencing for one of the crimes against the person found in G.L. c. 265 who does not impose a sentence of incarceration "shall include in the record of the case specific reasons for not imposing a sentencing of imprisonment," which shall be a public record. G.L. c. 265, § 41.

2. **Right of appeal.** Massachusetts R. Crim. P. 28(c) provides that after a judgment of guilty is entered, "the court shall advise the defendant of his right to appeal. In the District Court, upon the request of the defendant, the clerk of the court shall prepare and file forthwith a notice of appeal." A notice of appeal must be filed in writing with the clerk within 30 days after the verdict or sentence. Mass. R. A. P. 3(a) & 4(b). The 30 days exclude the day of the verdict or sentence, but include intermediate Saturdays, Sundays and legal holidays and the last day of the period, unless it is a Saturday, Sunday or legal holiday. Mass. R. A. P. 14(a). The running of the 30 days is stayed by the filing of a motion for new trial, but begins to run anew from the date such a motion is denied. Mass. R. A. P. 4(b). It is also stayed during the pendency of a timely-filed motion for reconsideration. *Commonwealth v. Powers,* 21 Mass. App. Ct. 570, 573-574, 488 N.E.2d 430, 432-433 (1986).

Upon a showing of excusable neglect, the trial judge may extend the time for filing by up to 30 days beyond the normal expiration date. Mass. R. A. P. 4(c). A single justice of an appellate court may extend the period for appeal for up to one year from the date of verdict or sentence. Mass. R. A. P. 14(b). Neither the trial judge nor an Appeals Court single justice has any authority to further extend the filing period for an appeal, although an S.J.C. single justice may have general superintendence power to do so under G.L. c. 211, § 3. *Commonwealth v. Lopes,* 21 Mass. App. Ct. 11, 16, 483 N.E.2d 479, 482-483 (1985).

3. **Batterers intervention program mandatory for violation of abuse prevention order.** Assignment to a certified batterer's intervention program is mandatory for any violation of an abuse prevention order "unless, upon good cause shown, the court issues specific written findings describing the reasons that batterer's intervention should not be ordered or unless the batterer's intervention program determines that the defendant is not suitable for intervention. The court shall not order substance abuse or anger management treatment or any other form of treatment as a substitute for certified batterer's intervention. If a defendant ordered to undergo treatment has received a suspended sentence, the original sentence shall be reimposed if the defendant fails to participate in said program as required by the terms of his probation." G.L. c. 209A, § 7.

4. **Required money assessments.** Various statutes require imposition of money assessments as part of the disposition of specified offenses. These are listed below and in the chart of "Potential Money Assessments in Criminal Cases" appended to this instruction.

• ***209A additional fine*** is mandatory upon conviction of violating a restraining order (G.L. c. 209A, § 7), in additional to any other fine or penalty. The statute is silent as to waiver for indigency.

• ***Batterers intervention program assessment*** is mandatory when a defendant is referred to a certified batterers intervention program as a condition of probation, in addition to the cost of the program. The assessment may be reduced or waived if the defendant is indigent

or if payment would cause the defendant or the defendant's dependents financial hardship. G.L. c. 209A, § 10.

• ***Drug analysis fee*** is mandatory upon conviction or a finding of sufficient facts of distribution of a Class A drug (G.L. c. 94C, § 32), Class B drug (§ 32A), Class C drug (§ 32B), Class D drug (§ 32C), Class E drug (§ 32D) or counterfeit drug (§ 32G), subsequent-offense possession of heroin (§ 34), or being present where heroin is kept (§ 35). For multiple offenses in a single incident, the maximum fee is $500. The fee may be reduced or waived if it would cause the defendant undue hardship. G.L. c. 280, § 6B.

• ***GPS fee*** is mandatory for any probationer who is required to wear a GPS device as a condition of probation for an offense that requires registration as a sex offender. The fee may be waived for indigency. G.L. c. 265, § 47.

• ***Hate crimes surfine*** is a mandatory addition to any fine imposed upon a conviction of any of the four hate crimes found in G.L. c. 265, § 39 (assault to intimidate, assault and battery to intimidate, assault and battery to intimidate with bodily injury, and property damage to intimidate). For multiple offenses, the surfine applies to each. The statute is silent as to waiver for indigency.

• ***OUI § 24D fee*** is mandatory when a defendant is placed in a driver alcohol or drug abuse education program as part of a G.L. c. 90, § 24D disposition for OUI. It may be reduced, paid over time or waived if it would cause "grave and serious hardship." G.L. c. 90, § 24D ¶¶ 9-10.

• ***OUI victims assessment*** is mandatory upon conviction, continuance without a finding, probation, admission to sufficient facts, or guilty plea to OUI/.08% (G.L. c. 90, § 24[1]), vehicular homicide involving OUI (§ 24G), or OUI with serious injury (§ 24L). The assessment "shall not be subject to waiver by the court for any reason." G.L. c. 90, § 24(1)(a)(1) ¶ 3.

• ***OUI or Negligent Operation head injury assessment*** is mandatory upon conviction, continuance without a finding, probation, admission to sufficient facts, or guilty plea to OUI/.08% (G.L. c. 90, § 24[1]) or operating negligently (§ 24[2]). The assessment may be reduced or waived only on a written finding of fact that it would cause severe financial hardship. G.L. c. 90, § 24(1)(a)(1) ¶ 2 or § 24(2)(a) ¶ 2.

• ***Probation fee*** (plus surcharge) is mandatory each month for a defendant placed on supervised or administrative supervised probation. The fee may be waived to the extent the probationer pays equivalent restitution. It may be waived or reduced only after hearing and upon a written finding of undue hardship, and the probationer must instead perform community work service for at least 1 day monthly for supervised probation or 4 hours monthly for administrative supervised probation. G.L. c. 276, § 87A.

• ***Surfine.*** A surfine (or "special cost assessment") of 25% must be added to any fine, except for motor vehicle offenses not punishable by incarceration. G.L. c. 280, § 6A.

• ***Victim/witness assessment*** is required upon conviction or finding of sufficient facts for any crime. The assessment may be reduced or waived only on a written finding that it would cause severe financial hardship. G.L. c. 258B, § 8.

2.521 POTENTIAL MONEY ASSESSMENTS IN CRIMINAL CASES

2009 Edition

This is a chart and can be viewed as a pdf.
http://www.mass.gov/courts/docs/courts-and-judges/courts/district-court/jury-instructions-criminal/2521-imposing-sentence-chart-of-potential-money-assessments.pdf

2.540 SUBSEQUENT OFFENSE

G. L. c.278 § 11A
Revised May 2011

The defendant is charged with being a subsequent offender. Section ____of Chapter ____ of our General Laws provides that a person who is convicted of *[underlying offense]* shall be punished as a subsequent offender if, prior to the date of that offense, he (she) had been convicted of (the same) (a like) offense.

The defendant was convicted of *[underlying offense]* that occurred on *[date of underlying offense]* when (you returned a verdict of guilty) (a verdict of guilty was returned) (a finding of guilty was entered) (the defendant pleaded guilty to that offense). You are therefore to treat this fact as undisputed and proved. You must now go on to determine whether the Commonwealth has proved the charge that this was a subsequent offense.

The defendant has pleaded not guilty to the charge that this was a subsequent offense. He (she) is presumed to be innocent of the charge that it was a subsequent offense, and the burden is on the Commonwealth to prove that it was.

In order to prove that the defendant is guilty of being a subsequent offender, the Commonwealth must prove beyond a reasonable doubt that prior to the date when the defendant committed *[underlying offense]* , this same defendant had previously been convicted of (the same) (a like) offense.

If this is not the same jury that returned a guilty verdict on the underlying offense, here instruct on Reasonable Doubt (Instruction 2.180).

The word "conviction" refers to the entry of a guilty verdict by a jury or a guilty finding by a judge.

SUPPLEMENTAL INSTRUCTIONS

1. CWOF and program assignment in OUI cases. **A prior conviction may also be shown by proving that this same defendant was previously assigned by a court to an alcohol or controlled substance education, treatment or rehabilitation program, *and* that the program assignment was made because of a like offense.**

G.L. c. 90, § 24D. *Commonwealth v. Murphy*, 389 Mass. 316, 451 N.E.2d 95 (1983).

2. "Like offense" in another state. **I instruct you, as a matter of law, that the offense known as_____ in the state _____of is a like offense to the offense of *[underlying offense]* here in Massachusetts.**

To prove that the defendant was previously convicted of (a like) (the same) offense, the Commonwealth must prove beyond a reasonable doubt that the person who is now in the courtroom is the same person as the person previously convicted.

Identity cannot be proved simply by showing that this defendant has the same name — even the identical name — as a person previously convicted. The Commonwealth must prove the common identity of this defendant and the other person — that they are in fact the same person — beyond a reasonable doubt.

You should consider all the evidence and any reasonable inferences you draw from the evidence in determining whether common identity has been proved.

After considering all of the evidence, if you determine that the Commonwealth has proved beyond a reasonable doubt that, prior to the date of this offense, the defendant had previously been convicted of (the same) (a like) offense, then you should find the defendant guilty of being a subsequent offender. If you determine that the Commonwealth has not proved that the defendant had previously been convicted of (the same) (a like) offense, then you must find the defendant not guilty.

SUPPLEMENTAL INSTRUCTIONS

1. If conviction may have been obtained without counsel or waiver of counsel. **If there is evidence that the defendant did not have an attorney represent him (her) when he (she) was previously convicted of (a like) (the same) offense and that he (she) did not waive his (her) right to be represented by an attorney, the Commonwealth must also prove beyond a reasonable doubt that the defendant was in fact either represented by an attorney when he (she) was previously convicted of (a like) (the same) offense or waived his (her) right to be represented by an attorney.**

The Commonwealth may prove this in various ways, such as offering court documents which name an attorney as representing the defendant or which indicate that the defendant signed a waiver of attorney or chose not to hire an attorney. The defendant is not required to present any evidence. It is up to the Commonwealth to prove beyond a reasonable doubt that the defendant was either represented by an attorney or waived his (her) right to be represented.

See *Commonwealth v. Saunders*, 435 Mass. 691, 696 (2002); *Commonwealth v. McMullin*, 76 Mass. App. Ct. 904, 905 (2010).

2. If more than one prior offense is alleged. **The Commonwealth alleges that, prior to the date of this offense, the defendant had previously been convicted ____ times of (the same) (a like) offense. It is for you to determine from the evidence whether the Commonwealth has proved any prior convictions beyond a reasonable doubt, and if so, how many.**

In determining whether and how many times this defendant was previously convicted of *[offense]* , you should consider all of the evidence and any reasonable inferences you choose to draw from that evidence. If the Commonwealth has proved one or more prior offenses, you should return a verdict reflecting the total number of prior convictions proved beyond a reasonable doubt.

In such cases, appropriate modifications should be made in the basic instruction to refer to prior offenses in the plural. See also *Commonwealth v. Bowden*, 447 Mass. 593, 855 N.E.2d 758 (2006) (proof of prior conviction for third offense OUI sufficient to establish all three prior convictions).

3. If this is the same jury that returned a guilty verdict on the underlying offense. **All of my instructions on the law at the first trial apply fully and equally here. I remind you that the complaint alleging that the defendant is a subsequent offender is not any evidence of guilt. The defendant is presumed to be innocent until proven guilty beyond a reasonable doubt. The burden falls entirely on the Commonwealth to prove that this conviction for *[underlying offense]* is in fact a subsequent conviction for this defendant. The burden of proof never shifts to the defendant. The defendant has no burden to prove anything nor to introduce any evidence.**

You may not consider any evidence that was introduced in the first trial. None of that evidence is relevant to the determination you must make now: whether the Commonwealth has proved beyond a reasonable doubt that the defendant was previously convicted of (the same) (a like) offense. You may only consider the evidence introduced during this second trial in which it is alleged that the conviction is a subsequent offense.

NOTES:

1. **Bifurcated proceeding required by G.L. c. 278, § 11A.** "If a defendant is charged with a crime for which more severe punishment is provided for second and subsequent offenses, and the complaint or indictment alleges that the offense charged is a second or subsequent offense, the defendant on arraignment shall be inquired of only for a plea of guilty or not guilty to the crime charged, and that portion of the indictment or complaint that charges, or refers to a charge that, said crime is a second or subsequent offense shall not be read in open court. If such defendant pleads not guilty and is tried before a jury, no part of the complaint or indictment which alleges that the crime charged is a second or subsequent offense shall be read or shown to the jury or referred to in any manner during the trial; provided, however, that if a defendant takes the witness stand to testify, nothing herein contained shall prevent the impeachment of his credibility by evidence of any prior conviction, subject to the provisions of [G.L. c. 233, § 21]. If a defendant pleads guilty or if there is a verdict or finding of guilty after trial, then before sentence is imposed, the defendant shall be further inquired of for a plea of guilty or not guilty to that portion of the complaint or indictment alleging that the crime charged is a second or subsequent offense. If he pleads guilty thereto, sentence shall be imposed; if he pleads not guilty thereto, he shall be entitled to a trial by jury of the issue of conviction of a prior offense, subject to all of the provisions of law governing criminal trials. A defendant may waive trial by jury. The court may, in its discretion, either hold the jury which returned the verdict of guilty of the crime, the trial of which was just completed, or it may order the impaneling of a new jury to try the issue of conviction of one or more prior offenses. Upon the return of a verdict, after the separate trial of the issue of conviction of one or more prior offenses, the court shall impose the sentence appropriate to said verdict." The defendant is not entitled to have a new jury seated to try the subsequent offense allegation merely because the first jury has just convicted him of the underlying offense. *Commonwealth v. Means,* 71 Mass. App. Ct. 788, 797-798, 886 N.E.2d 754, 761 (2008).

2. **Subsequent offense allegation required in complaint.** A defendant may not be subjected to enhanced punishment which is statutorily provided for a subsequent offense unless the prior offenses have been alleged in the complaint and proved beyond a reasonable doubt. *Commonwealth v. Fortier,* 258 Mass. 98, 100, 155 N.E. 8, 9 (1927); *McDonald v. Commonwealth,* 173 Mass. 322, 326-327, 53 N.E. 874, 874-875 (1899), judgment aff'd, 180

U.S. 311, 21 S.Ct. 389 (1901); *Tuttle v. Commonwealth,* 2 Gray 505, 506 (1854). A statute providing otherwise would be unconstitutional under Art. 12 of the Massachusetts Declaration of Rights. *Commonwealth v. Harrington,* 130 Mass. 35, 36 (1880).

Since subsequent offense provisions do not create separate offenses but sentencing enhancements, a subsequent offense allegation may appear either within the charging language of the underlying offense or in the format of a separate count within the same complaint. *Commonwealth v. Fernandes,* 430 Mass. 517, 722 N.E.2d 406 (1999) (reference to defendant as "having been previously convicted of a similar offense" is sufficient allegation of prior offense); *Commonwealth v. Gonzalez,* 22 Mass. App. Ct. 274, 283-285, 493 N.E.2d 516, 522-523 (1986) (indictment that "further alleges this to be the second and subsequent offense" is sufficient allegation of prior offense). If the statute does not provide for enhanced punishment for a subsequent offense, any such allegation in the complaint should be stricken. See *Commonwealth v. Markarian,* 250 Mass. 211, 213, 145 N.E. 305, 306 (1924). If the subsequent-offense allegation is charged in a separate count, it operates in conjunction with the substantive count and the sentence must pertain to both counts; the judge should not file the substantive count and impose sentence on the subsequent-offense-allegation count. *Commonwealth v. Lopez,* 55 Mass. App. Ct. 741, 742 n.1, 774 N.E.2d 667, 669 n.1 (2002).

If the Commonwealth fails to prove the subsequent offense, the defendant may only be convicted and sentenced as a first offender. *Commonwealth v. Barney,* 258 Mass. 609, 610, 155 N.E. 600, 601 (1927). However, as a matter of discretion, a judge may always consider prior convictions as a reason to sentence on the severe end of the range of first-offense penalties. *Commonwealth v. Baldwin,* 24 Mass. App. Ct. 200, 205-206, 509 N.E.2d 4 (1987).

3. **Sentencing must await resolution of subsequent offense allegation.** A judge is not to impose sentence when the defendant is convicted of the underlying offense, but is to await completion of the separate trial on whether it is a subsequent offense. *Commonwealth v. Jarvis*, 68 Mass. App. Ct. 538, 863 N.E.2d 567 (2007). If a subsequent offense is charged in a separate count, one sentence is to be imposed on both counts; the judge should not file the count charging the underlying offense and impose sentence on the count with the subsequent offense allegation. *Commonwealth v. Lopez,* 55 Mass. App. Ct. 741, 742 n.1, 774 N.E.2d 667, 669 n.1 (2002).

4. **Judge's option whether to impanel different jury.** The judge should inquire whether the defendant pleads guilty or not guilty to that portion of the complaint that alleges a subsequent offense. If the defendant pleads not guilty, the "court may, in its discretion, either hold the jury which returned the verdict of guilty of the crime, the trial of which was just completed, or it may order the impaneling of a new jury to try the issue of conviction of one or more prior offenses." G.L. c. 278, § 11A. The defendant is not entitled to a new jury merely based on speculation that the first jury may be biased because it has just convicted him of the underlying offense. *Commonwealth v. Means,* 71 Mass. App. Ct. 788, 797, 886 N.E.2d 754, 761 (2008).

5. **Guilty plea or bench trial on subsequent offense allegation.** If the defendant pleads guilty as to the subsequent offense allegation, the judge must conduct a colloquy and find a knowing and voluntary waiver of the right to trial on that issue. A defendant may not stipulate to a subsequent offense through counsel. *Commonwealth v. Orben*, 53 Mass. App. Ct. 700, 706-707, 761 N.E.2d 991, 997-998 (2002). If the defendant also pleaded guilty to the underlying offense, only an abbreviated colloquy is necessary; the judge need not repeat the preliminary questions but must make clear that they apply here as well. The prosecutor should set forth the facts of the prior offenses, and the judge should further inquire as to whether the defendant committed the acts described, whether his plea to them is voluntary, and so on. W hen satisfied

that the plea is voluntary, made with an understanding of its consequences, and that sufficient facts warrant a finding of guilty on the subsequent offense portion of the charge, the judge may then impose sentence. *Commonwealth v. Pelletierg*, 449 Mass. 392, 397-398, 868 N.E.2d 613, 618 (2007).

If the defendant was tried and convicted by a jury on the underlying offense and then waives jury trial on the subsequent offense portion of the complaint, both a written jury waiver and a jury waiver colloquy are required and their absence is fatal. A stipulation by counsel to a bench trial of the subsequent offense allegation is insufficient. *Commonwealth v. Dussault,* 71 Mass. App. Ct. 542, 883 N.E.2d 1243 (2008).

6. **Prior convictions must precede subsequent offense, not just subsequent conviction.** The OUI statute defines a subsequent offender as a defendant who was "previously convicted or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like violation preceding the date of the *commission* of [this] offense" (G.L. c. 90, § 24[1][a][1]) (emphasis added). This requires that the prior conviction must have preceded the subsequent offense and not merely the subsequent conviction. *Commonwealth* v. *Hernandez*, 60 Mass. App. Ct. 416, 802 N.E.2d 1059 (2004). This is true also of drug offenses under G.L. c. 94C. See *Bynum v. Commonwealth,* 429 Mass. 705, 711 N.E.2d 138 (1999). In prosecutions for other subsequent offenses, the precise wording of the statute should be examined.

7. **"Like offense."** A "like offense" or "like violation" is determined by the elements of the offense, not the penalty. *Commonwealth v. Corbett,* 422 Mass. 391, 396-397, 663 N.E.2d 259 (1996) (irrelevant that 3rd offense OUI is felony while 1st and 2nd offenses are misdemeanors); *Commonwealth v. Becker,* 71 Mass. App. Ct. 81, 879 N.E.2d 691 (2008) (irrelevant that Massachusetts offense of indecent assault and battery is felony, while similar NY offense of 3rd degree sexual abuse is misdemeanor). See also *Commonwealth v. Valiton,* 432 Mass. 647, 655-656, 737 N.E.2d 1257 (2000) (prior delinquency charge qualifies as prior offense).

8. **Identity of defendant.** Mere identity of names is not enough to prove a prior conviction. *Commonwealth* v. *Koney*, 421 Mass. 295, 301-302, 657 N.E.2d 210, 214 (1995). See also *Commonwealth v. Maloney*, 447 Mass. 577, 582, 855 N.E.2d 765, 770 (2006).

9. **Methods of proving prior offense and identity of defendant.** In prosecutions under G.L. c. 90, § 24:

> "introduction into evidence of a prior conviction or a prior finding of sufficient facts by either certified attested copies of original court papers, or certified attested copies of the defendant's biographical and informational data from records of the department of probation, any jail or house of corrections, the department of correction, or the registry, shall be prima facie evidence that the defendant before the court had been convicted previously or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program by a court of the commonwealth or any other jurisdiction. Such documentation shall be self-authenticating and admissible, after the commonwealth has established the defendant's guilt on the primary offense, as evidence in any court of the commonwealth to prove the defendant's commission of any prior convictions described therein. The commonwealth shall not be required to introduce any additional corroborating evidence, nor live witness testimony to establish the validity of such prior convictions."

G.L. c. 90, § 24(1)(c)(4). This does not limit the ways in which the Commonwealth may prove a prior offense.

Bowden, supra (prior version of statute); *Commonwealth v. Maloney,* 447 Mass. 577, 855 N.E.2d 765 (2006) (current version of statute).

In OUI and other prosecutions, see also G.L. c. 90, § 30 ("[c]ertified copies of such records [of 'all applications and of all certificates and licenses issued' and of 'all convictions of persons charged with violations of the laws relating to motor vehicles'] of the registrar, attested by the registrar or his authorized agent, shall be admissible as evidence in any court of the commonwealth to prove the facts contained therein"); G.L. c. 233, § 76 ("[c]opies of books, papers, documents and records in any department of the commonwealth or of any city or town, authenticated by the attestation of the officer who has charge of the same, shall be competent evidence in all cases equally with the originals thereof"); Mass. R. Crim. P. 40(a)(1) (an "official record . . . may be evidenced by a copy attested by the officer having legal custody the record, or by his deputy"); Mass. G. Evid. § 902(b) (2008-2009) (same). W ith respect to court records from another state, see G. L. c. 233, § 69 (records and court proceedings of a court of another state or of the United States may be authenticated "by the attestation of the clerk or other officer who has charge of the records under its seal"); Mass. G. Evid. § 902(a) (2008-2009) (same).

An "attested copy" is one "which has been examined and compared with the original, with a certificate or memorandum of its correctness, signed by the persons who have examined it. Thus, to qualify as an 'attested' copy, there must be a written and signed certification that it is a correct copy. The attestation of an official having custody of an official record is the assurance given by the certifier that the copy submitted is accurate and genuine as compared to the original." *Commonwealth v. Deramo,* 436 Mass. 40, 47, 762 N.E.2d 815, 821 (2002) (photocopy of original attestation insufficient).

The attesting signature may be either holographic, stamped or printed. G.L. c. 218, § 14 (District Court clerks may use facsimile signature for criminal records except for search warrants and process authorizing arrests or commitments); G.L. c. 221, § 17 (Massachusetts court clerks may use facsimile signature for writs, summonses, subpoenas, and orders of notice or attachment, except executions); *Commonwealth v. Johnson,* 32 Mass. App. Ct. 355, 357, 589 N.E.2d 328, 330 (1992) ("It is a well established principle that in the absence of a statutory directive, a signature may be affixed in many different ways. It may be written by hand or it may be stamped, printed, or affixed by other means"). See *Commonwealth v. Apalakis,* 396 Mass. 292, 486 N.E.2d 669 (1985) (temporary driver's license "bearing a stamped facsimile of the registrar's signature . . . served as a temporary license until a regular photographic license could be obtained"); *Foss v. Wexler,* 242 Mass. 277, 282, 136 N.E. 243, 245 (1922) ("In the absence of statute or regulation to the contrary, we cannot say that the licenses are invalid because the signature of the commissioners was made by their duly authorized agent with a rubber stamp"); *Commonwealth v. Michael J. English,* 72 Mass. App. Ct. 1120, 894 N.E.2d 1181, 2008 W L 4539475 (No. 07-P-1503, Oct. 14, 2008) (unpublished opinion under Appeals Court Rule 1:28) (in OUI trial, Registrar's rubber-stamped signature sufficient to authenticate RMV records); *Commonwealth v. King,* 35 Mass. App. Ct. 221, 222 n.3, 617 N.E.2d 1036, 1037 n.3 (1993) (rejecting challenge to drug analysis certificate because it "carried the stamped signature rather than the handwritten signature of the notary").

Nasser v. State, 646 N.E.2d 673, 676-677 (Ind. Ct. App. 1995), held that it is not necessary for each page in a document to be separately attested if one page incorporates the others, or if the pages are numbered, or if from the context it is otherwise "clear that all of the pages are part of the same document." *Bates v. State,* 650 N.E.2d 754 (Ind. Ct. App. 1995), held that a court clerk's attestation on the first page of a record of conviction was sufficient to cover a second page that was not numbered and did not bear the defendant's name or docket number, where similar information in DMV records confirmed that the second page of the court record was a continuation of the first. No Massachusetts appellate court has considered the issue.

10. **Representation by counsel on earlier convictions.** A defendant generally is presumed to have been represented by (or to have waived) counsel in prior proceedings that resulted in a conviction, and the Commonwealth need not come forward with proof on the point unless the defendant first makes a showing that the conviction was obtained without representation by or waiver of counsel. *Commonwealth* v. *McMullin* 76 Mass. App. Ct. 904, 905 (2010). Among the ways this may be done are a judge's entry on the complaint that the nonindigent defendant did not want counsel or had failed to retain counsel after a reasonable period, or probation records indicating counsel's name at the time of the prior conviction. *Commonwealth v. Savageau,* 42 Mass. App. Ct. 518, 520-522, 678 N.E.2d 1193, 1195-1196 (1997) (collecting cases with sufficient evidence of waiver).

11. **Commonwealth entitled to proceed on subsequent offense.** A judge does not have discretion to prevent the Commonwealth from proceeding on the subsequent offense portion of the charge, effectively reducing the charge to a first offense over the prosecutor's objection. *Commonwealth v. Pelletier,* 449 Mass. 392, 868 N.E.2d 613 (2007).

12. **Operating after OUI-related license loss does not require bifurcation.** A charge of operating a motor vehicle after an OUI-related license loss (G.L. c. 90, § 23, second par.) does not require a bifurcated trial under G.L. c. 278, § 11A. *Commonwealth v. Blake,* 52 Mass. App. Ct. 526, 755 N.E.2d 290 (2001).

13. **Jury verdict slips.** Two alternative jury verdict slips are appended to this instruction. The first alternative (Instruction 2.541, One Prior Offense Verdict Slip) requires the jury to determine *whether* the defendant is guilty or not guilty as a subsequent offender, while the second alternative (Instruction 2.542, Several Prior Offenses Verdict Slip) also requires the jury to determine the *number* of prior offenses. When the defendant is charged with more than one prior offense, the second alternative verdict slip should be used.

14. **Proof of prior subsequent conviction(s).** "A judgment of conviction for a third offense may appropriately be relied on to establish culpability for the first two offenses." *Commonwealth v. Bowden*, 447 Mass. 593, 599, 855 N.E.2d 758, 763 (2006).

2.541 SAMPLE JURY VERDICT FORM (ONE PRIOR OFFENSE ALLEGED)

2009 Edition
COMMONWEALTH OF MASSACHUSETTS
DISTRICT COURT DEPARTMENT OF THE TRIAL COURT
_____ Division
Complaint No. _____
)
COMMONWEALTH)
)
vs.)
JURY VERDICT
)
_____)
We, the jury, unanimously return the following verdict:
We find the defendant:

❑**NOT GUILTY** as a subsequent offender.

❑**GUILTY** as a subsequent offender.
Date: _____
Signature:_____
Foreperson of the Jury

2.542 SAMPLE JURY VERDICT FORM (SEVERAL PRIOR OFFENSES ALLEGED)

2009 Edition
COMMONWEALTH OF MASSACHUSETTS
DISTRICT COURT DEPARTMENT OF THE TRIAL COURT
_____ Division
Complaint No. _____
)
COMMONWEALTH)
)
vs.)
JURY VERDICT
)
_____)
We, the jury, unanimously return the following verdict:
We find the defendant:

❑**NOT GUILTY** as a subsequent offender.

❑**GUILTY** as a subsequent offender as this conviction was a:

- ❑ second offense
- ❑ third offense
- ❑ fourth offense

❑ fifth offense
Date: _____
Signature:_____
Foreperson of the Jury

DEFINITIONS AND PROOF

3.100 INFERENCES

2009 Edition

An inference is a permissible deduction that you may make from evidence that you have accepted as believable. Inferences are things you do every day: little steps in reasoning, in which you take some known information, apply your experience in life to it, and then draw a conclusion.

You may draw an inference even if it is not necessary or inescapable, so long as it is reasonable and warranted by the evidence, and all the evidence and reasonable inferences in the case together prove the defendant's guilt beyond a reasonable doubt.

Commonwealth v. Corriveau, 396 Mass. 319, 340, 486 N.E.2d 29, 43 (1985); *Commonwealth v. Best*, 381 Mass. 472, 483, 411 N.E.2d 442, 449 (1980); *DeJoinville v. Commonwealth*, 381 Mass. 246, 253 n.13, 408 N.E.2d 1353, 1357 n.13 (1980); *Commonwealth v. Montecalvo*, 367 Mass. 46, 54-55, 323 N.E.2d 888, 893 (1975); *Commonwealth v. Loftis*, 361 Mass. 545, 551, 281 N.E.2d 258, 262 (1972); *Commonwealth v. Kelley,* 359 Mass. 77, 88, 268 N.E.2d 132, 140 (1971); *Commonwealth v. Doherty,* 137 Mass. 245, 247 (1884); *Commonwealth v. Settipane,* 5 Mass. App. Ct. 648, 651, 368 N.E.2d 1213, 1216 (1977). *Dirring v. United States,* 328 F.2d 512, 515 (1st Cir.), cert. denied, 377 U.S. 1003 (1964). The first and third sentences of the model instruction, and the first supplemental instruction, are adapted from the charge in *Commonwealth v. Niziolek,* 380 Mass. 513, 404 N.E.2d 643 (1980), habeas corpus denied sub nom. *Niziolek v. Ashe,* 694 F.2d 282 (1st Cir. 1982), which the Supreme Judicial Court has called a "lucid and accurate general description of inferences and their proper role." 380 Mass. at 523, 404 N.E.2d at 649.

See also Instruction 2.240 (Direct and Circumstantial Evidence).

SUPPLEMENTAL INSTRUCTIONS

1. *Example.* **Let me give you an example of an inference. If your mailbox was empty when you left home this morning, and you find mail in it when you go home tonight, you may infer that the mailman delivered the mail. Now, obviously, you didn't see the mailman deliver the mail, but from the fact that it was empty this morning and is filled tonight, you can properly infer that the mailman came in the interim and delivered the mail. That is all that we mean by an inference.**

It is proper to use an illustration to explain the concept of inference. *Commonwealth v. Shea*, 398 Mass. 264, 271, 496 N.E.2d 631, 635 (1986). Illustrations must avoid any similarity to the evidence in that case, *Commonwealth v. Vaughn*, 32 Mass. App. Ct. 435, 443, 590 N.E.2d 701, 706 (1992), and must not involve remote or speculative inferences, the piling of inference upon inference, or any suggestion that, if one is very good at deductive reasoning, only one conclusion is possible, *Commonwealth v. Gonzalez*, 28 Mass. App. Ct. 906, 907, 545 N.E.2d 1189, 1191- 1192 (1989).

2. *Alternate example.* **You draw such inferences every day. If your son leaves your house in the morning with an umbrella, without saying anything, you can draw two conclusions: he thinks it's raining outside and he intends to go out in the rain. Those two conclusions are inferences about his knowledge and his intent. They are reasonable because you know that's what such behavior indicates.**

NOTES:

1. **Subsidiary facts need not be proved beyond reasonable doubt.** The defendant is not entitled to an instruction that the jury may draw an inference only if the Commonwealth has proved beyond a reasonable doubt the subsidiary facts on which it rests. *Commonwealth v. Lawrence,* 404 Mass. 378, 394, 536 N.E.2d 571, 581 (1989).

2. **Subsidiary inferences need not be proved beyond reasonable doubt.** There is no requirement that every inference must be proved beyond a reasonable doubt. *Commonwealth v. Ruggerio,* 32 Mass. App. Ct. 964, 966, 592 N.E.2d 753, 755 (1992); *Commonwealth v. Azar,* 32 Mass. App. Ct. 290, 309, 588 N.E.2d 1352, 1364 (1992).

It appears that *Niziolek*, 380 Mass. at 522, 404 N.E.2d at 648, entitles the defense to an instruction that the jury may not draw an inference unless they are persuaded of the truth of the inference beyond a reasonable doubt only in the case of an inference that directly establishes an element of the crime, and not to subsidiary inferences in the chain of reasoning.

3. **"Two possible inferences."** If the judge correctly charges on reasonable doubt and the burden of proof, the judge is not required to charge on request that if the evidence is susceptible of two reasonable interpretations, the jury must adopt that favoring the defendant. *Commonwealth v. Rhoades,* 379 Mass. 810, 822, 401 N.E.2d 342, 349-350 (1980). Such a charge might be open to objection that it suggests that the Commonwealth could prevail on a standard less than proof beyond a reasonable doubt. See *Id.,* 379 Mass. at 822 n.11, 401 N.E.2d at 350 n.11. Where the judge correctly charges on reasonable doubt, the judge is not required to charge on request that if the evidence sustains either of two inconsistent propositions, neither has been established. *Commonwealth v. Basch,* 386 Mass. 620, 625-626, 437 N.E.2d 200, 205 (1982).

3.120 INTENT

2009 Edition

I. SPECIFIC INTENT

I have already instructed you that one of the things that the Commonwealth must prove beyond a reasonable doubt is that at the time of the offense the defendant intended to _____ . A person's intent is his or her purpose or objective.

This requires you to make a decision about the defendant's state of mind at that time. It is obviously impossible to look directly into a person's mind. But in our everyday affairs, we often must decide from the actions of others what their state of mind is. In this case, you may examine the defendant's actions and words, and all of the surrounding circumstances, to help you determine what the defendant's intent was at that time.

As a general rule, it is reasonable to infer that a person ordinarily intends the natural and probable consequences of any acts that he does intentionally. You may draw such an inference, unless there is evidence that convinces you otherwise.

You should consider all the evidence, and any reasonable inferences you draw from the evidence, in determining whether the Commonwealth has proved beyond a reasonable doubt, as it must, that the defendant acted with the intent to _____ .

Specific intent is "a conscious act with the determination of the mind to do an act. It is contemplation rather than reflection and it must precede the act." *Commonwealth v. Nickerson*, 388 Mass. 246, 253- 254, 446 N.E.2d 68, 73 (1983). It is a person's purpose or objective, *Commonwealth v. Blow*, 370 Mass. 401, 407, 348 N.E.2d 794, 798 (1976), and corresponds loosely with the Model Penal Code term "purpose," *United States v. Bailey*, 444 U.S. 394, 405, 100 S.Ct. 624, 632 (1980). Specific intent means that "a defendant must not only have consciously intended to take certain actions, but that he also consciously intended certain consequences." *Commonwealth v. Gunter*, 427 Mass. 259, 269, 692 N.E.2d 515, 523 (1998). It is usually proved by circumstantial evidence, since there is no way to look directly into a person's mind. *Commonwealth v. Blake*, 409 Mass. 146, 150, 564 N.E.2d 1006, 1010 (1991); *Commonwealth v. Niziolek*, 380 Mass. 513, 528, 404 N.E.2d 643, 651 (1980), habeas corpus denied sub nom. *Niziolek v. Ashe*, 694 F.2d 282 (1st Cir. 1982); *Commonwealth v. Scanlon*, 373 Mass. 11, 17-19, 364 N.E.2d 1196, 1199-1200 (1977); *Commonwealth v. Sandler*, 368 Mass. 729, 741, 335 N.E.2d 903, 911 (1975); *Commonwealth v. Eppich*, 342 Mass. 487, 493, 174 N.E.2d 31, 34 (1961); *Commonwealth v. Ronchetti*, 333 Mass. 78, 81, 128 N.E.2d 334, 336 (1955); *Commonwealth v. Kelly*, 1 Mass. App. Ct. 441, 448-449, 300 N.E.2d 443, 448 (1973).

In defining specific intent, "[w]e see no need for a judge to refer to the defendant's specific intent to do something as an element of a crime. A reference to intent is sufficient." *Commonwealth v. Sires*, 413 Mass. 292, 301 n.8, 596 N.E.2d 1018, 1024 n.8 (1992). Nor should a judge define specific intent by contrasting it with "general intent," in the sense of unconscious or reflex actions. Such noncriminal "general intent" (which differs from criminal general intent, or "scienter") does not refer to any mental state which is required for the conviction of a crime, and its use in a specific intent definition is "unnecessary and confusing." *Commonwealth v. Sibinich*, 33 Mass. App. Ct. 246, 249 nn.1&2, 598 N.E.2d 673, 675 nn.1&2 (1992).

The judge may properly charge that the jury may draw a permissive inference that a person intends the natural and probable consequences of acts knowingly done. *Commonwealth v. Doucette*, 391 Mass. 443, 450-452, 462 N.E.2d 1084, 1093 (1984); *Commonwealth v. Ely*, 388 Mass. 69, 75-76, 444 N.E.2d 1276, 1280-1281 (1983); *Lannon v. Commonwealth*, 379 Mass. 786, 793, 400 N.E.2d 862, 866-867 (1980). But it is error to charge that a person is "presumed" to intend the natural and probable consequences of his or her acts, since this unconstitutionally shifts the burden of proof to the defendant, *Sandstrom v. Montana*, 442 U.S. 510, 524, 99 S.Ct. 2450, 2459 (1979); *DeJoinville v. Commonwealth*, 381 Mass. 246, 408 N.E.2d 1353 (1980), even if the judge indicates that the "presumption" is rebuttable, *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965 (1985), and such a charge is harmless error only if intent is not a live issue, *Connecticut v. Johnson*, 460 U.S. 73, 87-88, 103 S.Ct. 969, 978 (1983). For two excellent discussions of intent, see R. Bishop, Prima Facie Case, Proof and Defense § 1362 (1970), and G. Mottla, Proof of Cases in Massachusetts § 1201 (2d ed. 1966).

II. GENERAL INTENT

In determining whether the defendant acted "intentionally," you should give the word its ordinary meaning of acting voluntarily and deliberately, and not because of accident or negligence. It is not necessary that the defendant knew that he (she) was breaking the law, but it is necessary that he (she) intended the act to occur which constitutes the offense.

This instruction is recommended for use only in response to a jury question, since in instructing on a general intent crime, the judge is not required to charge on the defendant's intent as if it were a separate element of the crime. *Commonwealth v. Lefkowitz*, 20 Mass. App. Ct. 513, 519 & n.12, 481 N.E.2d 227, 231 & n.12 (1985). One way to describe general intent is whether the defendant "intended the act to occur," as contrasted with an accident. See *Commonwealth v. Saylor*, 27 Mass. App. Ct. 117, 122, 535 N.E.2d 607, 610 (1989); *Commonwealth v. Fuller*, 22 Mass. App. Ct. 152, 159, 491 N.E.2d 1083, 1087 (1986). General intent corresponds loosely with the Model Penal Code term "knowingly." Bailey, supra.

Criminal mens rea is normally required for all criminal offenses, except for minor, strict-liability "public order" offenses clearly so designated by statute. *Commonwealth v. Buckley*, 354 Mass. 508, 510- 511, 238 N.E.2d 335, 337 (1968); *Commonwealth v. Murphy*, 342 Mass. 393, 397, 173 N.E.2d 630, 632 (1961); *Commonwealth v. Wallace*, 14 Mass. App. Ct. 358, 363-364, 439 N.E.2d 848, 852 (1982).

NOTES:

1. **Intoxication or mental disease as negating intent**. Where supported by the evidence, the defendant is entitled to an instruction that alcohol or drug intoxication, or mental condition, may negate specific intent. See Instructions 9.180 (Intoxication with Alcohol or Drugs) and 9.220 (Mental Impairment Short of Insanity).

2. **Wanton or reckless conduct**. Wanton or reckless conduct is often equivalent to intentional conduct. See Instructions 6.140 (Assault and Battery) and 5.140 and 5.160 (Homicide by a Motor Vehicle).

3. **Wilful conduct.** While the term "wilful" was traditionally defined as knowledge with an evil intent or "bad purpose," in modern times it is appropriate to charge a jury that "wilful means intentional" (as opposed to accidental) without making reference to any ill will or malevolence. *Commonwealth v. Luna*, 418 Mass. 749, 753, 641 N.E.2d 1050, 1053 (1994). For the definition of "wilful and malicious" with respect to property destruction, see Instruction 8.280 (Wilful and Malicious Destruction of Property).

3.140 KNOWLEDGE

2009 Edition

I have already instructed you that one of the things the Commonwealth must prove beyond a reasonable doubt is that at the time of the offense the defendant knew that _____ .

This requires you to make a decision about the defendant's state of mind at that time. It is obviously impossible to look directly into a person's mind. But in our everyday affairs, we often look to the actions of others in order to decide what their state of mind is. In this case, you may examine the defendant's actions and words, and all of the surrounding circumstances, to help you determine the extent of the defendant's knowledge at that time.

You should consider all of the evidence, and any reasonable inferences you draw from the evidence, in determining whether the Commonwealth has proved beyond a reasonable doubt, as it must, that the defendant acted with the knowledge that _____ .

Commonwealth v. Buckley, 354 Mass. 508, 512, 238 N.E.2d 335, 338 (1968); *Commonwealth v. Holiday*, 349 Mass. 126, 128, 206 N.E.2d 691, 693 (1965); *Commonwealth v. Settipane*, 5 Mass. App. Ct. 648, 651, 368 N.E.2d 1213, 1216 (1977). "Knowledge" commonly means "a perception of the facts requisite to make up the crime." *Commonwealth v. Horsfall*, 213 Mass. 232, 237, 100 N.E. 362, 364 (1913).

SUPPLEMENTAL INSTRUCTIONS

1. *Example:* ***contraband in plain view.*** **For example, when contraband is found in open view in an area over which a person has control, it may be reasonable to infer that the person knew that it was there.**

Commonwealth v. Albano, 373 Mass. 132, 135, 365 N.E.2d 808, 811 (1977).

2. *Knowledge must be personal.* **As I have indicated, you may look to all the circumstances to help you draw reasonable inferences about what the defendant knew. However, I emphasize that, in the end, you must determine, not what a reasonable person would have known, but what this particular defendant actually did or did not know at the time.**

Commonwealth v. Boris, 317 Mass. 309, 315, 58 N.E.2d 8, 12 (1944).

3. Knowledge of law not required. **The requirement that the defendant's act must have been done "knowingly" to be a criminal offense means that it must have been done voluntarily and intentionally, and not because of mistake, accident, negligence or other innocent reason. But it is not necessary that the defendant have known that there is a law that makes it a crime to _____ , since generally ignorance of the law is not an excuse for violating the law.**

Ratzlaf v. United States, 510 U.S. 135, 149, 114 S.Ct. 655, 663 (1994); *Cheek v. United States*, 498 U.S. 192, 199, 111 S.Ct. 604, 609 (1991); *Barlow v. United States*, 32 U.S. (7 Pet.) 404, 410-412 (1833).

NOTES:

1. **Is allegation of knowledge required?** Knowledge, even when an element of the offense, need not always be alleged in the complaint. See *Commonwealth v. Donoghue,* 23 Mass. App. Ct. 103, 100 n.5, 499 N.E.2d 832, 837 n.5 (1986), contrasting *Commonwealth v. Palladino,* 358 Mass. 28, 30-32, 260 N.E.2d 653, 654-656 (1970) (because of ambiguous nature of obscene material, knowledge must be alleged in possession complaint), with *Commonwealth v. Bacon,* 374 Mass. 358, 359-361, 372 N.E.2d 780, 781-782 (1978) (because characteristics of gun are obvious, knowledge need not be alleged in possession complaint). See also *Commonwealth v. Kapsalis*, 26 Mass. App. Ct. 448, 454, 529 N.E.2d 148, 151-152 (1988) (pretrial amendment of complaint to charge willfulness proper where defendant not surprised, since amendment "was in a *practical* sense one of form and not of substance").

2. **Instruction on "willful blindness."** When knowledge is an element of the offense, an instruction on willful blindness is appropriate when "[1] a defendant claims a lack of knowledge, [2] the facts suggest a conscious course of deliberate ignorance, and [3] the instruction, taken as a whole, cannot be misunderstood [by a juror] as mandating an inference of knowledge." *Commonwealth v. Mimless*, 53 Mass. App. Ct. 534, 544, 760 N.E.2d 762, 772 (2002), quoting *United States v. Hogan*, 861 F.2d 312, 316 (1st Cir. 1988).

3.160 LICENSE OR AUTHORITY

G.L. c. 278 § 7
2009 Edition

I. WHERE THERE IS SUCH EVIDENCE

In this case, there has been evidence about whether the defendant had legal authority to do what he (she) is charged with doing because he (she) allegedly (held a license to _____) (came within the exception to the statute which permits _____) (*[other claim of authority or appointment]*).

Now that such evidence is before you, the burden is on the Commonwealth to prove beyond a reasonable doubt that the defendant did *not* (hold such a license) (come within that exception to the statute) (*[other claim of authority or appointment]*).

If the Commonwealth has proved all of the elements of the offense beyond a reasonable doubt, and also proved beyond a reasonable doubt that the defendant did *not* (have such a license) (come within that exception to the statute) (*[other claim of authority or appointment]*), then you should find the defendant guilty.

If the Commonwealth has failed to prove any of the elements of the crime beyond a reasonable doubt, or if it has failed to prove that the defendant did *not* (have such a license) (come within that exception to the statute) (*[other claim of authority or appointment]*), then you must find the defendant not guilty.

> "A defendant in a criminal prosecution, relying for his justification upon a license, appointment, admission to practice as an attorney at law, or authority, shall prove the same; and, until so proved, the presumption shall be that he is not so authorized." G.L. c. 278, § 7. This statutory provision is applicable only where "the prohibition is general, the license is exceptional," and therefore absence of license, appointment or authority is not an element of the crime. *Commonwealth v. Nickerson*, 236 Mass. 281, 305, 128 N.E. 273, 283 (1920).
>
> In such circumstances, there is no jury issue as to license, appointment or authority unless the defendant introduces evidence of such. If the defendant does, the burden is then on the Commonwealth to prove the absence of license, appointment or authority beyond a reasonable doubt. *Commonwealth v. Pero*, 402 Mass. 476, 481, 524 N.E.2d 63, 67 (1988) (applicable to physician's prescription for controlled substance); *Commonwealth v. Jones*, 372 Mass. 403, 406, 361 N.E.2d 1308, 1310-1311 (1977) (applicable to license to carry a firearm in G.L. c. 269, § 10[a] prosecution); *Commonwealth v. Brunelle*, 361 Mass. 6, 9, 277 N.E.2d 826, 829 (1972) (applicable to license to practice medicine); Nickerson, supra (applicable to license to sell liquor).
>
> However, the statute is not applicable to operating a motor vehicle without insurance [G.L. c. 90, § 24J] "because insurance is an element of the crime charged, not a mere license or authority," and thus must be proved as an element. *Commonwealth v. Munoz*, 384 Mass. 503, 507, 426 N.E.2d 1161, 1163 (1981). Nor is the instruction applicable to using a motor vehicle without authority [G.L. c. 90, § 24(2)(a)]; see Instruction 5.660 (Use of Vehicle Without Authority).
>
> A defendant who intends to rely on a defense based on license, claim of authority or ownership, or exemption, must provide advance notice of such defense to the Commonwealth and the court. Mass. R. Crim. P. 14(b)(3).

II. WHERE THERE IS NO SUCH EVIDENCE

In this case there is no evidence before you suggesting that the defendant may have had legal authority to do what he (she) is charged with doing on the grounds that he (she) allegedly (held a license to _____) (came within the exception to the statute which permits _____) (*[other claim of authority or appointment]*). Since there is no evidence on that question, you are not to consider it. Please put it out of your minds, since it is not an issue in this case.

In the absence of evidence, the jury should not be permitted to consider the issue of license, appointment or authority. *Commonwealth v. Walker*, 372 Mass. 411, 412, 361 N.E.2d 1313, 1314 (1977); *Jones*, 372 Mass. at 410, 361 N.E.2d at 1313. Where there is no such evidence, normally the issue need never be mentioned to the jury. This instruction may be used where a cautionary instruction is necessary because the issue has been raised before or by the jury, even in the absence of evidence.

3.180 NEGLIGENCE

2009 Edition

Negligence is the failure to use that degree of care which a reasonably prudent person would use under the circumstances, either by doing something that a reasonably prudent person would *not* do, or by failing to do something that a reasonably prudent person *would* do under similar circumstances.

Before one can be negligent, one must owe a duty of reasonable care to another person. Motorists owe such a duty to other members of the public in the operation of their vehicles.

"There is in Massachusetts at common law no such thing as criminal negligence." *Commonwealth v. Welansky*, 316 Mass. 383, 400, 55 N.E.2d 902, 911 (1944). The definition given is the traditional definition of civil negligence. *Altman v. Aronson*, 231 Mass. 588, 591, 121 N.E. 505, 506 (1919). See *Beaver v. Costin*, 352 Mass. 624, 626, 227 N.E.2d 344, 345-346 (1967); *Scott v. Thompson*, 5 Mass. App. Ct. 372, 374-375, 363 N.E.2d 295, 296 (1977). Proof of ordinary (civil) negligence is sufficient in prosecutions for driving negligently so as to endanger (G.L. c. 90, § 24[2][a]) or for vehicular homicide (G.L. c. 90, § 24G). *Commonwealth v. Berggren*, 398 Mass. 338, 340, 496 N.E.2d 660, 661 (1986); *Commonwealth v. Jones*, 382 Mass. 387, 389, 392, 416 N.E.2d 502, 504, 506 (1981); *Commonwealth v. Burke*, 6 Mass. App. Ct. 697, 700 & n.3, 383 N.E.2d 76, 79 & n.3 (1978).

A negligence instruction must make at least some reference to the reasonable person standard and to the attendant circumstances. *Morgan v. Lalumiere*, 22 Mass. App. Ct. 262, 267, 493 N.E.2d 206, 210 (1986); *O'Leary v. Jacob Miller Co*., 19 Mass. App. Ct. 947, 948, 473 N.E.2d 200, 201 (1985).

The language of the model instruction is drawn from the Morgan case and from Manual of Model Jury Instructions for the Ninth Circuit § 14.02(B) (1985 ed.).

SUPPLEMENTAL INSTRUCTIONS

1. Reasonable care. **A person is negligent if, by doing something or not doing something, he or she fails to use reasonable care. Reasonable care means the level of attention and forethought that a reasonably careful person, a person of ordinary caution and prudence, would exercise in those particular circumstances to avoid harming others.**

2. Violation of safety regulation. **Violation of a safety regulation established by (statute) (ordinance) (by-law) (rule) (regulation) is some evidence of negligence. It is not, however, conclusive evidence of negligence. If it is proved that the defendant violated such a safety regulation, you may consider that fact, together with all the other circumstances, in determining whether the defendant acted negligently.**

3. Civil motor vehicle infraction. **You have heard some evidence suggesting that the defendant may have violated chapter _____ , section _____ of our General Laws, which (requires) (prohibits) a motorist _____ . Any such violation is a traffic infraction that is civil rather than criminal in nature, and therefore no such charge against the defendant is before you for your resolution. However, that statute was enacted for the safety of the public. As I have indicated, if it is proved that the defendant violated such a statute, you may consider that to be some evidence of whether the defendant was negligent.**

A violation of a safety statute, ordinance, by-law or regulation is evidence of negligence as to all consequences that the enactment was intended to prevent, but is not conclusive. In addition, such violation must be shown to be the proximate cause of the resulting injury. *Commonwealth v. Campbell*, 394 Mass. 77, 83 n.5, 474 N.E.2d 1062, 1067 n.5 (1985) (violation of speed limit); *Cimino v. Milford Keg, Inc*., 385 Mass. 323, 327, 431 N.E.2d 920, 923 (1985) (violation of dram shop law); *Michnik-Zilberman v. Gordon Liquors, Inc*., 390 Mass. 6, 10, 453 N.E.2d 430, 433 (1983) (selling liquor to minor); *Morris v. Holt*, 380 Mass. 133, 135, 401 N.E.2d 851, 853 (1980) (state sanitary code violation); *Perry v. Medeiros*, 369 Mass. 836, 841, 343 N.E.2d 859, 862 (1976) (building code violation); *Leone v. Doran*, 363 Mass. 1, 8, 292 N.E.2d 19, 26 (1973) (permitting unlawful use of auto); *Kralik v. LeClair*, 315 Mass. 323, 326, 52 N.E.2d 562, 564 (1943) (violation of D.P.W. safety regulation); *Gaw v. Hew Constr. Co*., 300 Mass. 250, 254, 15 N.E.2d 225, 227 (1938) (building permit violation); *Baggs v. Hirschfield*, 293 Mass. 1, 2, 199 N.E. 136, 137 (1935) (no tail lights); *Thurston v. Ballou*, 23 Mass. App. Ct. 737, 739-740, 505 N.E.2d 888, 890 (1987) (Federal highway safety regulations); *Petras v. Storm*, 18 Mass. App. Ct. 330, 333-334, 465 N.E.2d 283, 286 (1984) (O.U.I.).

The language of the supplemental instruction is adapted from Florida Standard Jury Instructions in Civil Cases § 4.11 (1980 ed.).

SELECTED RULES OF THE ROAD FROM G.L. c. 90, § 14

1. **Bicyclists**. "In approaching or passing a person on a bicycle the operator of a motor vehicle shall slow down and pass at a safe distance and at a reasonable and proper speed."

2. **Intersections**. "The person operating a motor vehicle on any way . . . upon approaching any junction of said way with an intersecting way shall, before entering the same, slow down and keep to the right of the center lane."

3. **Left turns**. "When approaching for a left turn on a two-way street, an operator shall do so in the lane of traffic to the right of and nearest to the center line of the roadway and the left turn shall be made by passing to the right of the center line of the entering way where it enters the intersection from his left. When turning to the left within an intersection or into an alley, private road or driveway an operator shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard. When approaching for a left turn on a one-way street, an operator shall do so in the lane of traffic nearest to the left-hand side of the roadway and as close as practicable to the left-hand curb or edge of roadway."

4. **Obstructed view**. "The person operating a motor vehicle on any way or a curve or a corner in said way where his view is obstructed shall slow down and keep to the right . . . ."

5. **Pedestrians**. "Upon approaching a pedestrian who is upon the traveled part of any way and not upon a sidewalk, every person operating a motor vehicle shall slow down."

6. **Right turns**. "When turning to the right, an operator shall do so in the lane of traffic nearest to the right-hand side of the roadway and as close as practicable to the right-hand curb or edge of roadway."

3.200 OPERATION OF A MOTOR VEHICLE

January 2013

A person "operates" a motor vehicle not only while doing all of the well-known things that drivers do as they travel on a street or highway, but also when doing any act which directly tends to set the vehicle in motion. The law is that a person is "operating" a motor vehicle whenever he or she is in the vehicle and intentionally manipulates some mechanical or electrical part of the vehicle — like the gear shift or the ignition — which, alone or in sequence, will set the vehicle in motion.

Commonwealth v. Ginnetti, 400 Mass. 181, 184, 508 N.E.2d 603, 605 (1987); *Commonwealth v. Uski*, 263 Mass. 22, 24, 160 N.E. 305, 306 (1928).

An intoxicated defendant found asleep behind the wheel of a vehicle parked on a public way, with the key in the ignition and the engine on, may be found to have "operated" the vehicle; the Commonwealth need not prove that the vehicle was driven before being parked nor prove the defendant's intention after occupying the driver's seat. *Commonwealth v. Sudderth*, 37 Mass. App. Ct. 317, 319-320, 640 N.E.2d 481, 482-483 (1994). However, the judge may not charge that such circumstances constitute operation as a matter of law. *Commonwealth v. Plowman*, 28 Mass. App. Ct. 230, 233-234, 548 N.E.2d 1278, 1280 (1990). See *Commonwealth v. Platt*, 57 Mass. App. Ct. 264, 267 nn. 5 & 6, 782 N.E.2d 542, 544 n.5 & 545 n.6 (2003) (collecting cases with sufficient and insufficient circumstantial evidence of operation).

SUPPLEMENTAL INSTRUCTIONS

1. "Motor vehicle." **The law defines what a "motor vehicle" is as follows: "all vehicles constructed and designed for propulsion by power other than muscular power," with certain exceptions that are not relevant here.**

G.L. c. 90, § 1. The jury may be given more of the statutory definition where appropriate to indicate that the term "motor vehicle" includes vehicles being pulled or towed, but excludes railroad, railway, trolley and other vehicles on tracks, highway construction and maintenance equipment incapable of more than 12 m.p.h., invalid wheelchairs, vehicles operated or guided by pedestrians, and mopeds. Trackless trolleys are included in the statutory definition, but only for certain purposes.

2. Stopped engine. **To "operate" a motor vehicle within the meaning of the law, it is not necessary that the engine be running. A driver continues to operate his or her motor vehicle when it is stopped in the ordinary course of its operation for some reason that is fairly incidental to the vehicle's operation. A person is also considered to be "operating" a stationary vehicle when he or she manipulates some part of it, like the gear shift, so that it moves forward of its own weight.**

Commonwealth v. McGillivary, 78 Mass. App. Ct. 644, 940 N.E.2d 506 (2011), rev. denied 459 Mass. 1107, 944 N.E.2d 1043 (2011); *Commonwealth v. Clarke*, 254 Mass. 566, 568, 150 N.E. 829, 830 (1926); *Commonwealth v. Henry*, 229 Mass. 19, 22, 118 N.E. 224, 225 (1918); *Commonwealth v. Cavallaro*, 25 Mass. App. Ct. 605, 607-611, 521 N.E.2d 420, 421-424 (1988).

3. Circumstantial evidence. **You may find that the defendant was the operator of the motor vehicle even if no witness saw him (her) driving the vehicle, if there is enough circumstantial evidence to prove to you beyond a reasonable doubt that the vehicle was operated and that the defendant, and no one else, was the operator of that vehicle.**

Here instruct on Direct and Circumstantial Evidence (Instruction 2.06).

Commonwealth v. Otmishi, 398 Mass. 69, 70-71, 494 N.E.2d 1350, 1351-1352 (1986); *Commonwealth v. Hilton*, 398 Mass. 63, 66-68, 494 N.E.2d 1347, 1349-1350 (1986); *Commonwealth v. Smith*, 368 Mass. 126, 330 N.E.2d 197 (1975); *Commonwealth v. Rand*, 363 Mass. 554, 561-563, 296 N.E.2d 200, 205-206 (1973); *Commonwealth v. Wood*, 261 Mass. 458, 459, 158 N.E.2d 834, 834 (1927); *Commonwealth v. Colby*, 23 Mass. App. Ct. 1008, 1010-1011, 505 N.E.2d 218, 220-221 (1987); *Commonwealth v. Balestra*, 18 Mass. App. Ct. 969, 969-970, 469 N.E.2d 1299, 1300 (1984); *Commonwealth v. Geisler*, 14 Mass. App. Ct. 268, 272-273, 438 N.E.2d 375, 378-379 (1982); *Commonwealth v. Doyle*, 12 Mass. App. Ct. 786, 787-789, 429 N.E.2d 346, 347-348 (1981). For cases where the circumstantial evidence was held insufficient, see *Commonwealth v. Shea*, 324 Mass. 710, 712-714, 88 N.E.2d 645, 646-647 (1949); *Commonwealth v. Mullen*, 3 Mass. App. Ct. 25, 322 N.E.2d 195 (1975).

NOTE:

Uncorroborated confession insufficient. A defendant cannot be convicted solely on his or her uncorroborated confession that he or she was the operator of the motor vehicle, *Commonwealth v. Leonard,* 401 Mass. 470, 517 N.E.2d 157 (1988) (circumstantial evidence pointed equally to defendant and his wife as probable operator), but such corroboration can be furnished by circumstantial evidence, *Commonwealth v. McNelley,* 28 Mass. App. Ct. 985, 987, 554 N.E.2d 37, 39-40 (1990).

3.210 MOTOR VEHICLE

May 2017

In general, any vehicle constructed and designed for propulsion by power other than muscular power is a "motor vehicle" in the Commonwealth. This would include, for example, automobiles, vans, trucks, buses, motorcycles, and motorized scooters.

SUPPLEMENTAL INSTRUCTIONS

Motorcycle

A "motorcycle" is any motor vehicle having a seat or saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground. It includes any bicycle with a motor or driving wheel attached, except (1) a tractor or a motor vehicle designed for the carrying of golf clubs and not more than four persons, (2) an industrial three-wheel truck, (3) a motor vehicle on which the operator and passenger ride within an enclosed cab, and (4) a motorized bicycle.

See G. L. c. 90, § 1.

Motorized Bicycle

A "motorized bicycle" is a pedal bicycle which has a helper motor, or a non-pedal bicycle which has (1) a motor, with a cylinder capacity not exceeding fifty cubic centimeters, (2) an automatic transmission, and (3) a maximum speed of no more than thirty miles per hour.

See G. L. c. 90, § 1.

Motorized Scooter

A "motorized scooter" is any two-wheeled tandem or three- wheeled device, that (1) has handlebars, (2) is designed to be stood or sat upon by the operator, and (3) is powered by an electric or gas powered motor that is capable of propelling the device with or without human propulsion. The definition of "motorized scooter" does not include a motorcycle, a motorized bicycle, or a three-wheeled motorized wheelchair.

See G. L. c. 90, § 1.

Vehicles that are motor vehicles only when driven on a public way. See Note 5 below.

An "all-terrain vehicle" is a motorized recreational vehicle that is (1) designed or modified for travel on four low pressure tires (2) has a seat designed to be straddled by the operator and (3) has handlebars for steering control.

A "recreation utility vehicle" or "utility vehicle" is a motorized flotation tire vehicle with not less than four and not more than six low pressure tires that (1) is limited in engine displacement to less than 1,500 cubic centimeters and in total dry weight to not more than 1,800 pounds, (2) has a seat that is of bench design, not intended to be straddled by the operator, and (3) has a steering wheel for control.

A "recreation vehicle" or "off-highway vehicle" is any motor vehicle designed or modified for use over unimproved terrain for recreation or pleasure while not being operated on a public way as defined in chapter 90. This includes all-terrain vehicles, off-highway motorcycles, dirt bikes, recreation utility vehicles and all registered motor vehicles while not being operated on a public way as defined in said chapter 90.

A "snow vehicle", is a motor vehicle that (1) is designed to travel over ice or snow, (2) that has a curb weight of not more than 453 kilograms or 1,000 pounds, (3) is driven by track or tracks in contact with the snow or ice and (4) is steered by a ski or skis in contact with the snow or ice.

Notes

1. **In General**. The main definition applies to all Chapter 90 offenses "unless a different meaning is clearly apparent from the language or context, or unless such construction is inconsistent with the manifest intention of the legislature." See g. L. c. 90, § 1, paragraph one.

2. **Expanded definition**. While the definition of a motor vehicle is contained in section 1 of G.L. c. 90, the statute provides that it may also include any vehicle which the Registry of Motor Vehicles has designated to be a motor vehicle in advance of the commission of the offense.

3. **Mopeds**. Mopeds or motorized bicycles are motor vehicles. *Commonwealth* v. *Griswold*, 17 Mass. App. Ct. 461 (1984). While a moped is a motor vehicle subject to traffic laws and regulations, it is not subject to traffic laws that do not regulate the manner in which a vehicle is operated. *Commonwealth v. Lopez*, 91 Mass. App. Ct. 485, 487-88 (2017).

4. **Recreational vehicles.** See G. L. c. 90B, § 20. All-terrain vehicles, recreational vehicles, off-highway vehicles and snow vehicles are not "motor vehicles" unless they are operated on a public way. See *Commonwealth* v. *Soldega*, 80 Mass. App. Ct. 853, 854-55 (2011).

5. Vehicles exempt from motor vehicle definition: The following vehicles are not considered to be motor vehicles: railroad and railway cars and other vehicles running that run only upon rails or tracks; wheelchairs owned and operated by disabled persons; vehicles which are operated or guided by a person on foot; motorized bicycles, and vehicles incapable of being driven at a speed exceeding twelve miles per hour and which are (a) used exclusively for the building, repair and maintenance of highways or (b) designed especially for use elsewhere than on the traveled part of a way (e.g., farm equipment, off-road recreational vehicles, and snow vehicles).4. Trackless trolley vehicles. See G. L. c. 163; and St. 1947, c. 544, § 10. Although trackless trolley vehicles are exempted from the definition of "motor vehicles" under G. L. c. 90, § 1, they are expressly considered "motor vehicles" for the purposes of Sections 17, 21, 24, 24I, 25 and 26 of Chapter 90.

3.220 POSSESSION

2009 Edition

I have told you that the Commonwealth must prove that the defendant possessed _____ .

What does it mean to "possess" something? A person obviously "possesses" something if he (she) has direct physical control or custody of it at a given time. In that sense, you possess whatever you have in your pocket or purse right now.

However, the law does not require that someone necessarily have actual physical custody of an object to "possess" it. An object is considered to be in a person's possession without physical custody if he (she) has

- **knowledge of the object,**
- **the ability to exercise control over that object, either directly or through another person, and**
- **the intent to exercise control over the object .**

For example, the law considers you to be in possession of things which you keep in your bureau drawer at home, or in a safe deposit box at your bank.

Whether the defendant possessed _____ is something that you must determine from all the facts and any reasonable inferences that you can draw from the facts. However, I caution you to remember that merely being present in the vicinity of a _____, even if one knows that it is there, does not amount to possession.

<u>If relevant:</u> **Neither is possession proved simply because the defendant was associated with a person who controlled the _____ or the property where _____was found.**

To show possession, there must be evidence justifying a conclusion that the defendant had knowledge of the _____ coupled with the ability and the intent to exercise control over the _____. Only then may the defendant be considered to have possessed the _____.

Commonwealth v. Than, 442 Mass. 748, 754-755, 817 N.E.2d 705, 710 (2004); *Commonwealth v. Owens*, 414 Mass. 595, 607, 609 N.E.2d 1208, 1216 (1993) (constructive possession of controlled substance requires proof that defendant knew location of illegal drugs plus ability and intent to exert dominion and control). See *Than*, supra, 442 Mass. 748 at 751, 817 N.E.2d at 708 (constructive possession inferable from defendant's proximity to gun in motor vehicle, where evidence that, when stopped by police, defendant "first leaned forward and to the right before complying with the order to raise his hands[,] . . . [and] [a] loaded handgun was found protruding from under the passenger seat in the vehicle he was operating"); *Alicea v. Commonwealth*, 410 Mass. 384, 387, 573 N.E.2d 487, 489 (1991) (defendant's presence in vehicle with contraband is not itself sufficient); *Commonwealth v. Ramos*, 51 Mass. App. Ct. 901, 903, 744 N.E.2d 107, 110 (2001) (constructive possession not inferable from proximity of gun to defendant's personal letters that were found in an envelope "addressed to the defendant, at a different address"); *Commonwealth v. Ramos*, 30 Mass. App. Ct. 915, 566 N.E.2d 1141 (1991); *Commonwealth v. Handy,* 30 Mass. App. Ct. 776, 780-781, 573 N.E.2d 1006, 1009-1010 (1991) (constructive possession supported by proof of ownership or tenancy, personal effects in proximity to contraband, large amounts of cash, or admissions); *Commonwealth v. Arias*, 29 Mass. App. Ct. 613, 618, 563 N.E.2d 1379, 1383 (1990), aff'd, 410 Mass. 1005, 572 N.E.2d 553 (1991) (constructive possession inferable from presence in early morning in heavily barricaded, sparsely-furnished apartment, in absence of owner or tenant); *Commonwealth v. Rarick*, 23 Mass. App. Ct. 912, 912, 499 N.E.2d 1233, 1233-1234 (1986) (in shared dwelling, possession of controlled substance may be inferred from proximity to defendant's effects in areas particularly linked to defendant); *Commonwealth v. Rodriguez*, 16 Mass. App. Ct. 944, 945-946, 450 N.E.2d 1118, 1119 (1983) (same); *Commonwealth v. Gill*, 2 Mass. App. Ct. 653, 656-657, 318 N.E.2d 628, 630-631 (1974) (same); *Commonwealth v. Miller*, 4 Mass. App. Ct. 379, 383-384, 349 N.E.2d 362, 365 (1976) (same rule applicable to van; possession also inferable from attempted flight); *Commonwealth v. Deagle,* 10 Mass. App. Ct. 563, 567-568, 409 N.E.2d 1347, 1350-1351 (1980) (proximity and knowledge do not establish possession unless they permit inference of control).

SUPPLEMENTAL INSTRUCTION

Joint possession. **A person can also "possess" something even if he is not its sole owner or holder. For example, a person is considered to "possess" something which he owns or holds jointly with another person, who is keeping it for both of them. A person is also considered to "possess" something which he owns or holds jointly with another person, and which they have agreed to deposit somewhere where both of them will have access to it.**

Commonwealth v. Beverly, 389 Mass. 866, 870, 452 N.E.2d 1112, 1115 (1983) (possession of controlled substance need not be exclusive; it may be joint and constructive); *Commonwealth v. Conroy*, 333 Mass. 751, 755, 133 N.E.2d 246, 249 (1956) (lookout was in joint possession of accomplice's burglarious tools); *Commonwealth v. Conlin*, 188 Mass. 282, 284, 74 N.E. 351, 352 (1905) (depositing bag of burglarious tools with another while retaining key was possession); *Commonwealth v. Gonzalez*, 23 Mass. App. Ct. 990, 992, 504 N.E.2d 1067, 1069 (1987) (possession may be joint and constructive); *Commonwealth v. Ronayne*, 8 Mass. App. Ct. 421, 426, 395 N.E.2d 350, 353 (1979) (joint flight from burglary supported inference of joint possession of, though only one defendant carried, tire iron); *Commonwealth v. Johnson*, 7 Mass. App. Ct. 191, 194, 386 N.E.2d 798, 800 (1979) (joint possession of items in auto trunk inferable against passenger only with other evidence).

3.240 PRESUMPTION

2009 Edition

NOTE:

The word "presumption" should be avoided in charging the jury where a permissible inference is meant, *Commonwealth v. Hughes,* 380 Mass. 596, 603, 404 N.E.2d 1246, 1250 (1980) (inference of intent to steal from breaking and entering a dwelling at night), even if the statute itself uses the word "presumption," *Commonwealth v. Moreira,* 385 Mass. 792, 797, 434 N.E.2d 196, 200 (1982).

It is constitutionally impermissible to shift the burden of proof as to an element of the crime to the defendant by means of a presumption. *Sandstrom v. Montana,* 442 U.S. 510, 524, 99 S.Ct. 2450, 2459 (1979) (presumption that person intends natural and probable consequences of his acts); *DeJoinville v. Commonwealth,* 381 Mass. 246, 408 N.E.2d 1353 (1980) (same); *Mullaney v. Wilbur,* 421 U.S. 684, 704, 95 S.Ct. 1881, 1892 (1975) (presumption of malice from intentional and unlawful homicide); *Commonwealth v. Zezima,* 387 Mass. 748, 754 755, 443 N.E.2d 1282, 1285-1286 (1982) (presumption that person intends natural consequences of using a dangerous weapon); *Moreira, supra* (statutory breathalyzer presumptions); *Commonwealth v. Munoz,* 384 Mass. 503, 509, 426 N.E.2d 1161, 1164-1165 (1981) (presumption that vehicle uninsured); *Commonwealth v. Callahan,* 380 Mass. 821, 822-826, 406 N.E.2d 385, 386-388 (1980) (presumption of malice from intentional use of deadly weapon). This is true even if the jury is instructed that the presumption is rebuttable. *Francis v. Franklin,* 471 U.S. 307, 105 S.Ct. 1965 (1985).

"Conclusive and mandatory presumptions are constitutionally infirm, while permissive presumptions, or inferences, are permissible." *Moreira,* 385 Mass. at 794, 434 N.E.2d at 199. A mandatory presumption is one that requires the jury to find an ultimate fact to be true upon proof of another fact unless they are otherwise persuaded by a preponderance of evidence offered in rebuttal. *Id.,* 385 Mass. at 795, 434 N.E.2d at 199.

In criminal cases, statutory provisions designating specified items as prima facie evidence of a fact to be proved must be presented to the jury as sufficient evidence of a permissible inference, and not as a mandatory presumption. See Instruction 3.260 (Prima Facie Evidence).

3.260 PRIMA FACIE EVIDENCE

2009 Edition

I. WHERE THE EVIDENCE IS DOCUMENTARY

Among the evidence before you is a certificate that indicates that it was signed by _____, and which certifies that _____.

If appropriate: **You may accept it as an authentic copy of an official record kept in this Commonwealth, if it is attested by the officer who has legal custody of that record, or by his or her deputy.**

Massachusetts R. Crim. P. 40[a][l].

If you find that this certificate is authentic, you are permitted to accept it as sufficient proof that _____, if there is no evidence to the contrary. You are not required to accept that as proven, but you may. If there *is* contrary evidence on that issue, you are to treat this certificate like any other piece of evidence, and you should weigh it along with all the rest of the evidence on that issue.

If the fact to be proved establishes guilt, or is an element of the offense, or negates a defense: **In the end, you must be satisfied that, on all the evidence, it has been proven beyond a reasonable doubt that _____.**

Among the statutory provisions giving prima facie effect to public documents are G.L. c. 22C, § 39 (State Police chemist's certificate of drug analysis); G.L. c. 46, § 19 (town clerk's certificate of birth, marriage or death certificate); G.L. c. 111, § 13 (D.P.H. or U.Mass. Medical School chemist's certificate of drug analysis); G.L. c. 140, § 121A (D.P.S. or Boston ballistics expert's certificate of ballistics analysis); G.L. c. 233, § 79F (official's certificate of public way).

II. WHERE THE EVIDENCE IS TESTIMONIAL

You have heard some evidence in this case suggesting that _____. If you find that fact to be proven, you are permitted to accept it also as sufficient proof that _____, if there is no evidence to the contrary. You are not required to accept that as proven, but you may. If there *is* contrary evidence on that issue, you are to treat this testimony like any other piece of evidence, and you should weigh it along with all the rest of the evidence on that issue.

If the fact to be proved establishes guilt, or is an element of the offense, or negates a defense: **In the end, you must be satisfied that, on all the evidence, it has been proven beyond a reasonable doubt that _____.**

NOTES:

1. **Prima facie evidence in civil cases.** In civil cases, when one fact is denominated prima facie evidence of another fact, proof of the first fact mandates a finding of the second fact unless sufficient contrary evidence is introduced to create an issue of fact for the jury. *Commonwealth v. Pauley*, 368 Mass. 286, 290, 331 N.E.2d 901, 904, appeal dismissed, 423 U.S. 887 (1975) (vehicle owner is prima facie violator of tunnel regulation). After contrary evidence is introduced, it remains evidence throughout the trial and is to be weighed like any other evidence on relevant questions of fact. *Commonwealth v. Chappee*, 397 Mass. 508, 520, 492 N.E.2d 719, 726 (1986), habeas corpus granted on other grounds, 659 F. Supp. 1220 (D. Mass. 1987), rev'd sub nom. *Chappee v. Vose*, 843 F.2d 25 (1st Cir. 1988) (chemical analysis certificate under former G.L. c. 147, § 4D [present G.L. c. 22C, § 39]); *Hobart-Farrel Plumbing & Heating Co. v. Klayman*, 302 Mass. 508, 509, 19 N.E.2d 805, 807 (1930).

2. **Prima facie evidence in criminal cases.** In a criminal case, the effect of unrebutted prima facie evidence cannot be as strong as in civil cases because the jury cannot be compelled to find against the defendant as to any element of the crime. In a criminal case, prima facie evidence means that proof of the first fact permits, but does not require, the jury, in the absence of competing evidence,

to find that the second fact is true beyond a reasonable doubt. *Commonwealth v. Pauley*, 368 Mass. at 291-292, 331 N.E.2d at 904-906; *Commonwealth v. Crosscup*, 369 Mass. 228, 239-240, 339 N.E.2d 731, 738-739 (1975) (proper mailing of letter as prima facie evidence of receipt). "[P]rima facie evidence . . . [has] no special force in a criminal case." *Commonwealth v. Leinbach,* 29 Mass. App. Ct. 943, 944, 558 N.E.2d 1003 (1990). It must be weighted equally with all other evidence in the case.

3. **Permissible and impermissible formulations.** It is proper to instruct the jury in a criminal case that prima facie evidence is "evidence which if unexplained or uncontradicted is deemed sufficient in the trial of a case to sustain a finding on that particular issue." *Commonwealth v. Lykus,* 406 Mass. 135, 144, 546 N.E.2d 159, 165 (1989). It is error to instruct the jury that prima facie evidence has "a compelling effect, until and only until evidence appears that warrants a finding to the contrary," since this in effect establishes a mandatory (though rebuttable) presumption. *Commonwealth v. Johnson,* 405 Mass. 488, 542 N.E.2d 248 (1989); *Commonwealth v. Claudio*, 405 Mass. 481, 541 N.E.2d 993 (1989); *Commonwealth v. Crawford*, 18 Mass. App. Ct. 911, 912, 463 N.E.2d 1193, 1194 (1984).

4. **The *Teixera* decision.** *Commonwealth v. Teixera*, 396 Mass. 746, 749-750, 488 N.E.2d 775, 778-779 (1986), is difficult to reconcile with the above line of cases. *Teixera* disapproved an instruction in a prosecution for non-support of an illegitimate child (G.L. c. 273, § 15) that "proof of the failure to make reasonable provisions for support is prima facie evidence that the neglect is willful and without cause. Prima facie evidence mean[s] that if . . . [there] was a failure to make reasonable provision for support, then you may find that the neglect was willful and without cause, unless you find other evidence in this case that would indicate the contrary." The court characterized the instruction as "entirely inconsistent with the Commonwealth's burden of proving the element of neglect or willful refusal reasonably to support," even apart from Federal constitutional principles. The court did not discuss the matter, but the charge was apparently based on the prima facie provision of G.L. c. 273, § 7, which has been assumed to apply to § 15 prosecutions. See G.L. c. 273, § 16; *Commonwealth v. Bird*, 264 Mass. 485, 489, 162 N.E. 900, 902 (1928); *Commonwealth v. Callaghan*, 223 Mass. 150, 111 N.E. 773 (1916). The opinion did not elaborate on whether the § 7 prima facie provision was inapplicable, or it was invalid as an insufficiently probative inference, or whether it was the phrasing or the substance of the instruction that was flawed. Subsequent cases discussing prima facie effect for offenses other than non-support (such as *Johnson* and *Lykus, supra*) have not cited *Teixera* and have reaffirmed the validity of charging the jury in terms similar to the model instruction's.

See also the note to Instruction 3.240 (Presumption).

3.280 PUBLIC WAY

G.L. c. 90 § 1
2009 Edition

I. SHORT-FORM INSTRUCTION

This short-form instruction may be used where the evidence involves only a public street or highway, and does not raise any issue of the statutory alternatives.

The Commonwealth must prove beyond a reasonable doubt that the defendant operated a motor vehicle on a public way.

Any street or highway that is open to the public and is controlled and maintained by some level of government is a "public way." This would include, for example, interstate and state highways as well as municipal streets and roads.

In determining whether any particular street is a public way, you may consider whether it has some of the usual indications of a public way — for example, whether it is paved, whether it has street lights, street signs, curbing and fire hydrants, whether there are buildings along the street, whether it has any crossroads intersecting it, and whether it is publicly maintained.

II. FULL INSTRUCTION

The Commonwealth must prove beyond a reasonable doubt that the defendant operated a motor vehicle in one of three places: on a public way, *or* in a place to which the public has a right of access, *or* in a place to which members of the public have access as invitees or licensees.

You will note that the statute treats these three types of places as alternatives. If any one of the alternatives is proved, then this element of the offense is satisfied. Let me discuss the three alternatives one at a time.

Our law defines a public "way" as:

"any public highway,

[or a] private way [that is] laid out under authority of [a] statute,

[or a] way dedicated to public use,

or [a] way [that is] under [the] control

of park commissioners or [a] body having [similar] powers."

G.L. c. 90, § 1.

Interstate and state highways, as well as municipal streets and roads, would all be included in this definition. In determining whether a road is a public way, you may consider whether it has some of the usual indications of a public way — for example, whether it is paved, whether it has street lights, street signs, traffic signals, curbing and fire hydrants, whether there are abutting houses or businesses, whether it has any crossroads intersecting it, whether it is publicly maintained, and whether there is an absence of signs prohibiting public access.

Commonwealth v. Charland, 338 Mass. 742, 744, 157 N.E.2d 538, 539 (1959) (signs, signals, curbing, crossroads); *Commonwealth v. Mara*, 257 Mass. 198, 208-210, 153 N.E. 793, 795 (1926) (street lights, paving, curbing, houses, crossroads, traffic); *Danforth v. Durell*, 8 Allen 242, 244 (1864) (paved roads, no sign that anyone excluded); *Commonwealth v. Muise*, 28 Mass. App. Ct. 964, 551 N.E.2d 1224 (1990) (usual indicia of public way include paved roads, absence of signs prohibiting access, street lights, curbing, abutting houses or businesses, crossroads, traffic, signs, signals, lighting and hydrants; unnamed, paved private way into trailer park with abutting residential trailers, and no signs prohibiting access, was public way); *Commonwealth v. Colby*, 23 Mass. App. Ct. 1008, 1010, 505 N.E.2d 218, 219-220 (1987) (paved road, lighting, hydrants); *Commonwealth v. Hazelton*, 11 Mass. App. Ct. 899, 900, 413 N.E.2d 1144, 1145 (1980) (regularly patrolled by police, "no parking" signs, municipally paved and plowed; photo of way admissible).

The second alternative under the statute is a place that is not a "way," but where the general public still has a right of access by motor vehicle. This might include, for example, a parking lot that is adjacent to city hall, or the parking area of a public park.

The third alternative is a place to which members of the public have access as invitees or licensees. The difference between invitees and licensees is not important here. Both are persons who are lawfully in a place at the invitation of the owner, or at least with the owner's tolerance. Some examples of locations where the public has access as invitees or licensees include shopping centers, roadside fuel stops, parking lots, and restaurant parking lots.

Bruggeman v. McMullen, 26 Mass. App. Ct. 963, 964, 526 N.E.2d 1338, 1339 (1988) (private way may be open to the public at large for ordinary travel even though there is somewhat less than the broad travel easement that the public enjoys on public ways); *Commonwealth v. Hart*, 26 Mass. App. Ct. 235, 525 N.E.2d 1345 (1988) (private way regularly used to access commercial abutters by employees, customers and vendors is a "place to which members of the public have access as invitees or licensees"); *State v. Brusseau*, 33 Or. App. 501, 577 P.2d 529 (1978) (reckless operation statute "modeled in part after a similar Massachusetts statute" and covering "premises open to the public" is applicable to private road in private apartment complex frequently used as thru street by general public). See *Commonwealth v. Venceslau C. Pires*, 44 Mass. App. Ct. 1101, 687 N.E.2d 651 (No. 97-P-79, Nov. 21, 1997) (unpublished opinion under Appeals Court Rule 1:28) (public park's parking lot remains "a way to which the public had access as invitees or licensees" even when parking is no longer permitted after sunset).

So if it is proved beyond a reasonable doubt that the defendant operated a motor vehicle in any of these areas, then this element of the offense has been proved.

SUPPLEMENTAL INSTRUCTIONS

1. Prima facie certificate. **The law provides that a certificate from the (Secretary of the State Public Works Commission) (Secretary of the M.D.C.) (city or town clerk) is evidence that a particular (state highway) (M.D.C. highway) (city or town way) is a public way.**

G.L. c. 233, § 79F. See Instruction 3.260 (Prima Facie Evidence).

Other official documents, while not prima facie evidence, are admissible as evidence tending to show that a particular road is a public way. *Hazelton*, supra (conveying deed, certificate of municipal acceptance, certificate that in municipal road directory).

2. Stipulation. **In this case, the parties have agreed that _____ is a public way, and therefore it is not necessary that you have any evidence on that issue.**

3. Distinction between invitees and licensees. **An "invitee" is a person who is at a place, usually a business establishment, at the request or invitation of the owner and for the mutual benefit of both — for example, a potential customer or restaurant patron. A "licensee" is a person who is at a place with only the passive permission of the owner and usually for the licensee's benefit — for example, a person driving on a private way that is commonly used by the public without the owner's objection.**

Brosnan v. Koufman, 294 Mass. 495, 499, 2 N.E.2d 441, 443 (1936); *Browler v. Pacific Mills*, 200 Mass. 364, 86 N.E. 767 (1909); *Moffatt v. Kenny*, 174 Mass. 311, 54 N.E. 850 (1899). See *Mounsey v. Ellard*, 363 Mass. 693, 297 N.E.2d 43 (1973) (abolishing distinction in negligence law).

NOTES:

1. **"Way".** General Laws c. 90, § 1 contains a four-part definition of "way" because not all roads open to public use were historically considered "public ways" — i.e., those which some governmental entity has a duty to maintain free from defects. See G.L. cc. 81-82; G.L. c. 84, §§ 1-11A, 15-22; *Fenn v. Middleborough*, 7 Mass. App. Ct. 80, 83-84, 386 N.E.2d 740, 742 (1983). Roads subject to a public right of access but not considered "public ways" included: (a) formally-accepted "statutory private ways," whether privately- or publicly-owned, see G.L. c. 82, § 21; G.L. c. 84, §§ 23-25; *Casagrande v. Town Clerk of Harvard*, 377 Mass. 703, 707, 387 N.E.2d 571, 574 (1979); *Schulze v. Huntington*, 24 Mass. App. Ct. 416, 418 n.1, 509 N.E.2d 927, 929 n.1 (1987); (b) private ways that were "open and dedicated to the public use" by a private owner's unequivocal dedication of the land to public use and surrender of private control, see *Uliasz v. Gillette*, 357 Mass. 96, 104, 256 N.E.2d 290, 296 (1970); and (c) park roads that were erected under the general authority of park commissioners, see *Burke v. Metropolitan Dist. Comm'n*, 262 Mass. 70, 73, 159 N.E. 739, 740 (1928) (sections of Memorial Drive adjoining an M.D.C. park); *Gero v. Metropolitan Park Comm'rs*, 232 Mass. 389, 392, 122 N.E. 415, 416

(1919) (Revere Beach Blvd.); *Jones v. Boston*, 201 Mass. 267, 268- 269, 87 N.E. 589, 590 (1909) (Back Bay Fens traverse road); *McKay v. Reading*, 184 Mass. 140, 143-144, 68 N.E. 43, 44-45 (1903) (walkway/drive across municipal common); *Fox v. Planning Bd. of Milton*, 24 Mass. App. Ct. 572, 573-574, 511 N.E.2d 30, 31-32 (1987).

2. **"Place to which the public has a right of access"**. The phrase "a place to which the public has a right of access," as it appears in motor vehicle statutes, refers to property subject to a general public easement as of right. See *Commonwealth v. Paccia*, 338 Mass. 4, 6, 163 N.E.2d 664, 666 (1958). The phrase is limited to places to which the public has a right of access *by motor vehicle*. *Commonwealth v. George,* 406 Mass. 635, 550 N.E.2d 138 (1990) (phrase does not extend to a baseball field which is not open to the public for travel in motor vehicles). The park example in the model instruction was suggested by *Farrell v. Branconmier*, 337 Mass. 366, 367-368, 149 N.E.2d 363, 364 (1958) (unpaved parking lot in public park is not a "way" as defined in G.L. c. 90, § 1). See *Parcia, supra* ("unnecessary for us to decide . . . whether a public property like that considered in the *Branconmier* case would be . . . a 'place to which the public has a right of access'").

3. **"Place to which members of the public have access as invitees or licensees".** This language was apparently intended to cover locations such as public parking lots or chain store parking lots. *Commonwealth v. Callahan,* 405 Mass. 200, 205, 539 N.E.2d 533, 536 (1989) (privately-owned parcel of land commonly used by recreational vehicles, and which had no barriers to access but was posted with an old "no trespassing" sign and which police had agreed to patrol for trespassers, was not such). See *Commonwealth v. Langenfeld,* 1 Mass. App. Ct. 813, 294 N.E.2d 457 (1973) (prior to 1961 statutory amendment, statute inapplicable to shopping center parking lot). The defendant need not personally qualify as either an "invitee" or a "licensee." *Callahan,* 405 Mass. at 205-206, 539 N.E.2d at 537 (statute defines the status of the way, not the status of the driver).

4. **Judicial notice.** Whether a street is a public way is an issue of fact and not a subject of judicial notice. *Commonwealth v. Hayden,* 354 Mass. 727, 728, 242 N.E.2d 431, 432 (1968).

EVALUATION OF EVIDENCE

3.500 ABSENT WITNESS

2009 Edition

The judge may not give such an instruction, nor permit counsel to comment on the potential inference, unless the judge has first ruled, as a matter of law, that there is a sufficient foundation for such an inference in the record. See notes 1 and 2, below.

In this case, you have heard some reference to a potential witness who did not testify.

I. WHERE DEFENSE DOES NOT CALL WITNESS

If the defendant in this case did not call a potential witness to testify, and four conditions are met, you may infer that the witness's testimony would not be favorable to the defendant. The four conditions are:

First: **that the Commonwealth's case against the defendant is strong;**

Second: **that the absent witness would be expected to offer important testimony that would support the defendant's innocence;**

Third: **that the absent witness is available to testify for the defendant; and**

Fourth: **that the witness's absence is not explained by any of the other circumstances in the case.**

If any of these four conditions has not been met, then you may not draw any inference from the witness's absence. If all four conditions have been met, you may infer that the testimony would not be favorable to the defendant if such an inference is reasonable in this case, and you are persuaded beyond a reasonable doubt that the inference is true.

This rule is based on common sense. First, you may not draw such an inference unless the Commonwealth presented a case strongly supporting guilt because under those circumstances it would be natural for an accused person to call an available witness to testify in his (her) favor. However, keep in mind that a defendant never has any burden to prove himself (herself) innocent and the Commonwealth bears the entire burden of proving his (her) guilt.

Second, you may not draw such an inference unless the absent witness's testimony would be relevant to the defendant's guilt or innocence in some significant way. Normally an accused person would have no reason to bring in a witness who would only testify about minor details, or who would only repeat what has already been said by other witnesses.

Third, you may not draw such an inference unless there is evidence that the accused was able to bring the absent witness into court.

And fourth, you may not draw such an inference if the evidence suggests another reasonable explanation for the witness's absence.

A version of this instruction was affirmed in *Commonwealth v. Rollins*, 441 Mass. 114, 120, 803 N.E.2d 1256, 1261 (2004), and in *Commonwealth v. Graves*, 35 Mass. App. Ct. 76, 80 n.6, 616 N.E.2d 817, 820 n.6 (1993). In the case of a defense failure to call a witness, the jury should be instructed that they "should not draw an adverse inference from the defendant's failure to call a certain witness unless they were persuaded of the truth of the inference beyond a reasonable doubt." *Commonwealth v. Olszewski*, 416 Mass. 707, 724 n.18, 625 N.E.2d 529, 540 n.18 (1993), cert. denied, 513 U.S. 835 (1994).

II. WHERE COMMONWEALTH DOES NOT CALL WITNESS

If the Commonwealth did not call a potential witness to testify, and four conditions are met, you may infer that the witness's testimony would not be favorable to the Commonwealth. The four conditions are:

***First:* that the Commonwealth's case against the defendant is sufficiently weak that it would normally be expected to call that witness to testify;**

***Second:* that the absent witness would be expected to offer important testimony that would support the Commonwealth's case;**

***Third:* that the absent witness is available to testify for the Commonwealth; and**

***Fourth:* that the witness's absence is not explained by any of the other circumstances in the case.**

If any of these four conditions has not been met, then you may not draw any inference from the witness's absence. If all four conditions have been met, you may infer that the witness's testimony would not be favorable to the Commonwealth if that is a reasonable conclusion in the circumstances of this case.

This rule is based on common sense. First, you may not draw such an inference unless the Commonwealth's case was sufficiently weak that it would be expected to bring in the absent witness.

Second, you may not draw such an inference unless the absent witness's testimony would be relevant to the defendant's guilt or innocence in some significant way. Normally the Commonwealth would have no reason to bring in a witness who would only testify about minor details, or who would only repeat what has already been said by other witnesses.

Third, you may not draw such an inference unless there is evidence that the Commonwealth was able to bring the absent witness into court.

And fourth, you may not draw such an inference if the evidence suggests another reasonable explanation for the witness's absence.

SUPPLEMENTAL INSTRUCTION

Neutralizing instruction where negative inference not allowed. **There has been mention in this case about a witness named *[absent witness]* . As a result of a hearing that I held when you were not in the courtroom, I have determined that *[absent witness]* is not available to be called as a witness by either side in this case. You may not draw any inference from the fact that *[absent witness]* did not appear as a witness.**

This supplemental instruction may be used when the judge does not instruct on, or permit argument about, an absent witness, and the judge wishes to neutralize the effect of a prior reference to that witness before the jury. It is drawn from *Commonwealth v. Gagnon*, 408 Mass. 185, 198 n.9, 557 N.E.2d 728, 737 n.9 (1990).

NOTES:

1. **When an absent witness inference is permissible**. The general rule is that where a party, without explanation, does not call a witness who is known to and can be located and brought forward by that party, who is friendly to, or at least not hostile toward, that party, and who can be expected to give material testimony of distinct importance to that party, then the jury may, if they think it reasonable in the circumstances, infer that the witness would have given testimony unfavorable to that party. *Commonwealth v. Schatvet*, 23 Mass. App. Ct. 130, 134, 499 N.E.2d 1208, 1210-1211 (1986). If the other party's case is strong enough that the noncalling party "would be naturally expected" to call the witness, such an inference may be permitted even if the witness is available to both parties, *Commonwealth v. Bryer*, 398 Mass. 9, 13, 494 N.E.2d 1335, 1338 (1986); *Commonwealth v. Niziolek*, 380 Mass. 513, 519, 404 N.E.2d 643, 646 (1980), habeas corpus denied sub nom. *Niziolek v. Ashe*, 694 F.2d 282 (1st Cir. 1982); *Commonwealth v. Franklin*, 366 Mass. 284, 293, 318 N.E.2d 469, 475 (1974); *Commonwealth v. Fulgham*, 23 Mass. App. Ct. 422, 425, 502 N.E.2d 960, 962 (1987), or can provide only partial corroboration of that party's story, *Bryer*, *supra*. Because of the potentially serious adverse effect on the noncalling party, the inference should be permitted "only in clear cases, and with caution." *Schatvet*, *supra*. The inference is not permissible if "so far as appears the witness would be as likely to be favorable to one party as the other." *Id.*, 23 Mass. App. Ct. at 134 n.8, 499 N.E.2d at 1211 n.8.

The judge may not instruct the jury, nor permit counsel to comment, on the potential inference unless the judge has first ruled, as a matter of law, that there is a sufficient foundation for such an inference in the record. *Commonwealth v. Zagranski,* 408 Mass. 278, 288, 558 N.E.2d 933, 939 (1990); *Commonwealth v. Sena,* 29 Mass. App. Ct. 463, 467, 561 N.E.2d 528, 530-531 (1990). "[T]he judge is to consider four factors: (1) whether the case against the defendant is strong and whether, faced with the evidence, the defendant would be likely to call the missing witness if innocent; (2) whether the evidence to be given by the missing witness is important, central to the case, or just collateral or cumulative; (3) whether the party who fails to call the witness has superior knowledge of the whereabouts of the witness; and (4) whether the party has a 'plausible reason' for not producing the witness." *Commonwealth v. Rollins*, 441 Mass. 114, 118, 803 N.E.2d 1256, 1260 (2004), quoting from *Commonwealth v. Alves*, 50 Mass. App. Ct. 796, 802, 741 N.E.2d 473, 480 (2001). The strength of the

Commonwealth's case "appears to have application" whether the Commonwealth or the defense is requesting the instruction. *Alves,* 50 Mass. App. Ct. at 803 n.1, 741 N.E.2d at 480 n.1. "We emphasize again that judges should be circumspect in allowing requests to give the instruction and should do so only when all foundation requirements are clearly met." *Rollins,* 441 Mass. at 120, 803 N.E.2d at 1261. See also *Commonwealth v. Fredette*, 396 Mass. 455, 465-467, 486 N.E.2d 1112, 1119-1120 (1985); *Commonwealth v. Luna*, 46 Mass. App. Ct. 90, 95 n.3, 703 N.E.2d 740, 743 n.3 (1998); *Commonwealth v. Happnie*, 3 Mass. App. Ct. 193, 197, 326 N.E.2d 25, 28 (1975); *Fulgham*, 23 Mass. App. Ct. at 426, 502 N.E.2d at 963.

In deciding the issue of the witness's availability, the judge may consider only the evidence that has been put before the jury, *Niziolek*, 380 Mass. at 520, 404 N.E.2d at 647, though the evidence need not be conclusive, see *Commonwealth v. Melandez*, 12 Mass. App. Ct. 980, 428 N.E.2d 824 (1981); *Commonwealth v. Andrews*, 12 Mass. App. Ct. 901, 902-903, 422 N.E.2d 484, 486-487 (1981). Apart from non-availability, plausible explanations for non-production would include: (1) that the witness's testimony would be immaterial or cumulative, *Happnie, supra*; *Commonwealth v. Groce*, 25 Mass. App. Ct. 327, 329-331, 517 N.E.2d 1297, 1298-1299 (1988) (error to so instruct where missing witness's alibi evidence would have been weak at best); *Schatvet*, 23 Mass. App. Ct. at 134, 499 N.E.2d at 1211; (2) that the case against the party is not strong and therefore there is no occasion to reply, *Id.*, 23 Mass. App. Ct. at 134 n.9, 499 N.E.2d at 1211 n.9; (3) that the witness is reluctant to testify for fear of reprisal, *Commonwealth v. Gagliardi,* 29 Mass. App. Ct. 225, 244, 559 N.E.2d 1234, 1246 (1990); (4) that a family member is nevertheless unfriendly to the defendant, *Commonwealth v. Resendes,* 30 Mass. App. Ct. 430, 433, 569 N.E.2d 413, 415 (1991); (5) that a prior conviction renders a witness antagonistic to the Commonwealth, *Commonwealth v. Anderson,* 411 Mass. 279, 283, 581 N.E.2d 1296, 1298-1299 (1991); or (6) that the witness has a prior criminal record that may be used for impeachment, or is susceptible to cross-examination on collateral issues, or there are other tactical reasons for not calling the witness, *Franklin*, 366 Mass. at 294, 318 N.E.2d at 476.

It is error to charge that "where a witness is equally available to either party, and the defendant fails to call the witness, an inference may be drawn that the testimony would have been unfavorable to the defendant where the evidence against him is so strong that, if innocent, he would be expected to call the missing witness." Where a witness is equally available to both sides, the judge may permit the jury to draw an inference against the defendant only if the prosecution has offered sufficient incriminating evidence and the defendant could produce witnesses who are more likely known to him or her than to the prosecution to offer explanations consistent with the defendant's innocence. *Commonwealth v. Cobb,* 397 Mass. 105, 107-109, 489 N.E.2d 1246, 1247-1248 (1986).

2. **Allowing inference is optional with judge.** The fact that a sufficient foundation is established in the record does not *require* the judge to allow comment by counsel and to give an appropriate instruction to the jury, particularly if the inference would run against the defendant. *Commonwealth v. Smith,* 49 Mass. App. Ct. 827, 832, 733 N.E.2d 159, 162 (2000); *Sena,* 29 Mass. App. Ct. at 467 n.6, 561 N.E.2d at 531 n.6. "[W]hether to give a missing witness instruction is a decision that must be made on a case-by-case basis, in the discretion of the trial judge . . . . That decision will be overturned on appeal only if it was manifestly unreasonable. *Commonwealth v. Thomas,* 429 Mass. 146, 151, 706 N.E.2d 669 (1999). However, once a judge permits counsel to make a 'missing witness' comment to the jury, "the judge also must give a 'missing witness' instruction to the jury [or] the effect is to undercut counsel's closing argument." *Smith, supra; Sena, supra.*

The degree of such discretion may be less when it is the defendant who asks for an absent witness instruction or to make an absent witness argument. *Commonwealth v. Tripolone*, 57 Mass. App. Ct. 901, 901, 780 N.E.2d 966, 968 (2003).

"[W]here incriminating evidence has been introduced by the Commonwealth and explanations consistent with his innocence could be produced by the defendant through witnesses other than

himself, his failure in this respect may be deemed by the judge to be a fair matter for comment" (citations omitted). *Bryer*, 398 Mass. at 12, 494 N.E.2d at 1337. On the other hand, "[e]ven though comment may be warranted, it does not necessarily follow that it should, in the judge's discretion, be permitted . . . . [T]he judge's discretion in allowing the inference should be applied cautiously and with a strict regard for the rights of persons accused," *Franklin, supra,* since care must be taken to avoid shifting the burden of proof or denigrating the defendant's failure to testify, *Bryer, supra*; *Commonwealth v. Perkins*, 6 Mass. App. Ct. 964, 965, 384 N.E.2d 215, 217 (1979); *Schatvet*, 23 Mass. App. Ct. at 135 n.10, 499 N.E.2d at 1211 n.10. The judge should consider the strength of the case against the defendant and permit the inference only if "'the evidence against him is so strong that, if innocent, he would be expected to call [the witness]'" (citations omitted). *Bryer, supra.* Although not determinative, the judge may also consider whether the defendant has superior knowledge of the absent witness's identity and whereabouts. *Niziolek*, 380 Mass. at 519, 404 N.E.2d at 646-647; *Franklin*, 366 Mass. at 293, 318 N.E.2d at 475. "In the last analysis, the trial judge has discretion to refuse to give the instruction, . . . and, conversely, a party who wishes the instruction cannot require it of right." *Anderson, supra.*

3. **Argument by counsel impermissible when foundation for instruction absent.** If the judge determines that the foundational requirements for an absent witness instruction are not met, then the judge should not permit counsel to make an absent witness argument either. Since an absent witness instruction is "a specific, limited exception to the more general instruction that the jury are not to draw any conclusion about the content of evidence that was not produced," counsel may not encourage the jury to draw an inference that the judge has determined is not appropriate in the case. This does not stop defense counsel from making the "standard argument that can be made in any case . . . that the evidence that has been produced is inadequate; the defendant may even legitimately point out that a specific witness or specific evidence has not been produced," but may not "point[] an accusatory finger at the Commonwealth for not producing the missing witness and urg[e] the jury to conclude affirmatively that the missing evidence would have been unfavorable to the Commonwealth," which is "the essence of the adverse inference." *Commonwealth v. Saletino*, 449 Mass. 657, 671-672 & n.22, 871 N.E.2d 455, 467-468 & n.22 (2007). Where a prosecutor makes an absent witness argument without having requested advance permission from the judge to do so, an appellate court will take the judge's failure to interrupt or give a curative instruction sua sponte as an implied ruling that the prosecution has laid a proper foundation. *Commonwealth v. Broomhead,* 67 Mass. App. Ct. 547, 855 N.E.2d 413 (2006).

When counsel wishes to make an absent witness argument to the jury, the proper practice is first to obtain the judge's permission to do so. *Smith,* 49 Mass. App. Ct. at 830, 733 N.E.2d at 161. Counsel who fails to do so "risk[s] interruption of his closing argument by the judge . . . . Whether a judge should prevent an improper argument by stopping counsel during the argument or instead should wait until the conclusion of the argument, or correct the argument in his charge to the jury rests largely in his discretion." *Commonwealth v. Vasquez,* 27 Mass. App. Ct. 655, 658 & n.4, 542 N.E.2d 296, 298 & n.4 (1989). A judge may be required to provide curative instructions immediately if a prosecutor's improper argument about an absent witness is sufficiently prejudicial. See *Commonwealth v. Rodriguez,* 49 Mass. App. Ct. 370, 729 N.E.2d 669 (2000) (judge's "tardy and tepid" boilerplate remarks in final instructions insufficient to dispel improper argument; to be effective, corrective instruction should have been given immediately).

4. **Witness present in court.** Since normally an absent witness instruction should not be given when the witness is "equally available to parties on both sides of a dispute," such an instruction is generally inappropriate where the witness is present in the courtroom. However, this is not a hard and fast rule, and need not be applied where one party is more closely acquainted with the witness and would naturally be expected to call the witness. *Saletino*, 449 Mass. at 669 n.17, 871 N.E.2d at 465 n.17.

5. **Non-defendant witness's pretrial silence**. The Commonwealth may impeach a defense witness other than the defendant with his or her pretrial silence only upon establishing the following foundation: (1) the witness knew of the pending charges in sufficient detail to realize that he or she possessed exculpatory information; (2) the witness had reason to make such information available; (3) the witness was familiar with the way to report it to the proper authorities; and (4) neither the defendant nor defense counsel asked the witness to refrain from doing so. *Commonwealth v. Gregory*, 401 Mass. 437, 445, 517 N.E.2d 454, 459 (1988); *Commonwealth v. Edgerton*, 396 Mass. 499, 506-507, 487 N.E.2d 481, 486-487 (1986); *Commonwealth v. Berth*, 385 Mass. 784, 790, 434 N.E.2d 192, 196 (1982); *Commonwealth v. Liberty*, 27 Mass. App. Ct. 1, 4-6, 533 N.E.2d 1383, 1385-1387 (1989); *Commonwealth v. Enos*, 26 Mass. App. Ct. 1006, 1007, 530 N.E.2d 805, 807 (1988); *Commonwealth v. Bassett*, 21 Mass. App. Ct. 713, 716-717, 490 N.E.2d 459, 461-462 (1986); *Commonwealth v. Brown*, 11 Mass. App. Ct. 288, 296-297, 416 N.E.2d 218, 224 (1981). See also *Commonwealth v. Nickerson*, 386 Mass. 54, 58 n.4, 434 N.E.2d 992, 995 n.4 (1982) (inference impermissible if witness had other reasons for not wanting to deal with police); *Commonwealth v. Baros*, 24 Mass. App. Ct. 964, 964, 511 N.E.2d 362, 363-364 (1987) (inferable from witness's explanation that fourth foundation requirement satisfied). The Commonwealth is entitled to pose such foundation questions in the presenceof the jury, *Enos, supra,* but it is error to permit such impeachment unless the proper foundation has been laid, *Commonwealth v. Rivers*, 21 Mass. App. Ct. 645, 648, 489 N.E.2d 206, 208 (1986).

6. **Absence of investigation or testing**. Defense counsel is entitled to argue to the jury that they should draw an adverse inference against the Commonwealth from the failure of the police to preserve and introduce material evidence or to perform probative tests. The judge is not required to instruct the jury that they may draw such an inference, although the Appeals Court has suggested that it is preferable to do so. See Instruction 3.740 (Omissions in Police Investigations.)

7. **Lost or destroyed evidence.** When the defense demonstrates a reasonable possibility that lost or destroyed evidence was in fact exculpatory, the judge must then balance the culpability of the Commonwealth, the materiality of the evidence and the potential prejudice to the defendant in determining an appropriate remedy, which may include instructing the jury that it is permissible for them to draw a negative inference against the Commonwealth.

See Instruction 3.740 (Omissions in Police Investigations).

3.520 ADMISSION BY SILENCE

2009 Edition

You have heard testimony suggesting that _*[speaker]*_ allegedly (told the defendant) (said in the defendant's presence and hearing) that _____. You have also heard testimony that the defendant allegedly (offered no response or explanation) (replied by saying that _____).

The Commonwealth is suggesting that the defendant's (silence) (reply was evasive or ambiguous and therefore it) amounts to a silent admission by the defendant that the accusation was true. If you believe the testimony, you will have to decide whether or not that is a fair conclusion.

Sometimes, when a direct accusation against a person is made to his face, you might naturally expect him to deny or correct the accusation if he is innocent of it. But that is not always true. Under some circumstances, it might not be reasonable to expect a routine denial.

You must be cautious in this area to be sure that any conclusions you draw are fair ones. First of all, you must be certain that the defendant heard any accusation and understood its significance.

You must also be satisfied that it is a fair conclusion that a person would always speak up in a situation like this if he were innocent. After all, no one is required to respond to every negative comment that is made about him. And there may be other factors in a given situation, apart from guilt or innocence with respect to the particular accusation, that might explain why a person did not choose to respond.

On the other hand, some accusations may be of such a nature, or come from such a source, that it may be natural to expect an innocent person to protest when such an accusation is made to his face if there are no other explanations for his silence.

If you accept the testimony about the defendant's alleged (silence) (reply), then you will have to look to your common sense and experience to determine how to interpret the defendant's (silence) (answer) in this particular case.

If you conclude that the defendant *did* silently admit that the accusation was true, you may give that whatever significance you feel it is fairly entitled to receive in your deliberations. If you are uncertain whether the defendant's alleged (silence) (reply) amounted to a silent admission, then you should disregard it entirely and go on to consider the other evidence in this case.

"Even where a jury is given proper instructions concerning the legal principles relating to admissions by silence, there is a substantial risk of misunderstanding and misapplication by a jury." *Commonwealth v. Freeman*, 352 Mass. 556, 563, 227 N.E.2d 3, 8 (1967). For that reason, the Ninth Circuit's Committee on Jury Instructions recommends that no such instruction be given and that, if the evidence permits an adverse inference, counsel be permitted to argue the point. Manual of Model Jury Instructions for the Ninth Circuit § 4.02 (1985 ed.).

NOTES:

1. **When admissible**. Either party may show an "adoptive admission by silence" by a witness (including a criminal defendant) who, while not under arrest, did not respond (or responded evasively or equivocally) to a direct accusation that he or she would naturally be expected to deny. (It would not be "natural" to reply if doing so might be self-incriminatory as to another crime, or as to the person's family members.) The jury should be instructed to consider whether the witness heard the statement, understood it, had motive and opportunity to reply, could properly do so, and appeared to acquiesce in the statement. A witness's failure to tell his or her story to authorities may also be admissible to impeach the witness's testimony as a recent contrivance, although evidence of the defendant's pre-arrest failure to volunteer information to authorities should be admitted with great caution. The judge should conduct a voir dire before permitting any evidence of the defendant's pre-arrest silence and weigh its admission carefully. *Jenkins v. Anderson,* 447 U.S. 231, 235-241, 100 S.Ct. 2124, 2127-2130 (1980); *Commonwealth v. Olszewski,* 416 Mass. 707, 718-719, 625 N.E.2d 529, 537 (1993); *Commonwealth v. Brown,* 394 Mass. 510, 515, 476 N.E.2d 580, 583 (1985); *Commonwealth v. Nickerson,* 386 Mass. 54, 57, 434 N.E.2d 992, 994-997 (1982); *Commonwealth v. Cefalo,* 381 Mass. 319, 338, 409 N.E.2d 719, 731 (1981); *Commonwealth v. Haas,* 373 Mass. 545, 560, 369 N.E.2d 692, 702-703 (1977); *Commonwealth v. McGrath,* 351 Mass. 534, 538, 222 N.E.2d 774, 777 (1967); *Commonwealth v. Kleciak,* 350 Mass. 679, 691, 216 N.E.2d 417, 425 (1966); *Commonwealth v. Burke,* 339 Mass. 521, 532, 159 N.E.2d 856, 863 (1959); *Commonwealth v. Aparicio,* 14 Mass. App. Ct. 993, 993, 440 N.E.2d 778, 779 (1982).

Adoptive admissions must be used with caution, since a person "is not bound to answer or explain every statement made by anyone in his presence if he wishes to prevent his silence from being construed as an admission . . . ." *Commonwealth v. Boris,* 317 Mass. 309, 317, 58 N.E.2d 8, 13 (1944).

2. **When inadmissible**. Once a person is given Miranda warnings or placed in a custodial situation, no adverse inference may be drawn from his or her silence, since "every post-arrest silence is insolubly ambiguous because of what the state is required to advise the person arrested." *Doyle v. Ohio,* 426 U.S. 610, 617-619, 96 S.Ct. 2240, 2244-2245 (1976); *Miranda v. Arizona,* 384 U.S. 436, 468 n.37, 86 S.Ct. 1602, 1624 n.37 (1966). See *Greer v. Miller,* 483 U.S. 756, 107 S.Ct. 3102 (1987); *United States v. Hale,* 422 U.S. 171, 175, 181, 95 S.Ct. 2133, 2136, 2139 (1975); *Commonwealth v. Mahdi,* 388 Mass. 679, 694-698, 448 N.E.2d 704, 713-715 (1983); *Nickerson,* 386 Mass. at 58-59 & n.5, 434 N.E.2d at 995 & n.5; *Commonwealth v. Cobb,* 374 Mass. 514, 520-521, 373 N.E.2d 1145, 1149-1150 (1978); *Commonwealth v. Morrison,* 1 Mass. App. Ct. 632, 634, 305 N.E.2d 518, 519-520 (1973). A postarrest equivocal answer, however, is admissible. *Commonwealth v. Valliere,* 366 Mass. 479, 488-489, 321 N.E.2d 625, 632 (1974); *Commonwealth v. Rogers,* 8 Mass. App. Ct. 469, 473-474, 395 N.E.2d 484, 486-487 (1979).

No inference of guilt may be drawn from a person's declining to speak without counsel present, or declining to speak on advice of counsel, or requesting to confer with counsel, even in a non-custodial situation. *Commonwealth v. Person,* 400 Mass. 136, 141, 508 N.E.2d 88, 91 (1987); *Haas, supra*; *Commonwealth v. Hall,* 369 Mass. 715, 733, 343 N.E.2d 388, 400 (1976); *Commonwealth v. Freeman,* 352 Mass. 556, 563-564, 227 N.E.2d 3, 8 (1967); *Commonwealth v. Sazama,* 339 Mass. 154, 157-158, 158 N.E.2d 313, 315-316 (1959).

3. **Defendant's denial**. When the defendant has denied an accusation, both the statement and the denial are inadmissible hearsay. *Commonwealth v. Ruffen,* 399 Mass. 811, 812-813, 507 N.E.2d 684, 685-686 (1987); *Commonwealth v. Nawn,* 394 Mass. 1, 4-5, 474 N.E.2d 545, 549 (1985); *Commonwealth v. Pleasant,* 366 Mass. 100, 102, 315 N.E.2d 874, 876 (1974).

3.540 CHILD WITNESS

2009 Edition

You have heard the testimony of *[child witness]* , and you may be wondering whether his (her) young age should make any difference.

In the end, what you must determine, as with any witness, is whether his (her) testimony is believable. In weighing his (her) testimony, you must consider not only his (her) age, but the factors that are important for all witnesses. Did he (she) understand the questions? Does he (she) have a good memory? Is he (she) telling the truth?

There may be a few additional considerations when the witness is a child. Because some young children may not fully understand what is happening here, you should consider whether *[child witness]* understood the seriousness of his (her) appearance here as a witness.

Also, some young children may be more suggestible than adults, and they may be influenced by the way that questions are asked. It is up to you to decide whether *[child witness]* understood the questions asked of him (her).

You should give his (her) testimony, like that of all witnesses, whatever weight you conclude that it is fairly entitled to receive.

Some portions of this intruction were adapted from Federal Judicial Center, Pattern Criminal Jury Instructions, Instruction 28 (1987).

Commonwealth v. Brusgalis, 398 Mass. 325, 329-331, 496 N.E.2d 652, 655-656 (1986); *Commonwealth v. Tatisos*, 238 Mass. 322, 130 N.E. 495 (1921); *Commonwealth v. Baran*, 21 Mass. App. Ct. 989, 990-991, 490 N.E.2d 479, 480-481 (1986); *Kentucky v. Stincer*, 482 U.S. 730, 742 n.12, 107 S.Ct. 2658, 2665 n.12 (1987); *Wheeler v. United States*, 159 U.S. 523, 524, 16 S.Ct. 93, 93 (1895). Such an instruction is permissible in the judge's discretion, but is not of right. *Commonwealth v. Perkins*, 39 Mass. App. Ct. 577, 580, 658 N.E.2d 975, 977 (1995); *Commonwealth v. Avery*, 14 Mass. App. Ct. 137, 140-145, 437 N.E.2d 242, 244-247 (1982). Particularly where the witness's age has been fully explored and argued to the jury, the judge may decide not to go beyond the general instructions on witness credibility (see Instruction 2.260), *Commonwealth v. Figueroa*, 413 Mass. 193, 198, 595 N.E.2d 779, 783 (1992) (judge "properly exercised his discretion" in declining to give specialized instruction "and thereby avoiding the risk of intrusion on the jury's role . . . by singling out a particular witness's testimony for special scrutiny"), or the judge may prefer simply to add "age" to the list of relevant factors in those general instructions, *Commonwealth v. A Juvenile*, 21 Mass. App. Ct. 121, 122-126, 485 N.E.2d 201, 203-204 (1985).

As to child witnesses and their competence, see Jury Trial Manual for Criminal Offenses Tried in the District Court § 4.15. A judge who decides to allow the prosecutor to pose questions during the voir dire of a child witness as to competence must allow defense counsel the same opportunity. *Commonwealth v. Massey*, 402 Mass. 453, 454-455, 523 N.E.2d 781, 782 (1988).

For the procedure to be followed after a child witness has been found presently incompetent, see *Commonwealth v. Corbett*, 26 Mass. App. Ct. 773, 533 N.E.2d 207 (1989).

3.560 CONFESSIONS AND ADMISSIONS (HUMANE PRACTICE)

2009 Edition

You have heard testimony about a statement allegedly made by the defendant concerning the offense which is charged in this case. Before you may consider any such statement, you are going to have to make a preliminary determination whether it can be considered as evidence or not. You may not consider any such statement in your deliberations unless, from all the evidence in the case, the Commonwealth has proved beyond a reasonable doubt that the defendant made the statement that he (she) is alleged to have made, and that he (she) made it voluntarily, freely and rationally.

At judge's option. **The reasons for this rule are probably obvious to all of you. Experience tells us that when a statement is involuntary, it is most often unreliable as well. Also, our society has long held a strong conviction that we should not take advantage of a person who is physically or mentally incapable of deciding freely whether or not to speak.**

Commonwealth v. Paszko, 391 Mass. 164, 177, 461 N.E.2d 222, 231 (1984), quoting from *Blackburn v. Alabama*, 361 U.S. 199, 207, 80 S.Ct. 274, 280 (1960).

Each juror must determine whether the Commonwealth has proved beyond a reasonable doubt that any statement that the defendant made about the offense was made voluntarily, freely and rationally. If any juror is not convinced beyond a reasonable doubt that the statement was voluntary, that juror may *not* use the statement as evidence in coming to his or her own conclusion about whether the Commonwealth has proved the charge beyond a reasonable doubt. If the Commonwealth *has* met that burden, then you may consider the defendant's statement, and rely on it as much, or as little, as you think proper, along with all the other evidence.

Massachusetts “humane” practice requires that when a defendant’s confession or admission is offered in evidence, the judge must initially decide at a preliminary hearing in the absence of the jury whether the Commonwealth has proved beyond a reasonable doubt that the statement was voluntary. If not, the judge must exclude it. If the statement is admitted, the judge must then resubmit the issue of voluntariness to the jury by instructing that each juror is not to consider the defendant’s statement unless, on all the evidence in the case, that juror is satisfied beyond a reasonable doubt that it was the defendant's free and voluntary act. The jury should not be told of the judge’s preliminary determination of voluntariness. *Commonwealth v. Tavares*, 385 Mass. 140, 149-153, 430 N.E.2d 1198, 1204-1206, cert. denied, 457 U.S. 113 (1982); *Harris v. Commonwealth*, 371 Mass. 478, 481 n.3, 358 N.E.2d 991, 993 n.3 (1976). See also *Commonwealth v. Hunter*, 416 Mass. 831, 834, 626 N.E.2d 873, 876 (1994) (humane practice also applies to statements to private citizens); *Commonwealth v. Dyke*, 394 Mass. 32, 474 N.E.2d 172 (1985) (Tavares requirement that voluntariness be shown beyond a reasonable doubt is not retroactive); *Commonwealth v. Brown*, 386 Mass. 17, 31-32, 434 N.E.2d 973, 981-982 (1982). The judge’s preliminary determination of voluntariness “must appear from the record with unmistakable clarity.” *Sims v. Georgia*, 385 U.S. 538, 544, 87 S.Ct. 639, 643 (1967); *Johnson v. Denno*, 378 U.S. 368, 391-394, 84 S.Ct. 1774, 1788- 1790 (1964).

Tavares does not require that the jury as a whole must agree unanimously beyond a reasonable doubt that a defendant’s statement is voluntary before it can be considered as evidence. The judge need only instruct that each juror individually should determine whether the statement was given voluntarily, and if a juror is not convinced beyond a reasonable doubt that the statement was voluntary, that juror should not use the statement as evidence in coming to his or her own conclusion as to whether the Commonwealth has proved the charged crimes beyond a reasonable doubt. *Commonwealth v. Watkins*, 425 Mass. 685, 691-692, 682 N.E.2d 859, 864 (1997).

If voluntariness is a live issue at trial, the judge must sua sponte conduct a preliminary hearing and then submit the question to the jury, even without a request from the defendant. *Commonwealth v. Parham*, 390 Mass. 833, 841-842, 460 N.E.2d 589, 595-596 (1984); *Commonwealth v. Cartagena*, 386 Mass. 285, 286-287, 435 N.E.2d 352, 354 (1982); *Commonwealth v. Van Melkebeke* 48 Mass. App. Ct. 364,367, 720 N.E.2d 834 (1999); *Commonwealth v. Bandy*, 38 Mass. App. Ct. 329, 331, 648 N.E. 2d 440 (1995). This sua sponte obligation applies only if voluntariness was a live issue before the jury, even if the judge heard conflicting evidence on voluntariness on voir dire. *Commonwealth v. Anderson*, 425 Mass. 685, 691-692, 682 N.E.2d 859, 864 (1997).

For a fuller discussion of humane practice and other issues related to confessions and admissions, see Jury Trial Manual for Criminal Offenses Tried in the District Court § 2.47.

Evidence of the circumstances surrounding a confession is relevant to credibility as well as voluntariness, and therefore may not be excluded by the trial judge even where the judge has denied the defendant's motion to suppress his confession as involuntary, and the jurisdiction does not require humane practice. *Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2142 (1986).

SUPPLEMENTAL INSTRUCTIONS

1. Relevant factors to consider. **In determining whether or not any statement made by the defendant was voluntary, you may consider all of the surrounding circumstances. You can take into account the nature of any conversations that the police officers had with the defendant, and the duration of any questioning, if there was any. You may consider where the statement was made and when it was made. You may consider the defendant's physical and mental condition, his (her) intelligence, age, education, experience, and personality. Your decision does not turn on any one factor; you must consider the totality of the surrounding circumstances.**

Commonwealth v. Lahti, 398 Mass. 829, 830-833, 501 N.E.2d 511, 511-513 (1986), cert. denied, 481 U.S. 1017 (1987) (false police promises of leniency rendered statement involuntary); *Commonwealth v. Wills*, 398 Mass. 768, 776-777, 500 N.E.2d 1341, 1346-1347 (1986) (defendant need not be told why being questioned for statement to be voluntary); *Parham*, 390 Mass. at 840, 460 N.E.2d at 595; *Commonwealth v. Garcia*, 379 Mass. 422, 399 N.E.2d 460 (1980) (language problem may render statement involuntary); *Commonwealth v. Meehan*, 377 Mass. 552, 564- 565, 387 N.E.2d 527, 534 (1979), cert. dismissed, 445 U.S. 39 (1980) (police may promise to bring defendant's cooperation to attention of authorities, but direct or indirect assurance that cooperation will result in a lesser sentence renders statement involuntary).

It is not enough that the statement was voluntary in the sense that it was not forced or tricked out of the defendant by physical intimidation or psychological pressure. It must also have been made freely and rationally. Obviously, a person cannot give up a valuable right freely if his brain is so clouded that he is not thinking straight. If you conclude that (mental illness) (mental retardation) (extreme intoxication on drugs) (extreme intoxication with alcohol) (*[other relevant factor]*) had rendered the defendant incapable of understanding the meaning and effect of his (her) statement, or incapable of withholding it, then you must exclude the defendant's statement from your deliberations as being involuntarily given.

The "meaning and effect" terminology in the model instruction is taken from *Commonwealth v. Vasquez*, 387 Mass. 96, 100 n.8, 438 N.E.2d 856, 859 n.6 (1982). The "incapable of withholding" language is drawn from *Paszko*, supra.

Although the Supreme Court has held that a confession can be involuntary in a due process sense only if it was the product of police coercion, and not solely because of a defendant's mental condition, *Colorado v. Connelly*, 479 U.S. 157, 163-167, 107 S.Ct. 515, 519-522 (1987), Massachusetts law that the defendant's mental or physical condition alone can invalidate a confession is drawn from common law as well as Federal constitutional sources, and appears to have been affirmed subsequent to *Connelly*. *Commonwealth v. Waters*, 399 Mass. 708, 711-714, 506 N.E.2d 859, 863 (1987).

If there is evidence of intoxication or mental condition: **If it appears that the defendant had mental problems, or was under the influence of drugs or alcohol, you must take special care in determining whether any statement was the product of the defendant's rational intellect and free will. However, mental problems or intoxication do not automatically make an otherwise voluntary act involuntary. You must look to all the circumstances to determine whether any statement was made freely and rationally.**

Blackburn, supra; *Commonwealth v. Shipps*, 399 Mass. 820, 826, 507 N.E.2d 671, 676 (1987) ("special care" required where alcohol or drugs used, but no per se rule); *Paszko*, 391 Mass. at 175-178, 461 N.E.2d at 230-231 (drug withdrawal may render statement involuntary, but no per se rule); *Commonwealth v. Louraine*, 390 Mass. 28, 39, 453 N.E.2d 437, 445 (1983) (evidence of insanity required humane practice even for spontaneous pre-arrest statements); *Vasquez*, 387 Mass. at 100-101, 438 N.E.2d at 858-859 (statement by psychotic not involuntary per se unless it would not have been obtained but for the psychosis); *Commonwealth v. Cameron*, 385 Mass. 660, 665, 433 N.E.2d 878, 883 (1982) (some custodial interrogation constitutionally permissible for a normal adult may be impermissible for a mentally retarded person, though no per se rule); *Commonwealth v. Vick*, 381 Mass. 43, 46, 406 N.E.2d 1295, 1297 (1980) (humane practice required sua sponte even where evidence of insanity offered after statement was introduced in evidence); *Commonwealth v. Brady*, 380 Mass. 44, 52, 410 N.E.2d 695, 699 (1980) (alcohol intoxication may render statement involuntary, but no per se rule); *Commonwealth v. Chung*, 378 Mass. 451, 457, 392 N.E.2d 1015, 1019 (1979) (any evidence of insanity at time of statement requires humane practice).

2. Relevance of Miranda warnings. **When the police take a person into custody, they must give him certain warnings before any statements he makes in response to interrogation will be admissible in evidence. You have probably heard of them; they are called Miranda warnings, after the name of the case in which the Supreme Court held that such warnings are required. They are relevant here because you may consider whether the Miranda warnings were given and understood, as part of your determination of whether any statement the defendant made was voluntary. There are four such warnings – a person must be advised: [1] that he has a right to remain silent; [2] that anything he says can be used as evidence against him in court; [3] that he has the right to the presence of an attorney during questioning; and [4] that if he wants an attorney but cannot afford one, the state will provide an attorney for him at no cost. The police may give a fifth warning, which is optional: that if the person decides to answer any questions, he has the right to stop the questioning at any time.**

In determining whether a statement was voluntary, you may consider whether these warnings were given and understood, along with the other factors I have mentioned.

Here instruct on "Unrecorded Custodial Interrogation" (Instruction 3.820) if the issue is raised by the defendant and supported by the evidence.

The “fifth Miranda warning” regarding termination of questioning at any time is good police practice but not required. *Commonwealth v. Lewis*, 374 Mass. 203, 205, 371 N.E.2d 775, 776-777 (1978).

Initially, compliance with *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966), is a prerequisite for admissibility and a question of law for the judge, who must be convinced beyond a reasonable doubt that the defendant received and waived Miranda rights before any statements in response to custodial interrogation may be admitted in evidence. *Tavares*, supra; *Commonwealth v. Day*, 387 Mass. 915, 923, 444 N.E.2d 384, 388 (1983); *Garcia*, 379 Mass. at 431, 399 N.E.2d at 466 (valid waiver does not require that in hindsight the defendant would still speak with police, only that police procedures must scrupulously respect defendant's free choice made with actual knowledge of rights); *Commonwealth v. Dustin*, 373 Mass. 612, 616, 368 N.E.2d 1388, 1391 (1980) (statements not in compliance with Miranda must be excluded even if voluntary and reliable).

Contested questions of Miranda compliance are not to be submitted to the jury for decision, but evidence on whether the warnings were given and whether rights were validly waived is relevant to the jury’s overall determination of voluntariness. *Tavares*, 385 Mass. at 153 n.19, 430 N.E.2d at 1206 n.19. Where Miranda warnings were given but were not required, it is within the judge’s discretion whether to permit evidence of the warnings to be considered by the jury on the issue of voluntariness. *Commonwealth v. Nadworny*, 396 Mass. 342, 368-370, 486 N.E.2d 675, 691, cert. denied, 477 U.S. 904 (1986).

4. Impeachment of defendant by otherwise inadmissible statement. **You have heard some evidence that in the past the defendant may have made a statement which is alleged to be inconsistent with the testimony he (she) has given in this case. If it has been proved to you that the defendant made such a statement voluntarily, you may consider it solely to assist you in evaluating the defendant’s credibility as a witness in this trial.**

When you evaluate how reliable any witness is, you may take into account whether that witness made any earlier statement that differs in any significant way from his present testimony at trial. It is for you to say how significant any difference is.

You may not consider any such statement as any evidence of the defendant's guilt. You may not take any such statement as positive evidence of any fact that is mentioned in it, and you must not draw any inference of guilt against the defendant if you find that he (she) made such a statement. The prior statement is relevant only as to your determination of whether to believe the defendant's present testimony in court.

This supplemental instruction may be used when the defendant's confession or admission was suppressed for lack of Miranda compliance and therefore was not introduced in the Commonwealth's case-in-chief, the defendant then testified in his or her own behalf, and the Commonwealth seeks in rebuttal to impeach the defendant's testimony by offering the otherwise inadmissible confession or admission as a prior inconsistent statement. *Commonwealth v. Britt*, 358 Mass. 767, 770, 267 N.E.2d 223, 225 (1971); *Commonwealth v. Simpson*, 300 Mass. 45, 55-56, 13 N.E.2d 939, 944-945 (1938), cert. denied, 304 U.S. 565 (1940).
This supplemental instruction should not be used when the defendant's confession or admission is introduced as substantive evidence.
A defendant may be impeached with a prior inconsistent statement that was not obtained in compliance with Miranda if it is voluntary and otherwise trustworthy. *Harris v. New York*, 401 U.S. 222, 224, 91 S.Ct. 643, 645 (1971); *Commonwealth v. Harris*, 364 Mass. 236, 238-241, 303 N.E.2d 115, 117-118 (1973). But an involuntary statement may not be introduced even for impeachment purposes. *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408 (1978). It is an open question whether the judge must sua sponte conduct a voir dire as to voluntariness when a statement is offered only for impeachment purposes. *Commonwealth v. Nicholson*, 20 Mass. App. Ct. 9, 14, 477 N.E.2d 1038, 1042 (1985).

3.580 CONSCIOUSNESS OF GUILT

2009 Edition

You have heard evidence suggesting that the defendant:

Here outline the nature of the evidence, e.g.:

A. Flight. **may have fled after he (she) discovered that he (she) was about to be (arrested for) (charged with) the offense for which he (she) is now on trial.**

B. False statements. **may have intentionally made certain false statements (before) (after) his (her) arrest.**

C. False name. **may have used a false name to conceal his (her) identity.**

D. Evidence tampering. **may have intentionally tried to (conceal) (destroy) (falsify) evidence in this case.**

E. Witness intimidation or bribery. **may have intentionally attempted to (intimidate or coerce) (bribe) a witness whom he (she) believed would testify against him (her).**

If the Commonwealth has proved that the defendant did _____, you may consider whether such actions indicate feelings of guilt by the defendant and whether, in turn, such feelings of guilt might tend to show actual guilt on (this charge) (these charges). You are not required to draw such inferences, and you should not do so unless they appear to be reasonable in light of all the circumstances of this case.

If you decide that such inferences are reasonable, it will be up to you to decide how much importance to give them. But you should always remember that there may be numerous reasons why an innocent person might do such things. Such conduct does not necessarily reflect feelings of guilt. Please also bear in mind that a person having feelings of guilt is not necessarily guilty in fact, for such feelings are sometimes found in innocent people.

Finally, remember that, standing alone, such evidence is never enough by itself to convict a person of a crime. You may not find the defendant guilty on such evidence alone, but you may consider it in your deliberations, along with all the other evidence.

Whenever the prosecution argues that certain evidence indicates consciousness of guilt, the judge is required at the defendant's request to instruct the jury: (1) that they may, but need not, consider such evidence as a factor tending to prove the defendant's guilt; (2) that they may not convict on the basis of such evidence alone; (3) that flight or similar conduct does not necessarily reflect feelings of guilt, since there are numerous reasons why an innocent person might flee; and (4) that even if flight or similar conduct demonstrates feelings of guilt, it does not necessarily mean that the defendant is guilty in fact because guilt feelings are sometimes present in innocent people. If the defense does not request such an instruction, it "is left to the sound discretion of the judge" whether to give such an instruction sua sponte. *Commonwealth v. Simmons*, 419 Mass. 426, 435-436, 646 N.E.2d 97, 102-103 (1995) (discarding Cruz rule that required such a charge sua sponte); *Commonwealth v. Cruz*, 416 Mass. 27, 515 N.E.2d 804 (1993); *Commonwealth v. Matos*, 394 Mass. 563, 566, 476 N.E.2d 608, 610 (1985); *Commonwealth v. Toney*, 385 Mass. 575, 433 N.E.2d 425 (1982); *Commonwealth v. Henry*, 37 Mass. App. Ct. 429, 437-438, 640 N.E.2d 503, 508-509 (1994); *Commonwealth v. Mercado*, 24 Mass. App. Ct. 391, 400, 509 N.E.2d 300, 306 (1987); *Commonwealth v. Rivera*, 23 Mass. App. Ct. 605, 608-610, 504 N.E.2d 371, 373-374 (1987); *Commonwealth v. Dwyer*, 22 Mass. App. Ct. 724, 728-729, 497 N.E.2d 1103, 1106 (1986). Where consciousness of guilt is central to the prosecution case, it is reversible error for the judge to charge only on the first two points and to refuse on request to charge as to the third and fourth points. *Commonwealth v. Estrada*, 25 Mass. App. Ct. 907, 514 N.E.2d 1099 (1987).

The model instruction has been affirmed as "balanced and in accord with the principles enunciated in" Toney. *Commonwealth v. Knap*, 412 Mass. 712, 715-716, 592 N.E.2d 747, 750 (1992).

SUPPLEMENTAL INSTRUCTION

Where such evidence is of another crime. **I caution you, in considering such evidence, that the defendant is not on trial for _____, and you are not to consider such evidence as a substitute for proof of guilt of the offense with which he (she) *is* charged. You may use such evidence only for the purpose I have outlined to you.**

NOTES:

1. **When inference permissible**. The evidence need not be "conclusive" but merely "sufficient" to warrant a consciousness of guilt instruction. *Commonwealth v. Lamont L.*, 54 Mass. App. Ct. 748, 753, 767 N.E.2d 1105, 1109 (2002). However, probatively weak evidence should be excluded or the jury charged not to draw such an inference, *Commonwealth v. Kane,* 19 Mass. App. Ct. 129, 137 n.6, 472 N.E.2d 1343, 1348 n.6 (1985). The judge has discretion to ban the prosecution from arguing a particular inference of consciousness of guilt because its inflammatory nature outweighs its probative value. *Commonwealth v. Sawyer*, 389 Mass. 686, 700, 452 N.E.2d 1094, 1102 (1983) (pretrial jail break); *Connors*, 18 Mass. App. Ct. at 290, 464 N.E.2d at 1379 (same).

2. **What constitutes evidence of consciousness of guilt**. The most common forms of consciousness of guilt evidence include ***flight or hiding*** to avoid apprehension, *Commonwealth v. Roberts,* 407 Mass. 731, 735, 555 N.E.2d 588, 591 (1990) (attempted escape while being transported to court); *Commonwealth v. Stewart*, 398 Mass. 535, 547-549, 499 N.E.2d 822, 830-831 (1986) (flight from Commonwealth); *Matos*, 394 Mass. at 564, 476 N.E.2d at 609 (flight from scene); *Commonwealth v. Jackson*, 388 Mass. 98, 103-104, 445 N.E.2d 1033, 1036-1037 (1983) (police chase and shootout); *Commonwealth v. Smith*, 350 Mass. 600, 605-607, 215 N.E.2d 897, 902-903 (1966) (hiding); *Commonwealth v. Garuti*, 23 Mass. App. Ct. 561, 566-568, 504 N.E.2d 357, 360-361 (1987) (delay in surrendering to police); *Commonwealth v. Connors*, 18 Mass. App. Ct. 285, 290-292, 464 N.E.2d 1375, 1379-1380 (1984) (pretrial jail break), giving intentionally ***false statements*** to police after the crime, *Commonwealth v. Lavalley,* 410 Mass. 641, 649-650, 574 N.E.2d 1000, 1006 (1991); *Commonwealth v. Sullivan,* 410 Mass. 521, 526, 574 N.E.2d 966, 970 (1991) (requesting relative to give false story); *Commonwealth v. Merola,* 405 Mass. 529, 546-547, 542 N.E.2d 249, 259-260 (1989); *Commonwealth v. Nadworny*, 396 Mass. 342, 370-372, 486 N.E.2d 675, 692 (1985), cert. denied, 477 U.S. 904 (1986); *Commonwealth v. Basch*, 386 Mass. 620, 624-625, 437 N.E.2d 200, 204-205 (1982); *Commonwealth v. Porter*, 384 Mass. 647, 653, 429 N.E.2d 14, 18 (1981); *Commonwealth v. Smith*, 368 Mass. 126, 129, 330 N.E.2d 197, 198 (1975); *Commonwealth v. Connors*, 345 Mass. 102, 105, 185 N.E.2d 629, 631 (1962), using a ***false name or address*** in connection with the crime, *Commonwealth v. Carrion,* 407 Mass. 263, 276, 552 N.E.2d 558, 566 (1990); *Commonwealth v. Pringle*, 22 Mass. App. Ct. 746, 751-752, 498 N.E.2d 131, 134-135 (1986); *Commonwealth v. Fetzer*, 19 Mass. App. Ct. 1024, 1024-1025, 476 N.E.2d 981, 982-983 (1985); *Commonwealth v. Walters*, 12 Mass. App. Ct. 389, 396, 425 N.E.2d 382, 387 (1981); *Commonwealth v. DiStasio*, 297 Mass. 347, 362, 8 N.E.2d 923, 931-932 (1937), ***threats or bribery of witnesses***, *Commonwealth v. Sowell*, 22 Mass. App. Ct. 959, 961, 494 N.E.2d 1359, 1362 (1986); *Commonwealth v. Toney*, 385 Mass. 575, 584 n.4, 433 N.E.2d 425, 431 n.4 (1982); *Porter, supra;* but see *United States v. Pina,* 844 F.2d 1, 9 (1st Cir. 1988) (threat against witness made *after* witness has already testified should not be allowed as consciousness of guilt; where

too late to effect trial, its probative value is outweighed by its inflammatory potential), concealing or destroying evidence, *Id.; Commonwealth v. Stanton,* 17 Mass. App. Ct. 1, 7, 455 N.E.2d 464, 467 (1983), ***inordinate interest in the details*** of a crime, *Commonwealth v. Montecalvo*, 367 Mass. 46, 52, 323 N.E.2d 888, 892 (1975), ***refusing to provide saliva, hair and blood examples pursuant to court order,*** *Commonwealth v. Brown*, 24 Mass. App. Ct. 979, 980-981, 573 N.E.2d 693, 695-696 (1987), or ***altering his appearance*** after the crime to conceal his physical characteristics, *Carrion,* 407 Mass. at 277, 552 N.E.2d at 567 (unspecified alteration of appearance); *Commonwealth v. Laaman*, 25 Mass. App. Ct. 354, 360 n.9, 518 N.E.2d 861, 865 n.9 (1988) (newly-grown beard that hid facial moles relevant to identification of the perpetrator).

Actions by others. Generally, only a defendant's *own* statements or actions can institute consciousness of guilt, and the judge should not charge that the jury may infer a defendant's consciousness of guilt if they disbelieve the defendant's alibi witnesses. *Commonwealth v. Ciampa,* 406 Mass. 257, 267, 272, 547 N.E.2d 314, 321, 323-324 (1989). There is a limited exception for "[a]cts of a joint venturer amounting to consciousness of guilt [which] may be attributed to another joint venturer if the acts occurred during the course of a joint venture and in furtherance of it." See *Commonwealth v. Mahoney,* 405 Mass. 326, 330-331, 540 N.E.2d 179, 182 (1989).

Flight after subsequent offense. When the defendant fled after a subsequent offense, there is no automatic rule that evidence of such flight cannot be admitted in the trial of an earlier offense. "While such a consideration affects the relevance of evidence and may prompt a judge to exclude it," other evidence may indicate that the flight evinced consciousness of guilt as to the earlier as well as the later offense. *Commonwealth v. Burke,* 414 Mass. 252, 260-261, 607 N.E.2d 991, 997 (1993).

Knowledge that complaint has issued not sufficient. A consciousness of guilt instruction is not warranted based solely on police having told the defendant that a criminal complaint had issued against him, without more. "The statement to a lay person that a complaint had 'issued' is not meaningful and does not convey that any particular action is required." *Commonwealth v. Stuckich*, 450 Mass. 449, 453, 879 N.E.2d 105, 111 (2008).

Knowledge that police looking for defendant not required. Proof that the defendant knew that the police were looking for him is not a precondition to a consciousness of guilt instruction based on alleged flight from the scene of a crime or from his usual environs. *Commonwealth v. Figueroa,* 451 Mass. 566, 887 N.E.2d 1040 (2008); *Commonwealth v. Toney,* 385 Mass. 575, 583, 433 N.E.2d 425, 431 (1982).

Perjury. The defendant's perjury at trial can be considered as evidence of consciousness of guilt, but an instruction to that effect is disfavored, since it places undue emphasis on only one aspect of the evidence. If a charge is given, it must carefully avoid implying that perjury is itself sufficient grounds for a guilty verdict. *Commonwealth v. Edgerly*, 390 Mass. 103, 109-110, 453 N.E.2d 1211, 1215-1216 (1983); *Commonwealth v. Jackson*, 388 Mass. 98, 103-104, 445 N.E.2d 1033, 1036-1037 (1983).

3. **Defendant's default at trial requires showing of voluntariness.** Evidence of the defendant's failure to appear for trial should not be admitted as evidence of consciousness of guilt unless the Commonwealth, at minimum, shows that the defendant knew of the scheduled court date and nevertheless failed to appear. *Commonwealth v. Hightower*, 400 Mass. 267, 269, 508 N.E.2d 850, 852 (1987) (reserving decision on whether failure to appear on a known assigned date, standing alone, is evidence of consciousness of guilt). See *Commonwealth v. Goldoff*, 24 Mass. App. Ct. 458, 465-466, 510 N.E.2d 277, 281-282 (1987) (evidence that defendant may have given police a false address, to which notices were sent, justified submitting issue of consciousness of guilt to jury). The judge should require the Commonwealth to make a showing before the jury, under the usual rules of evidence, that the defendant's absence is voluntary. Otherwise, the judge should warn against drawing any unfavorable inference from the defendant's absence. *Commonwealth v. Kane*, 19 Mass. App. Ct. 129, 134-137, 472 N.E.2d 1343, 1347-1349 (1985). For an instruction about the defendant's absence that

may be used when the judge does not permit the jury to consider it as evidence of consciousness of guilt, see Instruction 1.320.

The Appeals Court has given detailed instructions on the protocol to be followed before a judge permits a defendant's midtrial default to be considered by the jury as evidence of consciousness of guilt:

"When a defendant fails to appear midtrial, the judge is to determine whether the trial should proceed in the defendant's absence or whether a mistrial should be declared. In determining this question, the judge must determine whether the defendant's absence is without cause and voluntary. This judicial determination, in turn, requires that there be time allotted for some measure of inquiry and investigation into the reasons for the defendant's absence and the results of the efforts to locate the defendant. To this end, the judge should grant a recess of such duration as the judge deems appropriate to allow for investigation.[9] There must be evidence introduced on the record. The preferable practice . . . is that a voir dire hearing should be held directed to the evidence garnered concerning the circumstances of the defendant's failure to appear and the efforts to find the defendant.

> "Following this hearing, the judge should state a finding concerning whether the defendant's absence is without cause and voluntary. If the judge determines not to declare a mistrial, but rather to continue the trial in absentia, then the judge should give a neutral instruction to the jury to the effect that the defendant may not be present for the remainder of the trial, that the trial will continue, and that the defendant will continue to be represented by his attorney. If there will be no evidence adduced before the jury concerning consciousness of guilt, the judge may add that the jury should not speculate as to the reasons for the defendant's absence and should not draw adverse inferences, as there are many reasons why a defendant may not be present for the full trial.
>
> "Conversely, if the prosecution seeks to bring before the jury evidence of the defendant's flight to lay a foundation for a consciousness of guilt instruction, the judge should determine (based on the evidence adduced on voir dire) whether introducing such evidence is warranted. If so, the prosecution briefly may develop the facts and circumstances of the defendant's failure to appear, subject to such discretionary limitations as the judge believes necessary. If the judge determines that a consciousness of guilt instruction is appropriate based on the evidence, and that this instruction will be incorporated in the final charge, that instruction should be stated in accord with *Commonwealth v. Toney,* 385 Mass. at 585, and cases cited therein — all as tailored to the defendant's failure to appear at trial. See generally Model Jury Instructions for Use in the District Court § 4.12 (1997).

" [9] This investigation, in most cases, is not of the kind that would require a substantial amount of time or undue delay in the trial. A reasonably diligent investigation to determine if there is good cause for the defendant's absence from trial might entail some of the following steps: independent police inquiry; contact with the defendant's family and significant other persons in the defendant's life; calls to the places where the defendant lives and works; and inquiry of emergency health facilities in the immediate area where there is a reasonable probability the defendant may have been treated. Of course, defense counsel also should check to see if the defendant has communicated with counsel's law office."

Commonwealth v. Muckle, 59 Mass. App. Ct. 593[631], 639-640, 797 N.E.2d 456, 463-464 (2003) (citations omitted). This requirement applies only to absence at trial, and not to flight in anticipation of being charged with a crime. In the latter case, the Commonwealth is not required to prove that the defendant's absence was voluntary but only that it is probative of feelings of guilt. *Commonwealth v. Villafuerte,* 72 Mass. App. Ct. 908, 893 N.E.2d 73 (2008).

4. **Reference to specific evidence unnecessary**. In charging the jury, the judge is not required to identify specifically which items of evidence may bear on consciousness of guilt, *Porter*, 384 Mass. at 656 n.12, 429 N.E.2d at 20 n.12, or mention that the defendant has offered an innocent explanation, *Toney*, 385 Mass. at 583, 433 N.E.2d at 432.

5. **Parties' strategic decision not to seek instruction.** "Generally, if the prosecutor or defense counsel [seek a] jury instruction on the subject they would be entitled to the benefits of such instruction . . . . A prosecutor might choose not to request a consciousness of guilt instruction because the evidence raising the issue was of peripheral value and the instruction could divert the jury from considering other probative evidence on which the prosecutor based the case for conviction. A defense attorney also, as matter of trial tactics, might not want to request a consciousness of guilt charge if none is requested by the Commonwealth or given, sua sponte, by the judge. Defense counsel might feel that it would not assist the defendant's case to have the judge focus the jury's attention on such

matters as flight or concealment, even with cautionary language on how the evidence is to be weighed. Counsel at the trial might wish only to discuss evidence suggesting consciousness of guilt in closing arguments or simply to leave it for the jury's reflection unadorned by comment either by them or the judge." *Simmons, supra.*

6. **Right to rebut**. The defendant has "an unqualified right to negate the inference of consciousness of guilt by explaining [the facts] to the jury." *Commonwealth v. Chase*, 26 Mass. App. Ct. 578, 580-581, 530 N.E.2d 185, 1887 (1988) (defendant entitled to explain why he lied to police); *Commonwealth v. Kerrigan*, 345 Mass. 508, 513, 188 N.E.2d 484, 487 (1963) (same); *Garuti, supra* (defendant entitled to explain delay in reporting to police). Such an explanation is offered as to state of mind, and therefore is not hearsay. *Kerrigan, supra; Garuti, supra*.

7. **Innocent alternatives.** A consciousness of guilt inference is permissible even where the defendant's actions might have an innocent explanation or indicate consciousness of guilt regarding unrelated offenses. *Commonwealth v. Rivera*, 397 Mass. 244, 249-251, 490 N.E.2d 1160, 1163-1164 (1986); *Commonwealth v. Sawyer*, 389 Mass. 686, 700, 452 N.E.2d 1094, 1102 (1983); *Commonwealth v. Geagan*, 339 Mass. 487, 512, 159 N.E.2d 870, 887-888, cert. denied, 361 U.S. 895 (1959); *Commonwealth v. Derby*, 263 Mass. 39, 46-47, 160 N.E. 315, 317 (1928). The judge has no obligation to suggest to the jury specific examples of reasons other than consciousness of guilt why the defendant might have acted as he or she did. See *Commonwealth v. Lamont L.*, 54 Mass. App. Ct. 748, 754, 767 N.E.2d 1105, 1109 (2002); *Commonwealth v. Knap, 412 Mass. 712, 715-717, 592 N.E. 2d 747 (1992).*

8. **"Consciousness of innocence."** It is often appropriate to admit evidence alleged to be indicative of the defendant's "consciousness of innocence," although this may not be of right in all situations. Whether to draw such an inference should be left to argument, and should not be instructed on. *Commonwealth v. Lam*, 420 Mass. 615, 619, 650 N.E.2d 796, 799 (1995) (falling asleep shortly after being accused of crime); *Commonwealth v. Kozec*, 21 Mass. App. Ct. 355, 366, 487 N.E.2d 216, 223 (1985) (driving victim to hospital); *Commonwealth v. Coull*, 20 Mass. App. Ct. 955, 957-958, 480 N.E.2d 323, 326 (1985) (reporting related crime to police); *Commonwealth v. Martin*, 19 Mass. App. Ct. 117, 121-124, 472 N.E.2d 276, 278-280 (1984) (absence of flight). See *Commonwealth v. Preziosi*, 399 Mass. 748, 752-753, 506 N.E.2d 887, 890 (1987) (cooperation with police).

9. **Incriminating knowledge.** Evidence of consciousness of guilt should be distinguished from evidence of incriminating knowledge, i.e., knowledge of details of the crime that only the perpetrator would have, which may be admissible to prove identity. *Porter, supra.*

3.600 DEFENDANT DOES NOT TESTIFY

January 2013

The defendant is entitled to such an instruction on request. It is no longer reversible error to give such an instruction over the defendant's objection. See notes 1 and 2, infra.

You may have noticed that the defendant did not testify at this trial. The defendant has an absolute right not to testify, since the entire burden of proof in this case is on the Commonwealth to prove that the defendant is guilty. It is not up to the defendant to prove that he (she) is innocent.

The fact that the defendant did not testify has nothing to do with the question of whether he (she) is guilty or not guilty. You are not to draw any adverse inference against the defendant because he (she) did not testify. You are not to consider it in any way, or even discuss it in your deliberations. You must determine whether the Commonwealth has proved its case against the defendant based solely on the testimony of the witnesses and the exhibits.

NOTES:

1. **When instruction required.** The Fifth and Fourteenth Amendments require that, upon the defendant's proper request, the judge limit jury speculation by instructing that no adverse inferences are to be drawn from the fact that the defendant has not testified. *Carter v. Kentucky,* 450 U.S. 288, 305, 101 S.Ct. 1112, 1121-1122 (1981); *Commonwealth v. Sneed,* 376 Mass. 867, 871-872, 383 N.E.2d 843, 845-846 (1978); *Commonwealth v. Goulet,* 374 Mass. 404, 410-414, 372 N.E.2d 1286, 1293-1295 (1978).

2. **Instruction over defendant's objection no longer error**. If the defendant requests that no charge be given, it is not reversible error for the trial judge to instruct the jury on the defendant's right not to testify. *Commonwealth v. Rivera*, 441 Mass. 358, 368-371, 805 N.E.2d 942, 951-953 (2004) (overruling *Commonwealth v. Buiel,* 391 Mass. 744, 746-747, 463 N.E.2d 1172, 1173-1174 (1984)). However, the S.J.C. "remain[s] of the view that judges should not give the instruction when asked not to do so." *Id*., 441 Mass. at 371 n.9, 463 N.E.2d at 953 n.9. A request by the defendant must be clearly brought to the judge's attention, *Commonwealth v. Thompson,* 23 Mass. App. Ct. 114, 502 N.E.2d 541 (1986), although it is better practice for the judge to raise the issue with defense counsel sua sponte, *Id.,* 23 Mass. App. Ct. at 116 n.1, 402 N.E.2d at 543 n.1; *Sneed,* 376 Mass. at 871 n.1, 393 N.E.2d at 846 n.1. If there are multiple defendants, the judge must give such an instruction as to any defendant who requests it, and should consult with counsel for any other defendant who objects to such a charge

to see whether that defendant really wants reference to him or her to be omitted. *Buiel,* 391 Mass. at 747 n.3, 463 N.E.2d at 1174 n.3.

3. **Phrasing of instruction**. "No aspect of the charge to the jury requires more care and precise expression . . . . Even an unintended suggestion that might induce the jury to draw an unfavorable inference is error" (citations omitted). *Sneed,* 376 Mass. at 871, 393 N.E.2d at 846. Absent a request by the defendant or other special circumstances, it is preferable not to refer to the constitutional privilege at all, and instead to phrase the defendant's right not to testify in terms of the defendant's "right to remain passive, and to insist that the Commonwealth prove its case beyond a reasonable doubt without explanation or denial" by the defendant. *Commonwealth v. Thomas,* 400 Mass. 676, 678-680, 511 N.E.2d 1095, 1097-1098 (1987) (reasonable, and within spirit of cases, for defendant to request judge not to refer to his "refusal" or "neglect" to testify); *Buiel,* 391 Mass. at 746, 463 N.E.2d at 1173; *Sneed,* 376 Mass. at 871 n.1, 393 N.E.2d at 846 n.1; *Commonwealth v. Small,* 10 Mass. App. Ct. 606, 611, 411 N.E.2d 179, 183 (1980); *Commonwealth v. Powers,* 9 Mass. App. Ct. 771, 774, 404 N.E.2d 1260, 1262-1263 (1980). See *United States v. Flaherty,* 558[668] F.2d 566, 599-600 (1st Cir. 1981). On the other hand, the defendant is entitled on request to an explicit instruction that the jury may not draw any adverse inference from the defendant's exercise of his constitutional right not to testify. *Commonwealth v. Torres,* 17 Mass. App. Ct. 676, 677, 461 N.E.2d 1230, 1231 (1984). If reference is made to the constitutional privilege, the phrase "right against self-incrimination" should be carefully avoided and the phrase "right to remain silent" substituted. *Commonwealth v. Charles,* 397 Mass. 1, 9-10, 489 N.E.2d 679, 684-685 (1986); *Commonwealth v. Delaney,* 8 Mass. App. Ct. 406, 409-410, 394 N.E.2d 1006, 1008 (1979). On defense request, it is preferable for the judge's charge to use the exact words "no adverse inference," as does the above model instruction. *Commonwealth v. Feroli,* 407 Mass. 405, 411, 553 N.E.2d 934, 938 (1990).

4. **Unfavorable comment**. The Fifth and Fourteenth Amendments to the United States Constitution and article 12 of the Massachusetts Declaration of Rights prohibit any comment by the judge which can be fairly understood by the jury as permitting an adverse inference because of the defendant's failure to testify. *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824 (1967); *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229 (1965); *Commonwealth v. Goulet,* 374 Mass. 404, 412, 372 N.E.2d 1288, 1294 (1978); *Commonwealth v. Burden,* 15 Mass. App. Ct. 666, 681, 448 N.E.2d 387, 397 (1983). The prosecutor is also prohibited from inviting any unfavorable inference, directly or indirectly. See *Jury Trial Manual for Criminal Offenses Tried in the District Court* § 2.74.

5. **Colloquy unnecessary**. The judge is not required to conduct a colloquy with a defendant who does not testify to ascertain whether this is done knowingly and voluntarily. However, "[i]t may be the better practice for a judge to inform a defendant before trial of the right to testify and the right not to testify; that the decision, although made in consultation with counsel, is ultimately the defendant's own; and that the court will protect the defendant's decision." *Commonwealth v. Waters,* 399 Mass. 708, 716-717 & n.3, 506 N.E.2d 859, 864-865 & n.3 (1987); *Commonwealth v. Hennessey,* 23 Mass. App. Ct. 384, 386-390, 502 N.E.2d 943, 945-948 (1987).

3.620 EXCLUDED QUESTION; STRICKEN EVIDENCE

2009 Edition

I. EXCLUDED QUESTION

During this trial, it is the duty of the attorneys to object to evidence that may not be admissible under our rules of evidence.

If I "sustain" an objection — that is, if I do not allow the witness to answer — you are to disregard that question and you must not wonder or guess about what the answer might have been. An unanswered question is not evidence.

Please note also that a lawyer's question itself, no matter how artfully phrased, is not any evidence. A question can only be used to give meaning to a witness's answer. If a question includes any suggestions or insinuations, you are to ignore them unless I permit the witness to answer and the witness confirms those suggestions.

All of this comes down to a simple rule: testimony comes from the witnesses, not from the lawyers.

Commonwealth v. Repoza, 382 Mass. 119, 131, 414 N.E.2d 591, 598 (1980); *Commonwealth v. Paradiso*, 368 Mass. 205, 208 n.2, 330 N.E.2d 825, 827 n.2 (1975); *Commonwealth v. Bailey*, 12 Mass. App. Ct. 104, 106 n.2, 421 N.E.2d 791, 793 n.2 (1981).

II. STRICKEN EVIDENCE

(I have just ordered) (Sometime during this trial I may order) some (testimony) (piece of evidence) to be stricken from the record. Since it is no longer evidence, you must disregard it.

I recognize that it is a difficult thing for you to ignore something that you have (heard) (seen). But please keep in mind why we have rules of evidence. They are not there to keep evidence from you, but to make sure that all the evidence before you is presented in a reliable form so that you are in a fair position to be able to assess its truth. If I strike something from the record, it is because it would be unreliable or misleading for you to rely on it in that form.

Now it may seem hard to put something out of your mind once you have heard it. But it is really no different than adding up a column of numbers and then going back and subtracting one number in the column from the total. The (testimony) (piece of evidence) that I (have stricken) (may strike) is no longer evidence. You are therefore to subtract it from your consideration when you decide what all the evidence adds up to.

It is your sworn duty not to consider information that has been stricken from the record in deciding this case.

Some phrasing in the model instruction was adapted from Charrow & Charrow, “Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions,” 79 Colum. L. Rev. 1306, 1344-1345 (1979). The "column of numbers" analogy was suggested by Hon. Abraham D. Sofaer, formerly of the United States District Court for the Southern District of New York.

The judge must be careful not to present his or her function in excluding inadmissible evidence in a way that improperly vouches for the reliability of the evidence that is admitted, particularly where the defense does not offer any evidence. *Commonwealth v. Richards*, 53 Mass. App. Ct. 333, 338-341, 758 N.E.2d 1095, 1098-1100 (2001) (error to charge that admitted evidence is "reliable" and "high quality information").

3.640 EXPERT WITNESS

2009 Edition

When a case involves a technical issue, a person with special training or experience in that technical field is permitted to give his or her opinion about that technical issue, in order to help you as the jury.

Merely because a witness has expressed an opinion, however, does not mean that you must accept that opinion. In the same way as with any other witness, it is up to you to decide whether to rely on it. You may accept it or reject it, and give it as much weight as you think it deserves. In making your assessment, you may consider the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

Commonwealth v. Montecalvo, 367 Mass. 46, 54, 323 N.E.2d 888, 893 (1975); *Commonwealth v. Costa*, 360 Mass. 177, 183, 274 N.E.2d 802, 806 (1971); *Commonwealth v. Smith*, 357 Mass. 168, 178, 258 N.E.2d 13, 19-20 (1970). Manual of Model Jury Instructions for the Ninth Circuit § 4.16 (1985 ed.); Committee on Pattern Jury Instructions, District Judges Ass'n of the Eleventh Circuit, Pattern Jury Instructions—Criminal Cases § 7 (1985 ed.). As to when expert testimony is appropriate, see Jury Trial Manual for Criminal Offenses Tried in the District Court § 2.46. Language from the instruction approved in *Commonwealth v. Rodriguez*, 437 Mass. 554, 561, 773 N.E.2d 946 (2002), should be used with caution because its repeated use of the word "true" could invite speculation about the standard of proof for determining whether facts are "true." *Commonwealth v. Hinds*, 450 Mass. 1, 875 N.E.2d 488 (2007).

The assessment of an expert witness's qualifications is shared by the judge and the jury. The judge must make a preliminary finding that the proffered witness is at least minimally qualified to testify as an expert, and may not abdicate that responsibility to the jury. The jury must then assess the soundness and credibility of the expert's opinion, and one factor in that assessment is the extent of the expert's knowledge and experience. The model instruction avoids the word "expert," since it may prejudice the jury's ultimate responsibility to accept or reject the witness's expertise. *Leibovich v. Antonellis*, 410 Mass. 568, 572-573, 574 N.E.2d 978, 982 (1991).

ALTERNATE INSTRUCTION

There is one more point about witnesses to address: expert witnesses. This term refers to witnesses who have specialized training or experience in a particular field. Generally, in cases that are tried in our courts, both civil and criminal, witnesses may testify only to facts that are within their own personal knowledge — that is, things that they have personally seen or heard or felt. However, in a variety of cases, issues arise that are beyond the experience of lay persons, and in those types of cases, we allow a person with specialized training or experience, called an expert witness, to testify, and to testify not only to facts, but also to opinions, and the reasons for his or her opinions, on issues that are within the witness's field of expertise and are relevant and material to the case.

Because a particular witness has specialized training and experience in his or her field does not put that witness on a higher level than any other witness, and you are to treat the so-called expert witness just like you would treat any other witness. In other words, as with any other witness, it is completely up to you to decide whether you accept the testimony of an expert witness, including the opinions that the witness gave. It is also entirely up to you to decide whether you accept the facts relied on by the expert and to decide what conclusions, if any, you draw from the expert's testimony. You are free to reject the testimony and opinion of such a witness, in whole or in part, if you determine that the witness's opinion is not based on sufficient education and experience or that the testimony of the witness was motivated by some bias or interest in the case. You must also, as has been explained, keep firmly in mind that you alone decide what the facts are. If you conclude that an expert's opinion is not based on the facts, as you find those facts to be, then you may reject the testimony and opinion of the expert in whole or in part.

You must remember that expert witnesses do not decide cases; juries do. In the last analysis, an expert witness is like any other witness, in the sense that you alone make the judgment about how much credibility and weight you give to the expert's testimony, and what conclusions you draw from that testimony.

Commonwealth v. Hinds, 450 Mass. 1, 875 N.E.2d 488 (2007) (recommending this model instruction as preferable to the standard Superior Court instruction approved in *Commonwealth v. Rodriguez*, 437 Mass. 554, 561, 773 N.E.2d 946 [2002]).

SUPPLEMENTAL INSTRUCTION

Assumed facts. **Members of the jury, you will have noticed that this witness offered you an opinion that was based on certain assumed facts. It is permissible for a witness to testify in that form, because it is your responsibility — and not the witness's — to determine from all the evidence what the facts are.**

Obviously, such an opinion is of use to you only if the facts which the witness has been asked to assume, and on which his (her) opinion is based, are in fact true.

If you find that one or more significant facts that the witness was asked to base his (her) opinion upon are not true, then his (her) opinion is not relevant to the facts of this case, and you should not consider his (her) opinion in your deliberations.

Commonwealth v. Bjorkman, 364 Mass. 297, 306, 303 N.E.2d 715, 721 (1973); *Commonwealth v. Taylor*, 327 Mass. 641, 649, 100 N.E.2d 22, 26-27 (1951). See *Bagge's Case*, 369 Mass. 129, 134, 338 N.E.2d 348, 352 (1975); *Wing v. Commonwealth*, 359 Mass. 286, 287-288, 268 N.E.2d 658, 659-660 (1971); *Commonwealth v. Ward*, 14 Mass. App. Ct. 37, 41-42, 436 N.E.2d 439, 443 (1982).

An expert opinion may be based either on facts or data in evidence or "on facts or data not in evidence if the facts or data are independently admissible and are a permissible basis for an expert to consider in formulating an opinion." Allowing an opinion to be based on admissible but not actually admitted facts "eliminate[s] the necessity of producing exhibits and witnesses whose sole function is to construct a proper foundation for the expert's opinion." *Department of Youth Servs. v. A Juvenile*, 398 Mass. 516, 531-532, 499 N.E.2d 812, 821 (1986).

"If a party believes that an expert is basing an opinion on inadmissible facts or data, the party may request a voir dire to determine the basis of the expert opinion." Id. Absent a request for advance voir dire, the witness may offer the jury an expert opinion without disclosing the facts on which it is based, but the other party has the right to explore those facts on cross-examination. This has eliminated the requirement that the proponent elicit expert testimony only through hypothetical questions. Id.

3.660 FIRST COMPLAINT

March 2017

The jury should be instructed on the limited use of such evidence both when it is admitted and again during final instructions. Commonwealth v. King, 445 Mass. 217, 248 (2005).

The alleged victim is also known as the "complainant." In sexual assault cases the law allows testimony by one person whom the complainant told of the alleged assault. We call this "first complaint" evidence. The complainant may have reported the alleged sexual assault to more than one person. However, our rules normally permit testimony only as to the complainant's first report.

(The next witness will testify) (During this case you heard a witness testify) about the complainant's "first complaint." You may consider this evidence only for specific limited purposes: first, to establish the circumstances in which the complainant first reported the alleged offense, and then to determine whether that first complaint either supports or fails to support the complainant's own testimony about the crime.

You may not consider this testimony as evidence that the assault in fact occurred. The purpose of this "first complaint" evidence is to assist you in your assessment of the credibility and reliability of the complainant's testimony here in court.

In assessing whether this "first complaint" evidence supports or detracts from the complainant's credibility or reliability, you may consider all the circumstances in which the first complaint was made. The length of time between the alleged crime and the report of the complainant to this witness is one factor you may consider in evaluating the complainant's testimony, but you may also consider that sexual assault complainants may delay reporting the crime for a variety of reasons.

Commonwealth v. King, 445 Mass. 217, 247, 834 N.E.2d 1175, 1200 (2005), cert. denied, 546 U.S. 1216 (2006).

SUPPLEMENTAL INSTRUCTION

When non-sexual crime also charged. **You may consider any such statements made after the incident only to corroborate the complainant's present testimony about the alleged sexual assault. They are not relevant to the alleged *[non-sexual offense]* at all, and you may not consider them in evaluating the alleged victim's testimony about that alleged offense.**

NOTES:

1. **Fresh complaint doctrine abolished and first complaint doctrine recognized.** *Commonwealth* v. *King,* 445 Mass. 217 (2005), cert. denied, 546 U.S. 1216 (2006), abolished the fresh complaint doctrine and substituted for it the doctrine of "first complaint." Unlike the prior rule, first complaint evidence is not excluded because of a delay in reporting the alleged assault. Any delay is only one factor the jury may consider in weighing the complainant's testimony. *Id*. at 242.

2. **Relevance and admissibility**. First complaint testimony is limited to the specific purpose of assisting the jury in determining the credibility of the complainant's own testimony about the alleged sexual assault and therefore admissible except "where neither the occurrence of a sexual assault nor the complainant's consent is at issue." For example, it is not admissible in cases where the sole issue is the identity of the perpetrator. *King,* 445 Mass. at 247-48.

3. **Neutral rule of evidence.** The first complaint rule is a neutral rule of evidence, applicable whenever the credibility of a sexual assault allegation is at issue. As such, a defendant may proffer first complaint evidence where the defendant claims to be the victim of sexual assault and that claim is a live issue in the case. *Commonwealth v. Mayotte,* 475 Mass. 254, 260-61 (2016). In such instances, the substantive instruction should be modified to reflect its application to both the alleged victim and the defendant.

4. **Commonwealth limited to one first complaint witness or substitute.** Unless the testimony is about different periods of time and escalating levels of abuse, which constitute different and more serious acts committed over a lengthy period of time, *Commonwealth v. Kebreau*, 454 Mass. 287, 294 (2009), only one first complaint witness may testify. Multiple witnesses testifying about a victim's repeated complaints of the same sexual assault"likely serves no additional corroborative purpose, and may unfairly enhance a complainant's credibility as well as prejudice the defendant . . . ." *King,* 445 Mass. at 243. See *Commonwealth v. Aviles*, 461 Mass. 60, 71 (2011) (where a complainant makes successive complaints to the first complaint witness, only the initial complaint is admissible as first complaint evidence); *Commonwealth v. Stuckich*, 450 Mass. 449, 457 (2008) (complainant may not testify on direct examination that she "told" others because, even without details, listing the people to whom she told "is akin to a parade of multiple complaint witnesses, because the jury are likely to assume, and reasonably so, that the complainant repeated the substance of her testimony to each person to whom she complained"). Compare *Commonwealth v. Lyons*, 71 Mass. App. Ct. 671, 673-74 (2008) (after admitting complainant's tape-recorded 911 call as first complaint testimony, reversible error also to admit complaint to responding officer) with *Commonwealth v. Revells*, 78 Mass.App.Ct. 492, 496 (2010) (finding no first complaint violation from the introduction of both written and oral

communications, where “the victim's first complaint to her mother consisted of a single, tightly intertwined oral and written communication”). Where there is more than one witness to the first complaint, only one witness may testify as a first complaint witness. *Commonwealth v. Velazquez*, 78 Mass. App. Ct. 660, 665 n.7 (2011).

While generally the first complaint witness must be “the first person told of the assault,” if that person is unable to testify (e.g., unavailable, incompetent, or too young to testify meaningfully), the Commonwealth may file a motion in limine and the judge may, in his or her discretion, admit testimony of a single substitute complaint witness. *King,* 445 Mass. at 243-44. The judge may also allow a substitute when the victim’s first encounter “does not constitute a complaint” (e.g., when the victim expresses upset but does not actually state that she has been sexually assaulted) or where the first person encountered has an obvious bias or motive to minimize or distort the victim’s remarks. *Commonwealth v. Murungu,* 450 Mass. 441, 446 (2008). The substitute “should in most cases be the next complaint witness, absent compelling circumstances justifying further substitution.” *Id*. The Commonwealth may not “pick and choose among various complaint witnesses to locate the one with the most complete memory, the one to whom the complainant related the most details, or the one who is likely to be the most effective witness . . . . Generally, a voir dire is the appropriate mechanism by which to make the preliminary determinations required by such a decision.” *Id*. The judge should make any necessary findings of fact on which a substitution decision is dependent. *Id*. at 447.

5. **Defense not limited to one rebuttal witness.** The defense is not limited to one witness in attempting to show that the first complaint was misleading, inaccurate or false, that the proferred first complaint witness was not in fact the first person complained to, or that the complainant did not complain at the time, to the person, or in the detail one would expect. *Commonwealth v. Murungu,* 450 Mass. 441, 447 (2008).

6. **Permissible scope of witness’s testimony**. The first complaint witness may testify to the details provided by the complainant about the assault, as well as the witness’s own observations of the complainant during the complaint, and “the events or conversations that culminated in the complaint; the timing of the complaint, and other relevant conditions that might help a jury assess the veracity of the complainant’s allegations or assess the specific defense theories as to why the complainant is making a false allegation.” *King,* 445 Mass. at 244.

7. **Permissible scope of complainant’s testimony**. Unlike the prior law, see *Commonwealth v. Peters,* 429 Mass. 22, 30 (1999), the complainant herself or himself is no longer limited to testifying only that a complaint was made and to whom. If a first complaint witness or substitute testifies, the complainant may now also testify as to the details of the first complaint (i.e., what he or she told the first complaint witness) and why the complaint was made at that time. If no first complaint witness or substitute testifies, the complainant may not testify to the fact of the complaint or its details unless the witness is absent for a compelling reason that is not the Commonwealth’s fault. *King,* 445 Mass. at 245 & n.24. The complainant may not testify about whom else she told in addition to the first complaint witness, even if the details of those conversations are omitted, since “the jury are likely to assume, and reasonably so, that the complainant repeated the substance of her testimony to each person to whom she complained.” The judge should not allow a description of the investigative process, which is irrelevant to guilt and prejudicial. *Commonwealth v. Stuckich,* 450 Mass. 449 (2008).

8. **Independently admissible testimony.** While the first complaint doctrine prohibits the “piling on” of multiple complaint witnesses, it does not exclude testimony that “is otherwise independently admissible” and serves a purpose “other than to repeat the fact of a complaint and thereby corroborate the complainant's accusations.” *Commonwealth v. Arana*, 453 Mass. 214, 220–21, 229 (2009). “The doctrine [prohibiting multiple complaint testimony] is not intended to be used as a shield to bar the jury from obtaining a fair and accurate picture of the Commonwealth's case-in-chief....If ... after careful balancing of the testimony's probative and prejudicial value, testimony is found by the judge to be relevant and admissible for reasons that are independent of the first complaint doctrine, in the context

of a particular case, it is within the judge's discretion to admit the testimony." *Id*. at 337. See e.g., *Commonwealth v. Dargon*, 74 Mass. App. Ct. 330, 338 (2009), aff'd, 457 Mass. 387 (2010) (victim's statements recorded in medical records "served the independent purpose of establishing essential elements of the Commonwealth's aggravated rape case" as well as to rebut the claim of recent contrivance; nurse's description of examination, which necessarily conveyed the fact of the complaint, "served the independent purposes of providing background information and laying a foundation for the admission of physical evidence included in the sexual assault examination kit"); *Commonwealth v. Kebreau*, 454 Mass. 287, 298-99 (2009) (admissible to rebut claim of recent contrivance); *Commonwealth v. Lessieur*, 472 Mass. 317, 326, cert. denied 136 S. Ct. 418 (2015) (same). Compare *Commonwealth v. Parent*, 465 Mass. 395, 404 (2013) (claim of fabrication alone insufficient to open the door to the admission of multiple complaints).

9. **Expert on general characteristics of abused children.** "Notwithstanding the theoretical right of a qualified [first] complaint witness also to testify [as an expert] to the general characteristics of sexually abused children, . . . prosecutors would be well advised to avoid such juxtaposition and, if it occurs, trial judges should be alert to its considerable prejudicial potential." *Commonwealth v. Swain*, 36 Mass. App. Ct. 433, 444-45 (1994).

3.680 IMPEACHMENT BY PRIOR CONVICTION OF A CRIME

G.L. c. 233 § 21
2009 Edition

I. IMPEACHMENT OF DEFENDANT

You have heard evidence that the defendant was previously convicted of a crime. You may consider that information only for the purpose of helping you to decide whether or not to believe his (her) present testimony and how much weight, if any, to give it. You may not draw any inference of guilt against the defendant because of his (her) prior conviction.

The fact that the defendant was once found guilty of another crime does not mean that he (she) is guilty of this charge, and you must not consider that prior conviction to be any indication of guilt on this charge. You may consider the defendant's prior conviction solely to help you to determine whether or not he (she) is a truthful witness.

G.L. c. 233, § 21. The defendant waives the right to such a limiting instruction by not requesting it or objecting to its omission. *Commonwealth v. Whitehead*, 379 Mass. 640, 661, 400 N.E.2d 821, 836 (1980); *Commonwealth v. Cook*, 351 Mass. 231, 237, 218 N.E.2d 393, 397, cert. denied, 385 U.S. 981 (1966).

II. IMPEACHMENT OF NON-DEFENDANT WITNESS

You have heard evidence that (this) (a) witness was previously convicted of a crime. You may consider that information, along with any other pertinent information, in deciding whether or not to believe (this) (the) witness's present testimony and how much weight, if any, to give it.

SUPPLEMENTAL INSTRUCTION

Crimes involving dishonesty. **It is for you to say how much weight you should give a prior conviction in determining the (defendant's) (witness's) credibility. You might want to consider whether past crimes involving dishonesty are more relevant than past crimes that did not involve dishonesty, but it is up to you to decide how relevant you think any particular past conviction is to the (defendant's) (witness's) present truthfulness.**

Commonwealth v. Cefalo, 381 Mass. 319, 335, 409 N.E.2d 719, 729-730 (1980); *Commonwealth v. Bumpus*, 362 Mass. 672, 682-683, 290 N.E.2d 167, 176 (1972), vacated and remanded, 411 U.S. 945 (1973), aff'd on rehearing, 365 Mass. 66, 309 N.E.2d 491 (1974), denial of habeas corpus aff'd sub nom. *Bumpus v. Gunter*, 635 F.2d 907 (1st Cir. 1980), cert. denied, 450 U.S. 1003 (1981).

NOTES:

1. **Generally.** "The idea underlying G.L. c. 233, § 21, is that a conviction of a prior crime is a valid measure of the truthfulness of a witness, i.e., willingness to violate law translates to willingness to give false testimony, and it is solely for that purpose that the evidence of a prior conviction is received. That jurors, properly instructed, use a prior conviction only for that limited purpose may not be our most plausible legal fiction, but we adhere to it — not least because application of the statute so requires" (citations omitted). *Commonwealth v. Chartier*, 43 Mass. App. Ct. 758, 762-763, 686 N.E.2d 1055, 1058 (1997).

2. **Applicable statutes**. General Laws c. 233, § 21 limits the adult convictions which may be admitted to impeach credibility. General Laws c. 119, § 60 provides that juvenile delinquency findings based on violations of statutes (but *not* those based on violations of municipal ordinances or by-laws) "may be used for impeachment purposes in subsequent delinquency or criminal proceedings in the same manner and to the same extent as prior criminal convictions." General Laws c. 276, §§ 100A-100C and G.L. c. 94C, § 34 restrict the use of sealed convictions, subject to the constitutional right to show bias. *Commonwealth v. Santos,* 376 Mass. 920, 925-926, 384 N.E.2d 1202, 1204-1206 (1978).

3. **Judge's discretion to exclude impeachment by prior conviction.** Although it is not apparent on the face of G.L. c. 233, § 21, a judge has discretion to preclude the use of a prior conviction to impeach the credibility of a criminal defendant who chooses to testify, and upon request the judge must exercise such discretion one way or the other. *Commonwealth v. Knight*, 392 Mass. 192, 193-195, 465 N.E.2d 771, 773-774 (1984). It is reversible error for the judge to refuse to do so. *Commonwealth v. Ruiz*, 22 Mass. App. Ct. 297, 301, 493 N.E.2d 511, 514 (1986), aff'd, 400 Mass. 214, 508 N.E.2d 607 (1987). A judge has the same discretion to exclude the use of a prior conviction to impeach a witness other than the defendant. *Commonwealth v. Bucknam,* 20 Mass. App. Ct. 121, 123-124, 478 N.E.2d 747, 749 (1985).

4. **Representation by counsel**. If the defendant's prior conviction resulted in a jail sentence, the proponent must show that the defendant was represented by counsel or had validly waived counsel, *Loper v. Beto,* 405 U.S. 473, 483, 92 S.Ct. 1014, 1019 (1972); *Commonwealth v. Napier,* 417 Mass. 32, 33, 627 N.E.2d 913, 914 (1994); *Commonwealth v. Proctor,* 403 Mass. 146, 147, 526 N.E.2d 765, 766-767 (1988); *Gilday v. Commonwealth,* 355 Mass. 799, 247 N.E.2d 396 (1969). This requirement may be satisfied by a notation of the name of counsel on the face of the complaint, or a judge's notation of waiver by the defendant, or a copy of the "Notice of Assignment of Counsel." *Napier,* 417 Mass. at 33-34, 627 N.E.2d at 914. It is undecided whether representation by counsel must be shown before using the prior conviction of a nonparty witness. *Id.*

5. **Method of proof**. Generally a prior conviction may be proved only through a certified copy of the record of conviction and not through cross-examination of the witness. See, e.g. *Commonwealth v. Atkins,* 386 Mass. 593, 600, 436 N.E.2d 1203, 1207 (1982). The traditional procedure is to read the record of conviction, to ask the witness if he or she is the person named therein, and upon such admission to offer the record in evidence. *Commonwealth v. Connolly,* 356 Mass. 617, 626, 255 N.E.2d 191, 197 (1970). The record of conviction should not be put before the jury, however, if it contains extraneous entries, such as defaults, aliases, or probation surrenders. *Commonwealth v. White,* 27 Mass. App. Ct. 789, 795, 543 N.E.2d 703, 707 (1989); *Commonwealth v. Ford,* 20 Mass. App. Ct. 575, 578-579, 481 N.E.2d 534, 536 (1985), aff'd, 397 Mass. 298, 300-301, 490 N.E.2d 1166, 1168 (1986); *Commonwealth v. Clark,* 23 Mass. App. Ct. 375, 380-383, 502 N.E.2d 564, 568 (1987). The "better reasoned approach" is also to exclude any reference to the sentence, except perhaps in crossexamination of a witness who denies the conviction. *Commonwealth v. Eugene,* 438 Mass. 343, 352-353 & n.7, 780 N.E.2d 893, 900-901 (2003). If the witness was convicted only of a lesser included offense, the better practice is to omit any reference to the greater charge. *Commonwealth v. Gagliardi,* 29 Mass. App. Ct. 225, 238, 559 N.E.2d 1234, 1243 (1990). "The problem could be readily avoided by proving the convictions through admissions by the defendant in response to the prosecutor's questions without offering the certified papers; or by securing certifications of records properly abbreviated." *Ford,* 20 Mass. App. Ct. at 578 n.4, 481 N.E.2d at 536 n.4.

6. **Limited authority to restrict multiple prior offenses.** A defendant's prior convictions are admissible under G. L. c. 233, § 21 for impeachment purposes unless the danger of unfair prejudice outweighs their probative value. "It is at least difficult, if not impossible" to show an abuse of the judge's discretion in admitting prior convictions unless there is a "substantial similarity" between a prior conviction and the offenses being tried. Introducing a large number of prior convictions does not by itself create a risk of unfair prejudice. Nor does § 21 authorize a judge to exclude multiple offenses that are dissimilar to the charged offenses because, in combination, they might imply that the defendant had a propensity for violence. "We have never considered the effect of prior convictions in combination, and we decline to do so now." *Commonwealth v. Brown,* 451 Mass. 200, 884 N.E.2d 488 (2008).

7. **Pending charges.** Ordinarily the defense is entitled to impeach a prosecution witness with his or her pending criminal charges, in order to suggest bias because the witness has reason to curry favor with the prosecution. "There is, nevertheless, some room for the exercise of discretion" by the judge, e.g. where the witness made prior consistent statements prior to his or her arrest. *Commonwealth v. DiMuro,* 28 Mass. App. Ct. 223, 228-229, 548 N.E.2d 896, 899-900 (1990). The judge may *not* routinely permit evidence of criminal charges pending against a *defense* witness unless the facts point to the possibility of particularized bias (e.g. the charges grow out of the same incident that is being tried). The theory that *any* pending charge inculcates a generalized bias against the Commonwealth is too tenuous to serve as a basis for impeaching a defense witness. *Commonwealth v. Smith,* 26 Mass. App. Ct. 673, 532 N.E.2d 57 (1988).

8. **Prior arrests.** Prior arrests not resulting in conviction are generally inadmissible to impeach a witness, unless there is some persuasive explanation why the arrest might indicate bias or a motive to

lie (e.g. a witness found in a compromising situation who might himself or herself fear prosecution as a recidivist). *Commonwealth v. Allen*, 29 Mass. App. Ct. 373, 378, 560 N.E.2d 704, 707 (1990).

9. **Prior out-of-state OUI convictions.** With respect to prior out-of-state OUI convictions, see *Commonwealth v. Flaherty*, 61 Mass. App. Ct. 776, 777-779, 814 N.E.2d 398, 401 (2004) (conviction of a NH OUI criminal "violation" is a "conviction" for purposes of establishing a prior OUI offense under G.L. c. 90, § 24).

For a discussion of impeachment by prior conviction, see Jury Trial Manual for Criminal Offenses Tried in the District Court § 2.50.

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

January 2013

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* 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.

3.720 MUG SHOTS

2009 Edition

One of the witnesses has testified that *[e.g. the police showed the witness a photo of the defendant]* **. If you accept that testimony, you are not to draw any inference against the defendant because the police had his (her) photograph.**

Police departments collect pictures of many people from many different sources and for many different reasons. You are not to speculate what the reason was in this case. The fact that the police may have had the defendant's picture does not mean that the defendant committed this or any other crime.

Commonwealth v. Tuitt, 393 Mass. 801, 808-809, 473 N.E.2d 1103, 1109 (1985); *Commonwealth v. Blaney*, 387 Mass. 628, 634-640 & n.7, 442 N.E.2d 389, 394-396 & n.7 (1982); *Commonwealth v. Lockley*, 381 Mass. 156, 165-166, 408 N.E.2d 834, 841 (1980); *Commonwealth v. Johnson*, 27 Mass. App. Ct. 746, 752-753, 543 N.E.2d 22, 25-26 (1989).

Some phrases in the model instruction are based on Manual of Jury Instructions for the Ninth Circuit § 2.09 (1985 ed.). *Commonwealth v. Pullum*, 22 Mass. App. Ct. 485, 490, 494 N.E.2d 1355, 1359 (1986), approved additional language that "the police . . . may obtain pictures of people . . . who were arrested, and later found not guilty; of people who have applied for identification cards, of people who have applied for hackney licenses, and of people who have applied for a gun permit."

Prosecutors are expected to avoid references in testimony to the sources of such photographs. *Commonwealth v. Perez*, 405 Mass. 339, 344, 540 N.E.2d 681, 684 (1989). Whenever possible, it is best to leave the jury with the impression that such photographs were taken after the defendant's arrest on the current charges. *Commonwealth v. Banks*, 27 Mass. App. Ct. 1193, 543 N.E.2d 433 (1989). For the procedures required to sanitize mug shots, see Jury Trial Manual for Criminal Offenses Tried in the District Court § 2.48.

3.740 OMISSIONS IN POLICE INVESTIGATIONS

2009 Edition

You have heard some evidence suggesting that the Commonwealth did not conduct certain scientific tests or otherwise follow standard procedure during the police investigation. This is a factor you may consider in evaluating the evidence presented in this case. With respect to this factor, you should consider three questions:

First: **Whether the omitted tests or other actions were standard procedure or steps that would otherwise normally be taken under the circumstances;**

Second: **Whether the omitted tests or actions could reasonably have been expected to lead to significant evidence of the defendant's guilt or innocence; and**

Third: **Whether the evidence provides a reasonable and adequate explanation for the omission of the tests or other actions.**

If you find that any omissions in the investigation were significant and not adequately explained, you may consider whether the omissions tend to affect the quality, reliability or credibility of the evidence presented by the Commonwealth.

All of these considerations involve factual determinations that are entirely up to you, and you are free to give this matter whatever weight, if any, you deem appropriate based on all the circumstances.

NOTES:

1.Instruction is optional but preferable. This instruction is based on *Commonwealth* v. *Bowden*, 379 Mass. 472, 485-486, 399 N.E.2d 482, 491 (1980), and the discussion of *Bowden* and related decisions set forth in *Commonwealth* v. *Flanagan*, 20 Mass. App. Ct. 472, 475-476, 481 N.E.2d 205, 207-208 (1985).

A jury instruction on this subject is not required but is permissible in the judge's discretion. *Commonwealth v. Williams*, 439 Mass. 678, 687, 790 N.E.2d 662, 670 (2003); *Commonwealth v. Lapage*, 435 Mass. 480, 488, 759 N.E.2d 300, 307 (2001); *Commonwealth v. Richardson*, 425 Mass. 765, 769, 682 N.E.2d 1354, 1357 (1997); *Commonwealth v. Cowels*, 425 Mass. 279, 291, 680 N.E.2d 924, 932 (1997); *Commonwealth* v. *Rivera*, 424 Mass. 266, 274, 675 N.E.2d 791, 797-798 (1997); *Commonwealth v. Smith,* 412 Mass. 823, 838, 593 N.E.2d 1288, 1296 (1992); *Commonwealth v. Fitzgerald,* 412 Mass. 516, 525, 590 N.E.2d 1151, 1156 (1992); *Commonwealth* v. *Cordle*, 412 Mass. 172, 176-178, 587 N.E.2d 1372, 1375-1376 (1992); *Commonwealth v. Daye,* 411 Mass. 719, 740-741, 587 N.E.2d 194, 206-207 (1992); *Commonwealth v. Andrews,* 403 Mass. 441, 463, 530 N.E.2d 1222, 1234-1235 (1988); *Commonwealth* v. *Reid*, 29 Mass. App. Ct. 537, 540-541, 562 N.E.2d 1362, 1364-1365 (1990); *Commonwealth v. Porcher*, 26 Mass. App. Ct. 517, 520-521, 529 N.E.2d 1348, 1350-1351 (1988); *Commonwealth v. Ly,* 19 Mass. App. Ct. 901, 901-902, 471 N.E.2d 383, 384-385 (1984). The Appeals Court, while recognizing such discretion, has suggested that "it might be[ ] preferable for the judge to inform the jurors that the evidence of police omissions could create a reasonable doubt." *Commonwealth v. Reid,* 29 Mass. App. Ct. 537, 540-541, 562 N.E.2d 1362, 1365 (1990).

The obligation of law enforcement authorities to investigate a crime, and to disclose exculpatory evidence in their possession, does not entitle the defense to an instruction that the authorities have any duty to gather exculpatory evidence. *Commonwealth v. Martinez*, 437 Mass. 84, 92, 769 N.E.2d 273, 281 (2002); *Lapage*, 435 Mass. at 488, 759 N.E.2d at 307.

2. **Defense must be permitted to argue.** Defense counsel has a right to argue to the jury that they should draw an adverse inference against the Commonwealth from the failure of the police to preserve and introduce material evidence or to perform probative tests. See *Arizona v. Youngblood,* 488 U.S. 51, 109 S.Ct. 333 (1988) (while police have no constitutional duty to perform any particular test, the defense may argue to the jury that a particular test may have been exculpatory). While a judge is not required to instruct the jury that they may draw such an inference, the defendant is entitled to make such an argument, and in such a case it is error to caution the jury against drawing any inferences from the absence of evidence. *Commonwealth v. Person*, 400 Mass. 136, 140, 508 N.E.2d 88, 91 (1987); *Commonwealth v. Gilmore*, 399 Mass. 741, 745, 506 N.E.2d 883, 886 (1987); *Bowden, supra; Commonwealth v. Rodriguez*, 378 Mass. 296, 308, 391 N.E.2d 889, 896 (1979); *Commonwealth v. Jackson*, 23 Mass. App. Ct. 975, 975-976, 503 N.E.2d 980, 981-982 (1987); *Flanagan,* 20 Mass. App. Ct. at 475-477 & n.2, 481 N.E.2d at 207-209 & n.2.

3. **Instruction on lost or destroyed evidence.** The Commonwealth has a duty not to destroy exculpatory evidence, and must preserve such evidence for potential inspection or testing by the defense. *Commonwealth v. Sasville,* 35 Mass. App. Ct. 15, 19, 616 N.E.2d 476, 479 (1992). When it is alleged that the Commonwealth has lost or destroyed potentially exculpatory evidence, the defense has the initial burden of showing a reasonable possibility that the lost evidence was in fact exculpatory. A claim that the evidence "could have" exonerated the defendant is speculative and insufficient. If the defense meets this burden, the judge must then balance the culpability of the Commonwealth, the materiality of the evidence and the potential prejudice to the defendant. Where relief is appropriate, the judge has discretion as to the appropriate remedy, subject to review only for abuse of discretion. "In certain cases where evidence has been lost or destroyed, it may be appropriate to instruct the jury that they may, but need not, draw an inference against the Commonwealth . . . . [S]uch instruction should generally permit, rather than require, a negative inference against the Commonwealth. It may be possible to draw more than one inference from the circumstances warranting the missing evidence instruction, and choosing between competing inferences is the province of the jury." *Commonwealth v. Kee,* 449 Mass. 550, 554-558, 870 N.E.2d 57, 62-66 (2007). Accord, *Commonwealth v. Clemente,* 452 Mass. 295, 309, 893 N.E.2d 19, 34 (2008) (same rule applicable where evidence unavailable because

police have returned to owner); *Commonwealth v. Phoenix*, 409 Mass. 408, 415 n. 3, 567 N.E.2d 193, 197 n.3 (1991) (if requested, defense may have been entitled to instruction that jury may draw adverse inference from Commonwealth's negligent destruction of evidence which prevented forensic testing). Cf. *Sasville, supra* (grossly negligent destruction of evidence central to case could not be remedied by cross examination or suppression and required dismissal).

3.760 OTHER BAD ACTS BY DEFENDANT

2009 Edition [2010]

I. WHEN INADMISSIBLE FOR ANY PURPOSE

The defendant is not charged with committing any crime other than the charge(s) contained in the complaint. You have heard mention of other acts allegedly done by the defendant. I have struck that reference from the record, and you are to disregard it entirely.

I want to emphasize to you that you are not to consider that reference to other alleged acts at all. Your verdict is to relate only to the charge(s) contained in the complaint.

II. WHEN ADMISSIBLE ONLY FOR LIMITED PURPOSE

The defendant is not charged with committing any crime other than the charge(s) contained in the complaint. You have heard mention of other acts allegedly done by the defendant. You may not take that as a substitute for proof that the defendant committed the crime(s) charged. Nor may you consider it as proof that the defendant has a criminal personality or bad character.

But you may consider it solely on the limited issue of _____ [e.g. whether the defendant acted intentionally and not out of accident or other innocent reason] .

You may not consider this evidence for any other purpose. Specifically, you may not use it to conclude that if the defendant committed the other act(s), he (she) must also have committed (this charge) (these charges).

This limiting instruction should be given at the time the evidence is admitted. *Commonwealth v. Linton*, 456 Mass. 534, 924 N.E.2d 722 (2010).

Evidence of prior bad acts is not admissible to demonstrate the defendant's bad character or propensity to commit the crime charged but, if not too remote in time, may be admissible to show motive, opportunity, state of mind, intent, preparation, plan, pattern of operation, common scheme, relationship between a defendant and a victim, knowledge, identity, or absence of mistake or accident. *Commonwealth v. Brusgulis*, 406 Mass. 501, 505, 548 N.E.2d 1234, 1237 (1990) (admissible on modus operandi only if prior and current crime share "a special mark or distinctiveness"); *Commonwealth v. Helfant*, 398 Mass. 214, 228 n.13, 496 N.E.2d 433, 443 n.13 (1986); *Commonwealth v. Harvey*, 397 Mass. 803, 809, 494 N.E.2d 382, 386 (1986); *Commonwealth v. Hanlon*, 44 Mass. App. Ct. 810, 817-818, 694 N.E.2d 358, 365 (1998); *Commonwealth v. Calcagno*, 31 Mass. App. Ct. 25, 26-27, 574 N.E.2d 420, 422 (1991); *Commonwealth v. Clemente*, 25 Mass. App. Ct. 229, 239, 517 N.E.2d 479, 485 (1988).

"It has long been recognized that bad acts, even when nominally offered to show common plan or some other legitimate object, become dangerously confusing to the triers when piled on and unduly exaggerated." *Commonwealth v. Mills*, 47 Mass. App. Ct. 500, 505, 713 N.E.2d 1028, 1032 (1999). When evidence of prior bad acts is admitted, the jury must be instructed with particular care on how to use it, in order to avoid diversionary misuse of such information. Id., 47 Mass. App. Ct. 505-506, 713 N.E.2d at 1032.

Instruction 9.160 (Identification) is required on request if the defendant denies being the perpetrator of the asserted prior bad act, even if there is no identity issue about the charge being tried. *Commonwealth v. Delrio*, 22 Mass. App. Ct. 712, 721, 497 N.E.2d 1097, 1102 (1986).

An attorney attempting to impeach a witness with other bad acts should be required to represent that he or she has a reasonable basis for the suggestion and is prepared to prove the act if the witness does not acquiesce. Id., 22 Mass. App. Ct. at 719-712, 497 N.E.2d at 1101-1102.

The model instruction is adapted from L.B. Sand, J.S. Siffert, W.P. Loughlin & S.A. Reiss, Modern Federal Jury Instructions §§ 3-3, 5-25 (1985).

3.780 PRIOR TRIAL

2009 Edition

During the course of this trial, you have heard that the defendant was on trial before. That is true. The defendant and the Commonwealth are entitled, however, to have you decide this case entirely on the evidence that has come before you in this trial. You should not consider the fact that there was a previous trial in any way when you decide whether the Commonwealth has proved beyond a reasonable doubt that the defendant committed (this offense) (these offenses).

This instruction is drawn from Federal Judicial Center, Pattern Criminal Jury Instructions § 14 (1983 ed.)

3.800 REPUTATION OF DEFENDANT

2009 Edition

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).

3.820 UNRECORDED CUSTODIAL INTERROGATION

Revised May 2014

You have heard some evidence that there was no recording of the complete interrogation of the defendant conducted while (he) (she) was (in custody) (at a place of detention). The Supreme Judicial Court — this state's highest court — has expressed a preference that such interrogations be recorded whenever practicable. Since there is no complete recording of an interrogation in this case, you should weigh evidence of the defendant's alleged statement with great caution and care. The reason is that the Commonwealth may have had the ability to reliably record the totality of the circumstances upon which it asks you to determine beyond a reasonable doubt that the defendant's statement was voluntary, but instead is asking you to rely on a summary of those circumstances drawn from the possibly fallible or selective memory of its witness(es). [In evaluating the significance of the lack of a recording in this case, you may also consider any evidence concerning whether the defendant was given an opportunity to have (his) (her) interrogation recorded, and whether the defendant voluntarily elected not to have the interrogation recorded.]

Here the jury must be instructed on "Confessions and Admissions (Humane Practice)" (Instruction 3.560) when voluntariness is a live issue.

NOTES:

1. **When instruction required.** A defendant is entitled to this instruction on request when a defendant's statement arises from a custodial interrogation or from one conducted at a place of detention and there is no electronic recording of the complete interrogation. *Commonwealth v. DiGiambattista*, 442 Mass. 423, 448-449 (2004). It must be given whether or not the prosecution offers reasons or justification for the lack of recording.
While the Commonwealth always bears the burden of proving beyond a reasonable doubt that a statement is voluntary, the preference for recording is limited to statements made during custodial interrogation or interrogation conducted at a place of detention (e.g., a police station or jail cell). Custodial interrogation consists of questioning by law enforcement officers after a person has been taken into custody or deprived of his or her freedom in any significant way. Whether a defendant is in custody at any moment depends on whether a reasonable person in the defendant's shoes would have believed that he or she was not free to leave. *Commonwealth v. Morse*, 427 Mass. 117, 122-123 (1998); *Commonwealth* v. *Gendraw*, 55 Mass. App. Ct. 677, 682-683 (2002); *Commonwealth* v. *Ayre*, 31 Mass. App. Ct. 17, 20 (1991).
DiGiambattista applies only prospectively; that is, to cases tried after August 16, 2004. *Commonwealth v. Dagley*, 442 Mass. 713, 721 (2004).

2. **Voluntariness.** The absence of an electronic recording is only one factor to be considered in determining the voluntariness of a defendant's statement in the totality of the circumstances. *Commonwealth v. Trombley*, 72 Mass. App. Ct. 183, 187 (2008).

3. **Instruction must be given even where defendant refuses to have recording made.** The prosecution may "'address any reasons or justifications that would explain why no recording was made, leaving it to the jury to assess what weight they should give to the lack of a recording.'" *Commonwealth v. Tavares*, 81 Mass. App. Ct. 71, 73 (2011), quoting *Commonwealth v. DiGiambattista*, 442 Mass. 423, 448-449 (2004).

4. **Defendant's objection to recording.** When a defendant is given the opportunity to have his or her interrogation recorded, the jury should be advised that they may consider whether the defendant voluntarily chose not to have a recording made. *Commonwealth v. Rousseau*, 465 Mass. 372, 393 (2013).

5. **Not required for witness interviews where defendant is not a suspect.** The *DiGiambattista* instruction is not required for unrecorded witness interviews of non-suspects, specifically, where the police did not electronically record the volunteered statement by an uncharged defendant who appeared unexpectedly at the police station to discuss the victim's demise shortly after her death. The defendant was not a suspect at the time of the interview. *Commonwealth v. Issa*, 466 Mass. 1, 20-21 (2013).

3.840 CONSIDERATION OF BUSINESS RECORDS

There are records which were admitted in this case which will go to the jury room with you. You may consider these records only if these four things have been proved to you about them:

First: **That the entry, writing, or record was made in good faith;**

Second: **That it was made in the regular course of business;**

Third: **That it was made before the beginning of this criminal proceeding; and**

Fourth: **That it was the regular course of business to make such memorandum or record at the time of such act, transaction, occurrence, or event, or within a reasonable time thereafter.**

If these four things have not been proved, then you may not consider the content of these records in any way.

NOTES:

1. **Statutory requirement.** In a criminal proceeding where the judge admits a business record under G.L. c. 233, § 78, the questions of fact serving as a basis of admissibility must be submitted to the jury. See G.L. c. 233, § 78; *Commonwealth v. Zeininger,* 459 Mass. 775, 782 n.12, 947 N.E.2d 1060, 1066 n.12 (2011); *Commonwealth v. Reyes*, 19 Mass. App. Ct. 1017, 1019, 476 N.E.2d 978, 980 (1985).

2. **Requiring presence of a witness.** The trial judge may, as a condition to admissibility of business records, require the party offering the business records into evidence to call a witness who has personal knowledge of the facts stated in the record. See G.L. c. 233, § 78; *Burns v. Combined Ins. Co. of Am.*, 6 Mass. App. Ct. 86, 92, 373 N.E.2d 1189, 1193 (1978). Such a witness may be necessary to establish the foundation required to find that a document constitutes a business record. See *Commonwealth v. Gray,* 80 Mass. App. Ct. 98, 101, 951 N.E.2d 931, 934 (2011).

3. See Massachusetts Guide to Evidence § 803(6)(A) and notes following.

OFFENSES, GENERAL

4.100 ACCESSORY BEFORE THE FACT

G.L. c. 274 § 2
2009 Edition

Section 2 of chapter 274 of our General Laws provides for the punishment of any person who:

"is accessory [to a felony] before the fact by counseling, hiring or otherwise procuring such felony to be committed . . . ."

The phrase "before the fact" refers to time; the defendant is accused of having been an accessory to a felony before that felony was committed.

To prove the defendant guilty of being an accessory before the fact to a felony, the Commonwealth must prove three things beyond a reasonable doubt:

First: **That someone other than the defendant committed a felony;**

Second: **That the defendant was an accessory to that felony by counseling, hiring, or in some other way arranging for that person to commit the felony; and**

Third: **That the defendant did so with the same intent that the principal person was required to have to be guilty of the felony.**

As to the first element, a "felony" is a crime for which a person may be sent to state prison. Other, lesser crimes are called "misdemeanors." I instruct you as a matter of law that *[relevant felony]* is a felony. Before you may find the defendant guilty of being an accessory before the fact to that felony, the Commonwealth must prove beyond a reasonable doubt that the principal person whom the defendant is accused of aiding, did in fact commit that felony.

Here charge on the elements of the underlying felony.

Second, the Commonwealth must prove that this defendant counseled, or hired, or otherwise procured or encouraged or assisted that person in committing the felony. This requires a greater involvement than merely knowing about the crime, but it does not require that the defendant physically took part in the crime itself. It is enough if the Commonwealth proves that the defendant joined the criminal venture and took some significant role in it; that he (she) encouraged the principal person to commit the crime, or helped to plan or commit the crime, or stood by to help with the crime if he (she) were needed.

Thirdly, the Commonwealth must prove that the defendant had the same intent that the principal person is required to have had to be found guilty. The defendant must not only have had knowledge of what was being planned; he (she) must have intended to be part of it.

For an elaboration of the intent requirement, see Instruction 4.200 (Joint Venture).

SUPPLEMENTAL INSTRUCTION

Where principal and accessory tried together. **I have instructed you that, as part of its case against the defendant, the Commonwealth must prove beyond a reasonable doubt that the principal person is guilty of the felony which this defendant is accused of having aided or encouraged. Therefore, if your verdict is that the accused principal person, _____ , is not guilty of the felony, you are also required to find this defendant not guilty on this charge of being an accessory before the fact.**

NOTES:

1. **Accessory or principal?** A person who "counsels, hires or otherwise procures a felony to be committed may be [charged] and convicted as an accessory before the fact, either with the principal felon or after his conviction . . . .," G.L. c. 274, § 3, and upon conviction may be punished as a principal, G.L. c. 274, § 2.

At common law, an accessory before the fact is a person who advises, aids or abets another to commit a felony and is absent from (or present but not participating at) the crime scene, as distinguished from a principal in the second degree, who is a person present at a felony scene aiding and abetting the person actually committing the offense. *Commonwealth v. Mannos,* 311 Mass. 94, 109-110, 40 N.E.2d 291, 299-300 (1942); *Commonwealth v. Bloomberg,* 302 Mass. 349, 352-353, 19 N.E.2d 62, 64 (1939); *Commonwealth v. DiStasio,* 287[297] Mass. 347, 356-357, 8 N.E.2d 923, 928-929, cert. denied, 302 U.S. 683 (1937). General Laws c. 274, §§ 2-3 were amended by St. 1968, c. 206 to require that accessories before the fact be charged and tried as principals, see *Commonwealth v. Morrow,* 363 Mass. 601, 667, 296 N.E.2d 468, 475 (1973); *Commonwealth v. Benjamin,* 358 Mass.

672, 679-681, 266 N.E.2d 662, 667-668 (1971); *Commonwealth v. Perry,* 357 Mass. 149, 151, 256 N.E.2d 745, 747 (1970), but that 1968 amendment was later repealed by St. 1973, c. 529.

A defendant can be charged both as a principal and as an accessory before the fact in alternate counts, *Commonwealth v. Merrick,* 255 Mass. 510, 513, 152 N.E.2d 377, 378 (1926), but it is no longer common to do so, since G.L. c. 274, § 3 now permits an accessory before the fact to be tried either: (1) as an accessory before the fact, whether with the principal or separately, or (2) as a principal on the substantive felony. See *Commonwealth v. James,* 30 Mass. App. Ct. 490, 498 n.9, 570 N.E.2d 168, 174 n.9 (1991) ("[I]t seems accepted, under G.L. c. 274, § 2 . . . that a person [charged] as a principal may be convicted on a showing of accessorial, or joint venture, involvement"). If the principal felon and the accessory before the fact are tried together, the jury should be instructed that if they find the principal felon not guilty, they must find the accessory not guilty as well.

One may be charged as an accessory before the fact only to a felony; an accessory before the fact to a misdemeanor must be charged as a principal. See *Commonwealth v. Sherman,* 191 Mass. 439, 440, 78 N.E. 98, 99 (1906).

2. **Proving guilt of principal.** General Laws c. 274, § 3 has eliminated the common law requirement that the principal felon must already have been convicted prior to any prosecution of an accessory before the fact. However, in any prosecution for being an accessory before the fact, the principal's guilt must be proved beyond a reasonable doubt. *Commonwealth v. Reynolds,* 338 Mass. 130, 135, 154 N.E.2d 130, 134 (1958); *Bloomberg, supra; Commonwealth v. Kaplan,* 238 Mass. 250, 253-254, 130 N.E. 485, 486 (1921). The principal's guilt cannot be proved by producing the record of conviction or by offering testimony that the principal has pleaded guilty, *Commonwealth v. Tilley,* 327 Mass. 540, 546-549, 99 N.E.2d 749, 753-755 (1951); *Commonwealth v. Alicea,* 6 Mass. App. Ct. 904, 905, 378 N.E.2d 704, 705-706 (1978), nor by statements of the principal that are inadmissible as to the accessory, *Reynolds, supra.*

3. **Intent.** An accessory before the fact must share the criminal intent required of the principal, *Commonwealth v. Stout,* 356 Mass. 237, 240, 249 N.E.2d 12, 15 (1969); *Commonwealth v. Adams,* 127 Mass. 15, 17 (1879), although it is enough if the intent is conditional or contingent, *Commonwealth v. Richards,* 363 Mass. 299, 307-308, 293 N.E.2d 854, 860 (1973); *Commonwealth v. Fillipini,* 1 Mass. App. Ct. 606, 612-613, 304 N.E.2d 581, 585 (1973).

4. **Participation.** An accessory need not have physically participated in the crime, but active association with the venture and some significant participation by counseling, aiding or abetting is required. Conspiracy alone is not sufficient. *Commonwealth v. French,* 357 Mass. 356, 391-393, 259 N.E.2d 195, 222-223 (1970), judgments vacated as to death penalty sub nom. *Limone v. Mass.,* 408 U.S. 936 (1972); *Commonwealth v. Perry,* 357 Mass. 149, 152, 256 N.E.2d 745, 767 (1970). Knowledge, acquiescence and later concealment are not sufficient. *Commonwealth v. Raposo*, 413 Mass. 182, 595 N.E.2d 311 (1992) (evidence must show not only knowledge and shared intent, but also some sort of act that contributed to its happening); *Continental Assurance Co. v. Diorio-Volungis*, 51 Mass. App. Ct. 403, 409, 746 N.E.2d 550, 555 (2001). The accessory may be prosecuted for acts that took place outside Massachusetts if he or she intended them to have effect here. *Commonwealth v. Fafone,* 416 Mass. 329, 330, 621 N.E.2d 1178, 1179 (1993). An accessory before the fact need not have been the sole cause of the crime, *Merrick,* 255 Mass. at 515, 152 N.E.2d at 379, and need not have had direct contact with the principal; indirect contact through a third party can suffice, *Commonwealth v. Smith,* 93 Mass. 243, 256-257 (1865).

5. **Statute of limitations.** The statute of limitations for prosecution as an accessory before the fact runs from the date of the completed substantive felony. *Commonwealth v. Geagan,* 339 Mass. 487, 518-519, 159 N.E.2d 870, 891, cert. denied, 361 U.S. 895 (1959).

4.120 ATTEMPT

G.L. c.274 § 6
Revised May 2014

In this Commonwealth, an attempt to commit a crime is itself a crime.

The defendant is charged with (attempted) (an attempt to) _____. To prove that the defendant is guilty of this offense, the Commonwealth must prove two things beyond a reasonable doubt:

First: **That the defendant had a specific intent to commit _____; and**

Second: **That the defendant took an overt act toward committing that crime, which was part of carrying out the crime, and came reasonably close to actually carrying out the crime.**

The essence of the crime of attempt is that a person has a specific intent to commit a crime and takes a specific step toward committing that crime.

SUPPLEMENTAL INSTRUCTION

Overt act. **An "overt act" actual, outward, physical *action,* as opposed to mere talk or plans. It is not enough that someone just intends to commit a crime or talks about doing so.**

The overt act must also be a real step toward *carrying out* the crime. Preliminary preparations to commit a crime are not enough. The overt act has to be more of a step toward actually committing the crime, after all the preparations have been made. It must be the sort of act that you could reasonably expect to trigger a natural chain of events that will result in the crime, unless some outside factor intervenes.

It doesn't have to make the crime inevitable. For example, a pickpocket can be guilty of attempted larceny for putting his hand in another person's pocket with the intent to steal, even if it turns out that there is no money in that pocket. And a person can be guilty of attempted murder even if he doesn't hold the pistol straight when he shoots it at someone. But the overt act must be pretty closely linked with actually accomplishing the intended crime. It has to be an act that isn't too remote, and that is reasonably expected to bring about the crime. This is a question of fact that you must determine from all the evidence in the case.

NOTES:

1. **District Court jurisdiction.** Since the District Court has final jurisdiction over some attempts but not others, the judge should examine the complaint before trial. An attempt charge brought under the general attempt statute (G.L. c. 274, § 6) is within the District Court's final jurisdiction unless the attempted crime was murder. The District Court also has final jurisdiction over attempted burning to defraud an insurer (G.L. c. 266, § 10), attempted escape (G.L. c. 268, §§ 16-17), and certain attempted bribery offenses (G.L. c. 268, §§ 13, 13B; G.L. c. 268A, § 2; G.L. c. 271, §§ 39[a], 39A). The District Court does *not* have final jurisdiction over attempted murder (G.L. c. 265, § 16), attempted extortion (G.L. c. 265, § 25), attempted poisoning (G.L. c. 265, § 28), or attempted safe-breaking (G.L. c. 266, § 16). See G.L. c. 218, § 26.

2. **Intent.** Complaints charging an attempt require proof "that the defendant had a conscious design to achieve the felonious end . . . . If the [underlying] crime as defined includes the element of intent . . ., the prosecution must prove a specific intent on the part of the defendant." *Commonwealth v. Saylor*, 27 Mass. App. Ct. 117, 121 (1989).

3. **Proximity to success.** An attempt requires specific intent to commit the substantive crime, *Commonwealth v. Ware*, 375 Mass. 118, 120 (1978); *Commonwealth v. Hebert*, 373 Mass. 535, 537 (1977), coupled with an overt act which need not inevitably accomplish the crime but "must come pretty near to accomplishing that result . . . . Usually acts which are expected to bring about the end without further interference on the part of the criminal are near enough, unless the expectation is very absurd," *Commonwealth v. Kennedy,* 170 Mass. 18, 20-21 (1897) (shooting at post thought to be a person is not a criminal attempt, but shooting at a person with a pistol not aimed straight is). Mere intent or preparation are not enough; the overt act must lead toward the actual commission of the crime after preparations have been made. *Commonwealth v. Burns*, 8 Mass. App. Ct. 194, 196 (1979). "The most common types of an attempt are either an act which is intended to bring about the substantive crime and which sets in motion natural forces that would bring it about in the expected course of events but for an unforeseen interruption . . . or an act which is intended to bring about the substantive crime and would bring it about but for a mistake in judgment in a matter of nice estimate or experiment . . . . In either case the would-be criminal has done his last act. Obviously new considerations come in when further acts on the part of the person who has taken the first steps are necessary before the substantive crime can come to pass. In this class of cases there is still a chance that the would-be criminal may change his mind. In strictness, such first steps cannot be described as an attempt . . . . [A]n overt act . . . is not punishable if further acts are contemplated as needful . . . . But some preparations may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a [criminal attempt]." *Commonwealth v. Peaslee*, 177 Mass. 267, 271-272 (1901) (Holmes, C.J.). See *Commonwealth v. Scott*, 408 Mass. 811, 821-822 (1990) (victim's clothes ripped off, and a hair from victim found inside defendant's shorts, sufficient for attempted rape as a predicate for felony murder); *Commonwealth v. Ortiz*, 408 Mass. 463, 472 (1990) (defendant who armed himself and went searching for intended victim, but did not locate him, cannot be convicted of attempted ABDW); *Commonwealth v. Hamel*, 52 Mass. App. Ct. 250, 256 (2001) (furnishing information regarding form of payment, description of victims, and site for killings to solicitee feigning cooperation, not sufficient for attempted murder conviction). Factual impossibility is not a defense if the crime is apparently possible. *Commonwealth v. Jacobs*, 91 Mass. (9 Allen) 274, 275-276 (1864); *Commonwealth v. Starr*, 86 Mass. (4 Allen) 301, 305 (1862); *Commonwealth v. McDonald*, 59 Mass. (5 Cush.) 365, 367-368 (1850) (pickpocketing empty pocket). See discussion in *Commonwealth v. Bell*, 67 Mass. App. Ct. 266 (2006).

4. **Overt act.** An attempt complaint is fatally defective if it does not include an allegation of any specific overt act. *Commonwealth v. Gosselin*, 365 Mass. 116, 121 (1974); *Commonwealth v. Anolik*, 27 Mass. App. Ct. 701, 710-711 (1989); *Burns*, 8 Mass. App. Ct. at 195. But retrial is permissible since such a defective complaint does not put the defendant in jeopardy. *Id.* at 198 n.2. Only the overt act or acts alleged in the complaint may be proved to satisfy the requirement of an overt act. *Gosselin*, 365 Mass. at 121; *Peaslee*, 177 Mass. at 274. An attempt complaint is not required to set out the elements of the substantive crime attempted. *McDonald*, 59 Mass. (5 Cush.) at 367.

5. **Two elements of offense.** Appellate courts have repeatedly held that there are two elements to this offense. *Commonwealth v. Sullivan*, 84 Mass. App. Ct. 26, 27 (2013). See also *Commonwealth v. Rivera*, 460 Mass. 139, 142 (2011); *Commonwealth v. Foley*, 24 Mass. App. Ct. 114, 115 (1987).

6. **Lesser included offense of substantive crime**. While it is true that an attempt to commit a crime is a lesser included offense within that substantive crime, *Gosselin*, 365 Mass. at 120-121; *Commonwealth v. Banner*, 13 Mass. App. Ct. 1065, 1066 (1982), a defendant may be convicted of attempt as a lesser included offense only if the complaint alleges some overt act constituting the attempt. It may also be necessary that the complaint allege the defendant's specific intent to commit *every* element of the substantive crime (which would not normally be found in a complaint for a substantive offense, even one requiring specific intent as to *some* elements). If the complaint for the substantive crime does not meet those requirements, the defendant may be charged with attempt in a subsequent prosecution, since he or she was not put in jeopardy as to that charge. *Foley*, 24 Mass. App. Ct. at 115-117 & n.5.

4.140 COMPOUNDING OR CONCEALING A FELONY

G.L. c.268 § 36
2009 Edition

The defendant is charged with having violated section 36 of chapter 268 of our General Laws, which provides that:

"Whoever, having knowledge of the commission of a felony, takes money, or a gratuity or reward, or an engagement therefor, upon an agreement or understanding, express or implied, to compound or conceal such felony, or not to prosecute therefor, or not to give evidence thereof shall . . . be punished . . . ."

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

***First:* That the defendant knew that a felony had been committed;**

***Second:* That the defendant made an agreement, either expressly or by a silent understanding, either to conceal that felony, or not to prosecute it, or not to give evidence about it; and**

Third: **That the defendant made such an agreement in exchange for something of value or a promise of something of value.**

The essence of this offense is taking or agreeing to take money or something else of value in return for not prosecuting or giving evidence of a felony.

In this Commonwealth, offenses that are punishable by imprisonment in the state prison are called "felonies"; lesser offenses are called "misdemeanors." I instruct you as a matter of law that *[alleged felony]* is a felony.

See, e.g., *Commonwealth v. Pease*, 16 Mass. 91 (1819) (acceptance of promissory note not to prosecute constitutes compounding a felony); *Chester Glass Co. v. Dewey*, 16 Mass. 94 (1819) (refusing to prosecute out of sympathy rather than for something of value is not compounding a crime). There continue to be separate common law offenses of obstructing justice by procuring a material witness to absent himself, *Commonwealth v. Perkins*, 225 Mass. 80, 82, 113 N.E. 780, 781 (1916), or concealing or compounding a misdemeanor, *Partridge v. Hood*, 120 Mass. 403, 407 (1876); *Jones v. Rice*, 18 Pick. 440 (1836). See also G.L. c. 276, § 55 (accord and satisfaction permissible for some misdemeanors).

General Laws c. 268, § 36 provides for aggravated punishment if the felony that was concealed or compounded is punishable by death or imprisonment for life. If a capital or life felony may be the predicate felony in a particular case, the judge should instruct the jury that they must additionally determine whether it has been proved beyond a reasonable doubt that such was the predicate felony. The judge should either (1) provide the jury with a verdict form permitting the jury in the event of conviction to indicate whether or not the predicate felony was such, or (2) submit a special question to the jury in accordance with Mass. R. Crim. P. 27(c).

4.160 CONSPIRACY

G.L. c.274 § 7
2009 Edition

The defendant is charged with the offense of conspiracy. A conspiracy is an agreement of two or more people to do something that is unlawful

<u>If raised by the evidence:</u> **(or to do something by unlawful means).**

The crime is the *agreement* to do something unlawful

<u>If raised by the evidence:</u> **(or to use unlawful means).**

It does not matter whether the plan was successful or not, or whether any steps were taken to carry out the plan.

To prove the defendant guilty of the crime of conspiracy, the Commonwealth must prove three things beyond a reasonable doubt:

First: **That the defendant joined in an agreement or plan with one or more other persons;**

Second: **That the purpose of the agreement was to do something unlawful**

<u>If raised by the evidence:</u> **(or to do something that was itself lawful, but by unlawful means);**

and *Third:* That the defendant joined the conspiracy knowing of the unlawful plan and intending to help carry it out.

It is not necessary that the conspirators formulated a formal agreement among themselves, or that they agreed on every detail of the conspiracy, or even that they met together. But the Commonwealth must prove that there was a joint plan among them, and that the defendant joined in that plan.

It is not always possible to prove a conspiracy by direct evidence. The law allows you, where it seems reasonable, to infer that there was a conspiracy from all of the circumstances. For example, if people who know each other or have been in communication with each other are shown to have been involved in concerted actions which all seem designed to accomplish a specific purpose, then it may be reasonable to conclude that those actions were not coincidental but were taken pursuant to a joint plan.

However, remember that it is not enough that the defendant knew about the conspiracy or associated with conspirators. To be liable as a conspirator, the defendant must have actually joined in the conspiracy as something that he (she) wished to bring about.

G.L. c. 274, § 7 (punishment for conspiracy); *Commonwealth v. Benson*, 389 Mass. 473, 479-480, 451 N.E.2d 118, 122-123, cert. denied, 464 U.S. 915 (1983) (elements of conspiracy; acquittal on substantive charge does not preclude prosecution for conspiracy); *Commonwealth v. Pero*, 402 Mass. 476, 477-479, 524 N.E.2d 63, 65-66 (1988) (same); *Commonwealth v. Cerveny*, 387 Mass. 280, 288, 439 N.E.2d 754, 759 (1982) (conviction does not require proof of overt act); *Commonwealth v. Beneficial Fin. Co*., 360 Mass. 188, 249, 303, 275 N.E.2d 33, 69, 99 (1971), cert. denied sub nom. Farrell v. Massachusetts and sub nom. *Beneficial Fin. Co. v. Massachusetts*, 407 U.S. 910 (1972) (same; proof of participation is required since knowledge alone is insufficient; conspiracy provable by circumstantial evidence and "silent acquiescence" can suffice); *Commonwealth v. Beckett*, 373 Mass. 329, 341-342, 366 N.E.2d 1252, 1260 (1977) (whether knowledge of illegality required where act is only malum prohibitum); *Commonwealth v. Nelson*, 370 Mass. 192, 196-201, 346 N.E.2d 839, 842- 845 (1976) (conspiracy provable by circumstantial evidence; conspirator must be aware of unlawful objective, but not necessarily the detailed means, of conspiracy); *Commonwealth v. Stasiun*, 349 Mass. 38, 47, 206 N.E.2d 672, 678-679 (1965) (co-conspirator cannot be convicted of substantive offense unless he participated or aided in it); *Commonwealth v. Ries*, 337 Mass. 565, 581-582, 150 N.E.2d 527, 539 (1958) (Commonwealth need not prove every detail of conspiracy plan set out in complaint or bill of particulars, but only "sufficient details of the general plan that makes out a conspiracy"); *Commonwealth v. Beal*, 314 Mass. 210, 221-222, 50 N.E.2d 14, 21 (1943) (knowledge alone is insufficient); *Commonwealth v. Farese*, 265 Mass. 377, 380, 164 N.E. 239, 240 (1928) (conspiracy may be shown by conduct and reasonable inferences therefrom); *Attorney General v. Tufts*, 239 Mass. 458, 494, 132 N.E. 322, 328 (1921) (common purpose may be inferred from concerted action converging to a definite end); *Commonwealth v. Saia*, 18 Mass. App. Ct. 762, 764- 765, 470 N.E.2d 807, 809-810 (1984) (defendant may be convicted of lesser included conspiracy than charged); *Commonwealth v. Nighelli*, 13 Mass. App. Ct. 590, 593-597, 435 N.E.2d 1058, 1061-1062 (1982) (no overt act required under Massachusetts law; subsequent withdrawal not a defense); *Commonwealth v. Cook*, 10 Mass. App. Ct. 668, 673-677, 411 N.E.2d 1326, 1330 (1980) (joint venture requires conscious sharing in criminal act but not necessarily an agreement, while conspiracy requires an agreement to work in concert); *Commonwealth v. Dellinger*, 10 Mass. App. Ct. 549, 555- 559, 409 N.E.2d 1337, 1343-1345 (1980), rev'd on other grounds, 383 Mass. 780, 422 N.E.2d 1346 (1981) (unlawful purpose need not be proved precisely as alleged unless defendant prejudiced; imminence is not required; conspiracy can be complete even if details of precise target, time or manner still to be worked out).

A criminal conspiracy may be found where neither its purpose nor intended means was criminal, if the Commonwealth proves beyond a reasonable doubt that: (1) either its purpose or intended means was illegal (as distinguished from criminal); (2) the illegality was seriously contrary to the public interest because it caused a strong probability of significant harm to an individual or the public interest; and (3) if the illegality was not malum in se but only malum prohibitum, the defendant knew that the act was illegal. *Commonwealth v. Kelley*, 359 Mass. 77, 87-88, 268 N.E.2d 132, 139-140 (1971) (violation of non-criminal public bidding law); *Commonwealth v. Gill*, 5 Mass. App. Ct. 337, 340-344, 363 N.E.2d 267, 270-273 (1977) (same); *Commonwealth v. Benesch*, 290 Mass. 125, 134- 135, 194 N.E. 905, 910 (1935) (violation of non-criminal securities law). See *Commonwealth v. Beckett*, 373 Mass. 329, 341-342 & n.7, 366 N.E.2d 1252, 1260 & n.7 (1977). An act "malum in se" is one that is by "its very nature wrongful and detrimental to the public interest," Id., and includes "in addition to felonies, all breaches of public order, injuries to person or property, outrages upon public decency or good morals, and breaches of official duty, when done wilfully or corruptly," *Commonwealth v. Adams*, 114 Mass. 323, 324 (1873). By contrast, an act that is "malum prohibitum" is "any matter forbidden or commanded by statute, but not otherwise wrong." Id. The model instruction, which is phrased in terms of an intended crime, may be modified as appropriate if the intended object or means is illegal but non-criminal.

SUPPLEMENTAL INSTRUCTION

Co-conspirator hearsay exception. **You may consider against an individual defendant any statement made by another (defendant) (participant in the alleged conspiracy) only if three things have been proved to you about that statement: *First,* that other evidence apart from that statement shows that there was a conspiracy between the speaker and the defendant; *Second,* that the statement was made during the conspiracy; and *Third,* that the statement was made in order to further or help along the conspiracy.**

Only if those three things have been proved are you allowed to consider the statement of another (defendant) (alleged conspirator) when you are considering the charges against (a defendant other than the speaker) (the defendant). If those three things have not been proved, then you may not consider the alleged statement in any way when you consider the evidence against *[defendant]* , and he (she) is entitled to have his (her) case determined solely from the evidence about his (her) own acts and statements.

The statement of one co-conspirator during and in furtherance of the conspiracy is admissible against other co-conspirators. Such cases are normally tried by admitting such evidence only as to the speaker. When the judge determines, based on evidence other than the statement, that there is a fair inference that the conspiracy existed, the limitation is removed and the statement becomes subject to "humane practice." The jury should be instructed that they may consider the evidence against a defendant other than the speaker only if they find sufficient evidence apart from the statement to support a fair inference that the conspiracy existed, that the defendant had joined in it, and that the statement was uttered in the course of, and in furtherance of it. *Commonwealth v. Soares*, 384 Mass. 149, 159-160, 424 N.E.2d 221, 227 (1981); Beckett, 373 Mass. at 335-341, 366 N.E.2d at 1256-1259; *Commonwealth v. White*, 370 Mass. 703, 709, 352 N.E.2d 904, 909 (1976) (discussing whether conspiracy to commit crime necessarily includes conspiracy to escape, if necessary); *Commonwealth v. Pleasant*, 366 Mass. 100, 103-104, 315 N.E.2d 874, 876-877 (1974); *Beneficial Fin. Co*., 360 Mass. at 231 n.12, 364-365, 275 N.E.2d at 59 n.12, 132 (statement may be written rather than oral); Id., 360 Mass. at 222-223, 275 N.E.2d at 54 (presence of such evidence does not automatically require severance); *Kelley*, 359 Mass. at 85-86, 268 N.E.2d at 138. The rule applies even in severed trials. *Commonwealth v. Florentino*, 381 Mass. 193, 194, 408 N.E.2d 847, 849 (1980).

NOTES:

1. **District Court jurisdiction.** The *general conspiracy statute (G.L. c. 274, § 7)* provides different penalties for four groupings of conspiracies, depending on the maximum penalty of the crime which was the object of the conspiracy. Under G.L. c. 218, § 26, it appears that the District Court has final jurisdiction over any conspiracy charged under the third and fourth clauses of § 7, i.e., any conspiracy to commit an offense that is not itself punishable by more than 10 years in state prison.

The specialized *drug conspiracy statute (G. L. c. 94C, § 40)* does not group intended offenses for penalty purposes, but instead provides that the conspiracy penalty is identical to that for the particular crime which was the object of the conspiracy. Under G.L. c. 218, § 16, it appears that the District Court has final jurisdiction over any drug conspiracy charged under § 40 if the District Court would have final jurisdiction over the conspired offense.

Commonwealth v. Grace, 43 Mass. App. Ct. 905, 907, 681 N.E.2d 1265, 1268 (1997), created confusion about the District Court's jurisdiction over conspiracy charges. *Grace* held that the District Court lacked final jurisdiction over a charge of conspiracy to distribute heroin (G.L. c. 94C, § 32[a]) brought under the drug conspiracy statute. On appeal the defense argued that heroin distribution is a 10-year felony and therefore outside the District Court's final jurisdiction. (That argument is erroneous since first-offense heroin distribution [§ 32(a)] is within the District Court's final jurisdiction because it is listed in G.L. c. 218, § 26, as amended by St. 1987, c. 266.) In the Appeals Court the Commonwealth confessed error, apparently adopting a broader view that the District Court lacks final jurisdiction over all conspiracies, and citing *Berlandi v. Commonwealth,* 314 Mass. 424, 441, 50 N.E.2d 210, 221 (1943), *Commonwealth v. Garcia,* 34 Mass. App. Ct. 386, 388 n.3, 612 N.E.2d 674, 676 n.3 (1993), and *Commonwealth v. New York Cent. & H. R. R.,* 206 Mass. 417, 418, 92 N.E. 766, 767 (1910). However, *Berlandi* and *New York Cent.* were both premised on a statutory exclusion in G.L. c. 218, § 26 ("all misdemeanors, except conspiracies and libels") that was subsequently repealed by St. 1958, c. 138 and replaced with the current wording ("all misdemeanors, except libels"). The one-sentence reference to the issue in the *Garcia* footnote was dicta, since in that case the conspiracy charge had been dismissed and was not before the Appeals Court. The Appeals Court's opinion in *Grace* cited the *Berlandi* and *Garcia* cases and thus appeared to cast doubt on the District Court's jurisdiction over any conspiracy charge.

The confusion was partly resolved by *Commonwealth v. Stoico,* 45 Mass. App. Ct. 559, 565-566, 699 N.E.2d 1249, 1254 (1998), which held that the District Court does have final jurisdiction over a charge under the drug conspiracy statute of conspiring to distribute marihuana (G.L. c. 94C, § 32C[a]),

which has a 2-year maximum sentence, noting that "[n]othing in [*Garcia*] is to the contrary." See also *Commonwealth v. John R. Kuhn,* 48 Mass. App. Ct. 1106, 718 N.E.2d 896 (No. 98-P-489, October 29, 1999) (unpublished opinion under Appeals Court Rule 1:28) (District Court has jurisdiction over conspiracy to distribute marihuana because it has a maximum penalty of two years).

2. **Acquittal of all other conspirators**. The acquittal of all other co-conspirators at the same trial bars conviction of the defendant, *Benesch,* 290 Mass. at 135-136, 194 N.E. at 911; *Nighelli,* 13 Mass. App. Ct. at 595, 435 N.E.2d at 1062, but the rule does not apply if the co-conspirators were tried separately, *Cerveny,* 387 Mass. at 285- 286, 439 N.E.2d at 758-757.

3. **Feigned agreement**. Massachusetts probably subscribes to the "bilateral" theory of conspiracy, under which there is no conspiracy if one of two conspirators only feigns agreement but never intends to carry out the unlawful purpose. The jury must resolve any factual dispute about whether the disavowing conspirator intended to join the conspiracy. *Commonwealth v. Abdul-Kareem,* 56 Mass. App. Ct. 78, 80 n.3, 775 N.E.2d 454, 456 n.3 (2002) (police informant); *Commonwealth v. Themelis,* 22 Mass. App. Ct. 754, 757-761, 498 N.E.2d 136, 138-140 (1986) (claim of intent to "rip off" proffered fee without carrying out murder-for-hire).

4. **Multiple conspiracies**. Sub-agreements in pursuit of a common illegal objective are not separate conspiracies. *Commonwealth v. Winter,* 9 Mass. App. Ct. 512, 522-528, 402 N.E.2d 1372, 1378-1381 (1980). The Commonwealth has the burden of proving multiple conspiracies. *Cerveny,* 387 Mass. at 287-289, 439 N.E.2d at 758- 759.

5. **Specification of object of conspiracy.** The intended unlawful purpose, or lawful purpose by unlawful means, must be alleged in the complaint, but need not be described with great particularity. *Commonwealth v. Cantres,* 405 Mass. 238, 240-241, 540 N.E.2d 149, 150-151 (1989) (allegation of conspiracy to violate the Controlled Substances Act was adequate identification of object of conspiracy).

6. **Trial with substantive offense prohibited**. A conspiracy charge may not be tried simultaneously with a charge for the substantive offense unless the defendant moves for such joinder. Mass. R. Crim. P. 9(e). *Angiulo v. Commonwealth,* 401 Mass. 71, 80 n.10, 514 N.E.2d 669, 674 n.10 (1987).

7. **Venue**. Venue for a conspiracy prosecution lies anywhere an overt act is committed by any one of the conspirators in execution of the plan. *Stasiun,* 349 Mass. at 54, 206 N.E.2d at 682.

8. **Wharton's rule.** It is undecided whether Wharton's rule (holding that an agreement by two persons to commit a crime cannot be prosecuted as a conspiracy if the substantive crime requires two persons to commit) applies generally in Massachusetts, but if it does, it is inapplicable to prosecutions for conspiracy to distribute controlled substances because G.L. c. 94C, § 40 indicates a legislative intent to permit such conspiracy prosecutions. *Cantres, supra.*

4.180 CORPORATE CRIMINAL LIABILITY

2009 Edition

(The defendant) (One of the defendants) in this case is a corporation. A corporation is not a live person, of course, and therefore it can act only through its agents. To prove that a corporation is guilty of a criminal offense that was committed by one of its agents, the Commonwealth must prove three things beyond a reasonable doubt:

First: **That a specific person is guilty of this offense — that is, he or she committed all of the elements of this offense, as I (have defined them to you) (will define them to you in a moment);**

Second: **That such person, when he or she committed this offense, was engaged in some particular corporate business or project; and**

Third: **That the accused corporation had given that person authority and responsibility to act for it, and on its behalf, in handling that particular corporate business or project.**

It is *not* necessary that the person who committed the crime was a director, or an officer, or even an employee of the corporation. It is *not* necessary that those in control of the corporation directly requested or authorized the crime or approved of it afterwards. Those factors can be relevant to your decision, but they are not necessary for the corporation to be found guilty of this charge.

The corporation is guilty if it put the person who committed the crime in a position where he (she) had enough power and authority to act for the corporation in the corporate project he (she) was involved in when he (she) committed this offense.

Some of the factors you may consider on that issue are: how much authority and control that person exercised over corporate matters; how much control others in the corporation exercised over that person in corporate matters; whether and how corporate funds were used in the crime; and, finally, whether there was a repeated pattern of criminal conduct that might indicate corporate toleration or approval after the fact of that person's criminal acts.

Commonwealth v. Angelo Todesca Corp., 446 Mass. 128, 133-134, 136, 842 N. E. 2d 930, 937 (2006) (approving three elements as outlined in model instruction); *Worcester Ins. Co. v. Fells Acres Day School, Inc*., 408 Mass. 393, 408-409, 558 N.E.2d 958, 969 (1990); *Commonwealth v. L.A.L. Corp*., 400 Mass. 737, 511 N.E.2d 599 (1987) (close corporation); *Commonwealth v. Beneficial Fin. Co*., 360 Mass. 188, 254-281, 275 N.E.2d 33, 71-86 (1971), cert. denied sub nom. *Farrell v. Massachusetts*, 407 U.S. 910, and sub nom. *Beneficial Fin. Co. v. Massachusetts*, 407 U.S. 914 (1972) (publicly-held corporation). G.L. c. 4, § 7, Twenty-third (in construing statutes, "'[p]erson' or 'whoever' shall include corporations, societies, associations and partnerships").

4.200 AIDING OR ABETTING

Revised May 2011

(formerly JOINT VENTURE)

The Supreme Judicial Court recommends that judges incorporate instructions regarding aiding and abetting into the elements of the crime. "For instance, in cases charging murder in the first degree where two or more persons may have participated in the killing, the first element, 'that the defendant committed an unlawful killing,' should be changed to 'that the defendant knowingly participated in the commission of an unlawful killing.'" Commonwealth v. Zanetti, *454 Mass. 449 (2009). The following instruction may be given following the judge's explanation of the elements of the specific offense.*

Where there is evidence that more than one person may have participated in the commission of a crime, the Commonwealth must prove two things beyond a reasonable doubt:

First: **that the defendant knowingly and intentionally participated in some meaningful way in the commission of the alleged offense, alone or with (another) (others),**

and *Second:* that he (she) did so with the intent required for that offense.

The Commonwealth must prove that the defendant intentionally participated in the commission of a crime as something he (she) wished to bring about, and sought by his (her) actions to make succeed. Such participation may take the form of

(personally committing the acts that constitute the crime) *or*

(aiding or assisting another person in those acts) *or*

(asking or encouraging another person to commit the crime) *or*

(helping to plan the commission of the crime) *or*

(agreeing to stand by, or near, the scene of the crime to act as lookout) *or*

(agreeing to provide aid or assistance in committing the crime) *or*

(agreeing to help in escaping if such help becomes necessary).

An agreement to help if needed does not need to be made through a formal or explicit written or oral advance plan or agreement. It is enough to act consciously together before or during the crime with the intent of making the crime succeed.

The Commonwealth must also prove beyond a reasonable doubt that, at the time the defendant knowingly participated in the commission of the crime charged, *[identify the crime charged if needed to avoid confusion]* , he (she) had or shared the intent required for that crime. You are permitted, but not required, to infer the defendant's mental state or intent from his (her) knowledge of the circumstances or any subsequent participation in the crime. The inferences that you draw must be reasonable, and you may rely on your experience and common sense in determining from the evidence the defendant's knowledge and intent.

SUPPLEMENTAL INSTRUCTIONS

1. *Mere presence.* **Our law does not allow for guilt by association. Mere presence at the scene of the crime is not enough to find a defendant guilty. Presence alone does not establish a defendant's knowing participation in the crime, even if a person knew about the intended crime in advance and took no steps to prevent it. To find a defendant guilty, there must be proof that the defendant intentionally participated in some fashion in committing that particular crime and had or shared the intent required to commit the crime. It is not enough to show that the defendant simply was present when the crime was committed or that he (she) knew about it in advance. There must be proof that the defendant intentionally participated in committing the particular crime, not just that he (she) was there or knew about it.**

2. Mere knowledge. **Mere knowledge that the crime was to be committed is not sufficient to convict the defendant. The Commonwealth must prove more than mere association with a perpetrator of the crime, either before or after its commission. (Even evidence that the defendant agreed with another person to commit the crime would be insufficient to support a conviction if the defendant did nothing more.) The Commonwealth must prove more than a failure to take appropriate steps to prevent the commission of the crime. Some active participation in, or furtherance of, the criminal enterprise is required in order to prove the defendant guilty.**

3. Withdrawal from joint venture. **The defendant is not guilty of a crime if he (she) withdrew from or abandoned it in a timely and effective manner. A withdrawal is effective only if it is communicated to the other persons involved, and only if it is communicated to them early enough so that they have a reasonable opportunity to abandon the crime as well. If the withdrawal comes so late that the crime cannot be stopped, it is too late and is ineffective.**

If the evidence raises a question whether the defendant withdrew from participation, then the Commonwealth has the burden of proving to you beyond a reasonable doubt that the defendant did not withdraw it. If the Commonwealth does not do so, then you must find the defendant not guilty.

Commonwealth v. Hogan, 426 Mass. 424, 434 n.12, 688 N.E.2d 977, 984 n.12 (1998);*Commonwealth v. Cook*, 419 Mass. 192, 201-202, 644 N.E.2d 203, 209-210 (1994) (instruction required only where supported by evidence, viewed in light most favorable to defendant); *Commonwealth v. Galford*, 413 Mass. 364, 372, 597 N.E.2d 410, 415 (1992) (where raised by evidence, Commonwealth must prove beyond a reasonable doubt the absence of abandonment); *Commonwealth v. Fickett*, 403 Mass. 194, 201 n.7, 526 N.E.2d 1064, 1069 n.7 (1988) (same); *Commonwealth v. Graves*, 363 Mass. 863, 866-868, 299 N.E.2d 711, 713-714 (1973); *Commonwealth v. Green*, 302 Mass. 547, 555, 20 N.E.2d 417, 421-422 (1939); *Commonwealth v. Joyce*, 18 Mass. App. Ct. 417, 428, 467 N.E.2d 214, 221 (1984); *Commonwealth v. Farnkoff*, 16 Mass. App. Ct. 433, 447, 452 N.E.2d 249, 258 (1983); *Commonwealth v. Mangula*, 2 Mass. App. Ct. 785, 792 n.6, 322 N.E.2d 177, 182 n.6 (1975). See *Hogan*, 426 Mass. at 434, 688 N.E.2d at 984 ("In the case of multiple crimes committed by joint venturers and the issue of withdrawal, an instruction about withdrawal should point out, when the evidence warrants, that a defendant can be found guilty as a joint venturer of an initial crime but then can effectively withdraw so as to avoid culpability for a subsequent crime.");*Commonwealth v. Fickett*, 403 Mass. 194, 201, 526 N.E.2d 1064, 1069 (1988) (defendant may argue to jury, alternately, that he never entered a joint venture and that if he did he also timely withdrew).

4. Joint participant hearsay exception. **You may consider against an individual defendant any statements made by another (defendant) (alleged participant in a joint venture) only if three things have been proved to you about that statement: *First,* that other evidence apart from that statement shows that the speaker and this defendant were participating with each other in the commission of the crime; *Second,* that the statement was made during the commission or in furtherance of the crime, and *Third,* that the statement was made in order to further or help along the goal of committing the crime. Only if those three things have been proved are you allowed to consider the statement of another (defendant) (alleged participant) when you are considering the charges against (a defendant other than the speaker) (the defendant).**

The statement of one participant during and in furtherance of the crime is admissible against other participants. Such cases are normally tried by admitting such evidence only as to the speaker. When the judge determines, based on evidence other than the statement, that there is a fair inference that there was joint participation, the limitation is removed and the statement becomes subject to "humane practice." The jury should be instructed that they may consider the evidence against a defendant other than the speaker only if they find sufficient evidence apart from the statement to support a fair inference that there was more than one participant, that the defendant was a participant, and that the statement was uttered in the course of, and in furtherance of the commission of the crime. *Commonwealth v. Brown*, 394 Mass. 510, 516, 476 N.E.2d 580, 584 (1985); *Commonwealth v. Bongarzone*, 390 Mass. 326, 340, 455 N.E.2d 1183, 1192 (1983); *Commonwealth v. Beckett*, 373 Mass. 329, 338-340, 366 N.E.2d 1252, 1257-1259 (1977); *Commonwealth v. Flynn*, 362 Mass. 455, 476-477, 287 N.E.2d 420, 435-436 (1972), denial of habeas corpus aff'd sub nom. *Velleca v. Superintendent, M.C.I. Walpole*, 523 F.2d 1040 (1st Cir. 1975); *Commonwealth v. Cartagena*, 32 Mass. App. Ct. 141, 144-145, 586 N.E.2d 43, 45- 46 (1992).

The rule applies even in severed trials. *Commonwealth v. Florentino*, 381 Mass. 193, 194, 408 N.E.2d 847, 849 (1980).

The judge should not inform the jury of his or her preliminary ruling admitting such evidence against the defendant. *Commonwealth v. Beckett*, 373 Mass. 329, 337 n.3, 366 N.E.2d 1252, 1257 n.3 (1977); *Commonwealth v. Lima*, 29 Mass. App. Ct. 490, 492 & n.3, 562 N.E.2d 100, 102 & n.3 (1990).

NOTES:

1. **No distinction between a principal and a joint venturer.** In *Commonwealth* v. *Zanetti,* 454 Mass. 449 (2009), the Supreme Judicial Court renounced "the false distinction between a principal and an accomplice," holding, "We, therefore, now adopt the language of aiding and abetting rather than joint venture for use in trials that commence after the issuance of the rescript in this case. When there is evidence that more than one person may have participated in the commission of the crime, judges are to instruct the jury that the defendant is guilty if the Commonwealth has proved beyond a reasonable doubt that the defendant knowingly participated in the commission of the crime charged, alone or with others, with the intent required for that offense."

2. **Accessory after the fact.** Unlike a participant, an accessory after the fact to a felony is not involved in the planning or execution of the crime, and need not have advance knowledge of it. An accessory after the fact "need merely [1] know the identity of the principal perpetrator and [2] have knowledge of the substantial facts of the felonious crime that the principal committed and, possessed of such knowledge, [3] aid the principal in avoiding punishment," *Commonwealth v. Hoshi H.,* 72 Mass. App. Ct. 18, 19-21, 887 N.E.2d 1104, 1105-1106 (2008), by "harboring, conceal[ing], maintain[ing], . . . assist[ing] . . . or giv[ing] such offender any other aid" (G.L. c. 274, § 7). A defendant who harbors a principal who has committed multiple felonies may be convicted of the same number of counts of being an accessory after the fact. *Commonwealth v. Perez,* 437 Mass. 186, 189-194, 770 N.E.2d 428, 433-434 (2002). A defendant cannot be convicted both of the substantive crime and as being an accessory after the fact to the same crime. *Commonwealth v. Gajka,* 425 Mass. 751, 754, 682 N.E.2d 1345, 1348 (1997); *Commonwealth v. Berryman,* 359 Mass. 127, 129, 268 N.E.2d 354, 356 (1971). General Laws c. 274, § 4 is a 7-year felony that is not within the final jurisdiction of the District Court.

3. **Accomplice Testimony.** The statement of one joint venturer during and in furtherance of the joint venture is admissible against other joint venturers. Such cases are normally tried by admitting such evidence only as to the speaker. The statement may be admitted if "(a) the statement was made during the course of and in furtherance of a common criminal enterprise and (b) there is sufficient nonhearsay evidence to establish an adequate probability that the declarant and defendant were engaged in a criminal enterprise." *Commonwealth* v. *Nascimento,* 421 Mass 677 (1996). A jury "may not consider the statement of one defendant against the other until and unless the Commonwealth proves the existence of a joint venture beyond a reasonable doubt". *Commonwealth* v. *Clarke,* 418 Mass. 207, 635 N.E.2d 1197 (1994). The statement becomes subject to "humane practice." In most cases, it lies within the judge's discretion whether or not to instruct the jury that the testimony of accomplices should be examined with special care, although some appellate decisions seem to have encouraged such a charge. See the supplemental instructions to Instruction 2.260 (Credibility of Witnesses). The judge should not inform the jury of his or her preliminary ruling admitting such evidence against the defendant. *Commonwealth* v. *Beckett,* 373 Mass. 329, 366 N.E.2d 1252 (1977); *Commonwealth* v. *Lima*, 29 Mass. App. Ct. 490, 562 N.E.2d 100 (1990).

4. **Anticipatory compact not required.** Unlike a conspiracy charge, "there is no need to prove an anticipatory compact between the parties to establish a joint venture charge. It is enough to prove that at the "'climactic moment' the parties acted together to carry out their goal." *Commonwealth* v. *Sexton*, 41 Mass. App. Ct. 676, 672 N.E.2d 991(1996), rev'd on other grounds, 425 Mass. 146, 680 N.E.2d 23. For that reason, the acquittal of all codefendants on a conspiracy charge does not collaterally estop the

Commonwealth from later trying them on a joint venture charge. “The shared purpose of joint venturers in the commission of a substantial offense differs from the prior agreement to commit the offense that is the essence of a conspiracy...As a general rule,...the agreement that must be shown to prove a conspiracy is a meeting of the minds of the conspirators separate and distinct from and prior to the common intent that is implicit in the commission of the substantive crime.” Except in situations where concerted advance planning is necessarily implied in the substantive offense, a jury might acquit joint venturers of a conspiracy charge because there was insufficient proof on an antecedent, agreed-upon plan. *Commonwealth* v. *DeCillis*, 41 Mass. App. Ct. 312, 669 N.E.2d 1087 (1996).

5. **Conviction as principal.** “The jury are not required to conclude unanimously that the defendant was either the principal or the joint venturer, so long as sufficient evidence exists to support either role.” *Commonwealth v. Ellis*, 432 Mass. 746, 761, 739 N.E.2d 1107, 1119 (2000). “[I]t seems accepted, under G.L. c. 274, sec. 2...that a person [charged] as a principal may be convicted on a showing of accessorial, or joint venture, involvement.” *Commonwealth* v. *James*, 30 Mass. App. Ct. 490, 570 N.E.2d 168 (1991).

6. **Co-venturers tried separately.** Joint venturers need not be tried together. *Commonwealth* v. *Cifizzari,* 397 Mass. 560, 492 N.E.2d 357 (1986). Where warranted by the evidence, a joint venture charge may be appropriate even where a single defendant is on trial, to indicate that the defendant need not have acted alone. *Commonwealth v. Dyer*, 389 Mass. 677, 451 N.E.2d 1161 (1983). A joint venture charge is permissible even if the alleged co-venturer was previously acquitted at a separate trial. *Commonwealth* v. *Jones*, 403 Mass. 279, 526 N.E.2d 1288 (1988). It is not necessary for the Commonwealth to prove the identity of the other joint venturer as long as the evidence supports the finding that there existed some principal other than the defendant and that the defendant shared that other’s intent and was available to help as needed. *Commonwealth v. Williams*, 450 Mass. 894, 824 N.E.2d 843 (2008); *Commonwealth* v. *Gonzalez*, 443 Mass. 799, 824 N.E.2d 843 (2005); *Commonwealth* v. *Netto*, 438 Mass. 686, 783 N.E.2d 439 (2003).

7. **Knowledge of coventurer’s weapon.** To be convicted as a participant in a crime involving the use of a weapon, it must be proved that the defendant knew at the time of the offense that the other participant had the weapon. *Commonwealth v. Thompson*, 56 Mass. App. Ct. 710, 713, 780 N.E.2d 96, 98 (2002). See *Commonwealth v. Watkins*, 425 Mass. 830, 840, 683 N.E.2d 653, 660 (1997) (armed robbery); *Commonwealth v. Colon*, 52 Mass. App. Ct. 725, 730, 756 N.E.2d 615, 620 (2001) (armed robbery).

8. **Lookout liability.** Evidence of additional factors may permit an inference that a defendant contributed more than mere presence to a crime. See *Commonwealth v. DeJesus*, 48 Mass. App. Ct. 911, 911-912, 720 N.E.2d 28, 29 (1999) (finding additional factors where defendant hung out window of target apartment, looking up and down the street, and was later found there with four others, surrounded by drugs, cash, and packaging materials); *Commonwealth v. Velasquez*, 48 Mass. App. Ct. 147, 150, 718 N.E.2d 398, 401 (1999) (finding additional factors where defendant disposed of illegal drugs and made threatening remarks to police). See also *Commonwealth v. Serrano,* 74 Mass. App. Ct. 1, 4, 904 N.E.2d 247 (2009) (under “presence” branch of joint venture, “presence” is appropriately defined to mean “at or near the general vicinity of the crime . . . at some point during the joint venture”); *Commonwealth v. Frederico D. Centino*, 48 Mass. App. Ct. 1121, 724 N.E.2d 752 (No. 98-P-128, Feb. 22, 2000) (unpublished opinion under Appeals Court Rule 1:28) (finding no additional factors where defendant merely failed to open door for police and gave a false name).

9. **Mere presence.** If the defendant was present at the scene of the crime but denies participation, or knew that a crime was planned but denies aiding it, “the jury should be instructed that mere presence coupled with the failure to take affirmative steps to prevent the crime is insufficient, as is simple

knowledge that a crime will be committed, even if . . . supplemented by evidence of subsequent concealment of the completed crime." *Ortiz,* 424 Mass. at 859, 679 N.E.2d at 1011.

10. **Post-crime assistance.** Post-crime aid is not itself sufficient to establish a joint venture. *Commonwealth v. Christian,* 430 Mass. 552, 722 N.E.2d 416 (2000). See G.L. c. 274, § 4 (accessory after the fact).

11. **Post-crime statements.** The mere fact that alleged co-participants were arrested together is insufficient to establish that, after the crime, there was a continuing joint venture to conceal it, so as to make the hearsay exception applicable to a statement of one participant made upon arrest. *Commonwealth* v. *Pringle*, 22 Mass. App. Ct. 746, 498 N.E.2d 131(1986) (error to admit one co-defendant's use of false name upon arrest against other co-defendant.) However, such statements are admissible "where the participants are acting to conceal the crime that formed the basis of the enterprise." *Commonwealth* v. *Angiulo*, 415 Mass. 502, 615 N.E.2d 155 (1993). Whether there was such a continuing participation to conceal the crime may become a jury issue if there is additional evidence to support such an inference. *Commonwealth* v. *Andrews*, 403 Mass. 441, 530 N.E.2d 1222 (1988) (proper to admit one co-defendant's flight and use of false name against other co-defendant).

12. **Specific unanimity instruction not required; use of general verdict slip proper.** A specific unanimity instruction or bifurcated verdict slip should not be used. *Commonwealth* v. *Santos*, 440 Mass. 281, 797 N.E.2d 1191 (2003); *Commonwealth v. Ramos,* 31 Mass. App. Ct. 362, 367-368, 577 N.E.2d 1012, 1015 (1991). A general verdict slip should be. The Supreme Judicial Court held the trial judge may "furnish the jury with a general verdict even when there is differing evidence that the defendant committed the crime as a principal or as an accomplice; and (3) on conviction, examine whether the evidence is sufficient to permit a rational juror to conclude beyond a reasonable doubt that the defendant knowingly participated in the commission of the crime charged, with the intent required to commit the crime." *Commonwealth v. Zanetti*, 454 Mass. at 466-467. "We continue to permit the trial judge to furnish the jury with a general verdict slip even when there is differing evidence that the defendant committed the crime as a principal or as an accomplice. Now, however, on appeal after a conviction, we will examine whether the evidence is sufficient to permit a rational juror to conclude beyond a reasonable doubt that the defendant knowingly participated in the commission of the crime charged, with the intent required to commit the crime, rather than examine the sufficiency of the evidence separately as to principal and joint venture liability. *Commonwealth v. Zanetti*, 454 Mass. at 468 (2009).

MOTOR VEHICLE OFFENSES

5.100 ATTACHING WRONG PLATES TO CONCEAL IDENTITY

G.L. c.90 § 23
2009 Edition

The defendant is charged with having intentionally attached the wrong license plates to a motor vehicle in order to conceal its identity.

Section 23 of chapter 90 of our General Laws provides as follows:

"Any person who attaches or permits to be attached to a motor vehicle . . . a number plate assigned to another motor vehicle . . . , with intent to conceal the identity of such motor vehicle . . . shall be punished . . . ."

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

First: **That the defendant attached the license plate in question to a motor vehicle, or permitted it to be so attached;**

Second: **That the license plate in question was not assigned by the Registry of Motor Vehicles to that particular vehicle; and**

Third: **That the defendant did so with the intent to conceal the identity of that motor vehicle.**

See Instruction 3.120 (Intent).

5.120 FALSE STATEMENT IN LICENSE APPLICATION

G.L. c. 90 § 24[2][a]
2009 Edition

The defendant is charged with making a false statement in his (her) application for a (driver's license) (learner's permit).

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

First: **That the defendant made an application for a (driver's license) (learner's permit) to operate motor vehicles in the Commonwealth of Massachusetts;**

Second: **That in that application the defendant made a statement which was false; and**

Third: **That the defendant knew that the statement was false when he (she) made it.**

See Instruction 3.140 (Knowledge).

G.L. c. 90, § 24(2)(a); *Commonwealth v. Kraatz*, 2 Mass. App. Ct. 196, 201-202, 310 N.E.2d 368, 371-372 (1974) (offense requires scienter).

5.140 HOMICIDE BY A MOTOR VEHICLE (FELONY)

G.L. c.90 § 24G [a]
2009 Edition

The defendant is charged with homicide by a motor vehicle. Section 24G(a) of chapter 90 of our General Laws provides as follows:

"Whoever,

upon any way

***or* in any place to which the public has a right of access,**

***or* upon any way or in any place to which members of the public have access as invitees or licensees,**

operates a motor vehicle

with a percentage, by weight, of alcohol in their blood of eight one-hundredths or greater,

***or* while under the influence of intoxicating liquor**

***or* [certain drugs] . . .**

***and* so operates a motor vehicle recklessly or negligently so that the lives or safety of the public might be endangered,**

***and* by any such operation so described causes the death of another person,**

shall be guilty of homicide by a motor vehicle while under the influence of an intoxicating substance . . . ."

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

First: **That the defendant operated a motor vehicle;**

Second: **That he (she) operated it (on a way) (or) (in a place where the public has a right of access) (or) (in a place where members of the public have access as invitees or licensees);**

Third: **That while the defendant was operating the vehicle, he (she) (had a percentage, by weight, of alcohol in his [her] blood of .08% or greater)**

(or) (was under the influence of intoxicating liquor)

(or) (was under the influence of [marihuana] [narcotic drugs, depressants, or stimulant substances, as I will define them for you in a moment] [vapors of glue]);

Fourth:

Note: Based on the complaint, use only one of the following, unless they are charged in the alternative:

A. Reckless operation. **That the defendant operated the vehicle in a manner which is considered "reckless" under the laws of our Commonwealth;**

B. Negligent operation. **That the defendant operated the vehicle in a negligent manner so that the lives and safety of the public might have been endangered;**

and *Fifth:* That the defendant's actions caused the death of another person. The defendant caused the death if his (her) actions directly and substantially set in motion the entire chain of events that produced the death. The defendant is the cause of the death if his (her) actions produced it in a natural and continuous sequence, and the death would not have occurred without the defendant's actions.

At this point, the jury must be instructed on the definitions of "Operation of a motor vehicle" (Instruction 3.200) and "Public way" (Instruction 3.280). In addition, the jury must be instructed on the appropriate two predicate offenses: (1) either OUI-Liquor or with .08% Blood Alcohol (Instruction 5.300) or OUIDrugs (Instruction 5.400), plus (2) either "Operating negligently so as to endanger" (Instruction 5.240) or "Operating recklessly" (Instruction 5.260). See also the supplemental instruction and notes to "Homicide by a Motor Vehicle (Misdemeanor)" (Instruction 5.160).

NOTES:

1. **Continuance without a finding impermissible.** The prohibition in G.L. c. 90, § 24G(a) on filing or continuing without a finding a vehicular homicide charge governs all prosecutions "commenced under this section" and therefore applies both to felony vehicular homicide under § 24G(a) and misdemeanor vehicular homicide under § 24G(b). *Commonwealth v. Millican*, 449 Mass. 298, 867 N.E.2d 725 (2007).

2. **Parole eligibility**. A defendant convicted of felony vehicular homicide is eligible for parole, furlough, and good conduct deductions, subject to the one-year mandatory imprisonment requirement. *Commonwealth v. Haley*, 23 Mass. App. Ct. 10, 15-22, 498 N.E.2d 1063, 1068-1071 (1986).

5.160 HOMICIDE BY A MOTOR VEHICLE (MISDEMEANOR)

G.L. c. 90 § 24G[b]
2009 Edition

The defendant is charged with homicide by a motor vehicle. Section 24G(b) of chapter 90 of our General Laws provides as follows:

"Whoever,

upon any way

***or* in any place to which the public has a right of access,**

***or* upon any way or in any place to which members of the public have access as invitees or licensees,**

operates a motor vehicle

with a percentage, by weight, of alcohol in their blood of eight one hundredths or greater,

or while under the influence of intoxicating liquor

or [certain] drugs] . . .

***or* . . . operates a motor vehicle recklessly**

***or* [operates a motor vehicle] negligently so that the lives or safety of the public might be endangered**

***and* by any such operation causes the death of another person,**

shall be guilty of homicide by a motor vehicle. . . ."

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

First: **That the defendant operated a motor vehicle;**

Second: **That he (she) operated it (on a way) (or) (in a place where the public has a right of access) (or) (in a place where members of the public have access as invitees or licensees;**

Third:

Based on the complaint, use only one *of the following, unless they are charged in the alternative:*

A. OUI. **That while the defendant was operating the vehicle, he (she) (had a percentage, by weight, of alcohol in his [her] blood of .08% or greater) (or) (was under the influence of intoxicating liquor) (was under the influence of [marihuana] [narcotic drugs] [depressants] [stimulant substances], as I will define them for you in a moment) (was under the influence of vapors of glue).**

B. Reckless operation. **That the defendant operated the vehicle in a manner which is considered "reckless" under the laws of our Commonwealth.**

C. Negligent operation. **That the defendant operated the vehicle in a negligent manner so that the lives and safety of the public might have been endangered.**

and *Fourth:* That the defendant's actions caused the death of another person. The defendant caused the death if his (her) actions directly and substantially set in motion the entire chain of events that produced the death. The defendant is the cause of the death if his (her) actions produced it in a natural and continuous sequence, and the death would not have occurred without the defendant's actions.

At this point, the jury must be instructed on the definitions of "Operation of a motor vehicle" (Instruction 3.200) and "Public way" (Instruction 3.280). In addition, the jury must be instructed on the two appropriate predicate offenses: (1) either OUI-Liquor or with .08% Blood Alcohol (Instruction 5.300) or OUI-Drugs (Instruction 5.400), plus (2) either "Operating negligently so as to endanger" (Instruction 5.240) or "Operating recklessly" (Instruction 5.260).

Commonwealth v. Geisler, 14 Mass. App. Ct. 268, 276, 438 N.E.2d 375, 380 (1982); *Commonwealth v. Burke*, 6 Mass. App. Ct. 697, 699, 383 N.E.2d 76, 78 (1978). The statutory branches (operating under the influence, negligently, recklessly [, or with .08% blood alcohol]) are disjunctive, independent grounds for conviction of misdemeanor vehicular homicide. *Commonwealth v. Jones*, 382 Mass. 387, 389, 416 N.E.2d 502, 504 (1981). The "negligence" standard to be utilized is that of civil tort law. Id.; *Burke*, 6 Mass. App. Ct. at 700-701, 383 N.E.2d at 79. Evidence of intoxication may be admissible on the issue of negligence as well as on the issue of operating under the influence. *Commonwealth v. Campbell*, 394 Mass. 77, 83 n.6, 474 N.E.2d 1062, 1067 n.6 (1985). As to whether "public way" is an element of the "reckless or negligent" branch of the statute, see *Commonwealth v. Callahan*, 405 Mass. 200, 201 n.1, 539 N.E.2d 533, 534 n.1 (1989). See the note infra on the definition of causality.

SUPPLEMENTAL INSTRUCTION

Intervening and superseding causes. **There may be more than one cause of a person's death. The Commonwealth is not required to prove that the defendant was the *only* cause of the victim's death, but it *is* required to prove beyond a reasonable doubt that the defendant caused the death in the sense that he (she) directly and substantially set in motion a chain of events that produced the death in natural and continuous sequence.**

If the defendant's actions would not have brought about the death all by themselves, without the intervention of some other person or event, the defendant is still held responsible as the cause of the death if two conditions are met:

First: **The defendant's actions directly and substantially set in motion a natural and continuous sequence of events that caused the death; and**

Second: **A reasonable person in the defendant's position would have foreseen that his (her) actions could easily result in serious injury or death to someone like the victim.**

If both of these two conditions are proved beyond a reasonable doubt, then the defendant is responsible as the cause of the death, even if there were other causes which contributed to some degree in producing the fatal result — for example, if the victim was also negligent or intoxicated, or if rescue personnel or medical personnel later were also negligent.

On the other hand, the law does *not* consider the defendant to be the cause of the death, and therefore must be acquitted, if some other person or event was the direct and substantial cause of the death, and the defendant's actions were only a minor and remote link in the chain of events leading to the death. The defendant must also be acquitted if the death would not have occurred without the intervention of some other person or event, and a reasonable person in the same circumstances would not have foreseen the likely possibility of such a result.

NOTES:

1. **Bicyclists and pedestrians**. "In approaching or passing a person on a bicycle the operator of a motor vehicle shall slow down and pass at a safe distance and at a reasonable and proper speed . . . . Upon approaching a pedestrian who is upon the traveled part of any way and not upon a sidewalk, every person operating a motor vehicle shall slow down." G.L. c. 90, § 14. The mere happening of an accident between a vehicle and a pedestrian is not, standing alone, sufficient to prove negligence by the vehicle's operator. *Aucella v. Commonwealth*, 406 Mass. 415, 418, 548 N.E.2d 193, 195 (1990).

2. **Companion traffic violations**. For the effect of a prior acquittal of companion traffic violations, see *Commonwealth v. Kline*, 19 Mass. App. Ct. 715, 717-719, 477 N.E.2d 193, 194-196 (1985).

3. **Constitutionality**. Section 24G is not unconstitutionally vague, *Burke*, 6 Mass. App. Ct. at 698-700, 383 N.E.2d at 78-79, its penalty range is not unconstitutional for criminally punishing ordinary negligence, *Commonwealth v. Jones*, 9 Mass. App. Ct. 103, 120-121, 399 N.E.2d 1087, 1099-1100 (1980), aff'd, 382 Mass. 387, 416 N.E.2d 502 (1981), and its one-year mandatory minimum sentence for a felony violation is neither cruel and unusual punishment, a due process violation, or an art. 30 separation of powers violation, *Commonwealth v. Therriault*, 401 Mass. 237, 515 N.E.2d 1198 (1987).

4. **Continuance without a finding impermissible.** The prohibition in G.L. c. 90, § 24G(a) on filing or continuing without a finding a vehicular homicide charge governs all prosecutions "commenced under this section" and therefore applies both to felony vehicular homicide under § 24G(a) and misdemeanor vehicular homicide under § 24G(b). *Commonwealth v. Millican*, 449 Mass. 298, 867 N.E.2d 725 (2007).

5. **Misdemeanor and felony branches**. Statute 1982, c. 373 divided G.L. c. 90, § 24G into two subsections: misdemeanor vehicular homicide (§ 24G[b]), caused *either* by operation under the influence, *or* reckless operation, *or* negligent operation, and felony vehicular homicide (§ 24G[a]), caused by operation under the influence *coupled with* either reckless or negligent operation. *Campbell*, 394 Mass. at 86-87, 474 N.E.2d at 1068 1069. The District Court has final jurisdiction over both the misdemeanor and felony forms of vehicular homicide. G.L. c. 218, § 26. The complaint must be scrutinized in advance so that the instruction may be appropriately tailored. See Instruction 5.140 for an instruction covering felony vehicular homicide.

6. **Multiple counts where single death**. Where a defendant is convicted both of one count of vehicular homicide while operating under the influence of intoxicating liquor and a second count of vehicular homicide while operating to endanger, both referring to the same victim, the judge must dismiss one of the counts. *Commonwealth v. Riley*, 22 Mass. App. Ct. 698, 703-704, 497 N.E.2d 651, 655 (1986).

7. **Multiple victims**. Multiple deaths caused in a single accident may each be charged and punished as separate offenses. *Commonwealth v. Meehan*, 14 Mass. App. Ct. 1028, 442 N.E.2d 43 (1982).

8. **Proximate cause**. See *Commonwealth v. Carlson*, 447 Mass. 79, 83, 84, 849 N.E.2d 790, 794 (2006), affirming this instruction's wording as to proximate and intervening causes. "'Proximate cause' defines a point beyond which the law will not recognize a contributing factor as a cause giving rise to liability. 'The term "proximate" is used in contrast to the term "remote"'" (citation omitted). *Commonwealth v. McLeod*, 394 Mass. 727, 735, 477 N.E.2d 972, 979 (1985). "[W]e use 'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts . . . . Accordingly, among the many shapes this concept took at common law . . . was a demand for some direct relation between the injury asserted and the injurious conduct alleged." *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 112 S.Ct. 1311 (1992).

In a murder context, the Supreme Judicial Court has approved a definition of proximate cause as "a cause, which, in the natural and continuous sequence, produces the death, and without which the death would not have occurred." *Id.*, 394 Mass. at 735-736, 477 N.E.2d at 980; *Commonwealth v. Rhoades*, 379 Mass. 810, 825, 401 N.E.2d 342, 351 (1980). While a defendant accused of murder or manslaughter need not be the sole cause of the death, *Id.*, 379 Mass. at 823 n.12, 401 N.E.2d at 350 n.12, he or she must be the "efficient cause, the cause that necessarily set[ ] in operation the factors which caused the death," *Commonwealth v. Joyce*, 18 Mass. App. Ct. 417, 421, 467 N.E.2d 214, 217 (1984). If the defendant proximally caused the death, he or she is liable for it even if there are other contributing causes, such as simultaneous assault by another, *Commonwealth v. Flynn,* 37 Mass. App. Ct. 550, 554-555, 640 N.E.2d 1128, 1130-1131 (1994); *Joyce, supra*, or subsequent assault by

another, *McLeod*, 394 Mass. at 744-745, 477 N.E.2d at 984-985, or subsequent negligent medical treatment, *Commonwealth v. Williams*, 399 Mass. 60, 64-65, 503 N.E.2d 1, 4 (1987); *Commonwealth v. Fernette*, 398 Mass. 658, 667-668, 500 N.E.2d 1290, 1296 (1986); *Commonwealth v. Golston*, 373 Mass. 249, 256-257, 366 N.E.2d 744, 749-750 (1977), cert. denied, 434 U.S. 1039 (1979). The jury must be satisfied that the defendant's "negligence was the efficient cause or the cause that necessarily set in operation all of the factors which ultimately caused the death . . . . It would not be sufficient to convict . . . if the jurors were to find that the defendant's negligence was only a link, no matter how remote, in the chain of events . . . leading to [the] death." This definition of proximate cause in homicide cases "entail[s] a closer relationship between the result and the intended conduct than proximate causation in tort law." *Commonwealth v. Diaz*, 19 Mass. App. Ct. 29, 36-37, 471 N.E.2d 741, 746 (1984). See *Commonwealth v. Bianco*, 388 Mass. 358, 362-364, 446 N.E.2d 1041, 1045 (1985).

By contrast, *Commonwealth v. Berggren*, 398 Mass. 338, 496 N.E.2d 660 (1986), established that the broader tort standard of proximate causation is to be applied in vehicular homicide cases. Despite the presence of intervening persons or events, the defendant's negligence is the proximate cause if the death results from a natural and continuous sequence of events caused by the defendant's actions and if, in the circumstances, the likelihood of serious injury to someone like the victim was foreseeable. *Id.*, 398 Mass. at 341, 496 N.E.2d at 661-662; *Commonwealth v. Carlson*, 447 Mass. 79, 83, 84, 849 N.E.2d 790, 794 (2006).

In tort law, a defendant is the proximate cause of an injury if he or she is a substantial (as opposed to a remote) factor in bringing it about. *Johnson v. Summers,* 411 Mass. 82, 88, 577 N.E.2d 301, 305 (1991); Restatement (Second) of Torts § 431(a) (1965). See *Commonwealth v. Matos,* 36 Mass. App. Ct. 958, 961, 634 N.E.2d 138, 141- 142 (1994) (judge not required to use exact words "substantial cause" in instructing jury). An intervening cause does not amount to a superseding cause that will excuse the defendant from liability if the defendant should have realized that his or her acts might cause harm to another in substantially the manner in which it happened. *Rae v. Air-Speed, Inc.*, 386 Mass. 187, 193, 435 N.E.2d 628, 632 (1982), citing Restatement (Second) of Torts § 435(2), Comment b (1965); *Jesionek v. Massachusetts Port Auth.*, 376 Mass. 101, 105-106, 378 N.E.2d 995, 997 (1978); *Marshall v. Carter*, 301 Mass. 372, 377-378, 17 N.E.2d 205, 208 (1938); *Ogden v. Aspinwall*, 220 Mass. 100, 103, 107 N.E. 448, 449 (1915); *Lawrence v. Kamco, Inc.*, 8 Mass. App. Ct. 854, 857-859, 397 N.E.2d 1157, 1159-1160 (1979). See J.R. Nolan, *Tort Law* § 204 (1979). This foreseeability test has been applied whether the intervening cause was the non-negligent conduct of another, *Carlson*, 447 Mass. at 85, 849 N.E.2d at 795; *Wilborg v. Denzell*, 359 Mass. 279, 285, 268 N.E.2d 855, 859 (1971), the negligence of another, *Tritsch v. Boston Edison Co.*, 363 Mass. 179, 182, 293 N.E.2d 264, 266-267 (1973); *Smith v. Eagle Cornice & Skylight Works*, 341 Mass. 139, 141-142, 167 N.E.2d 637, 638-639 (1960); *Delicata v. Bourlesses*, 9 Mass. App. Ct. 713, 720, 404 N.E.2d 667, 671-672 (1980); *E.H. Hall Co. v. U.S. Plastics Corp.*, 2 Mass. App. Ct. 169, 173, 309 N.E.2d 533, 536 (1974), the intentional tort of another, *Mullins v. Pine Manor College*, 389 Mass. 47, 58-62, 449 N.E.2d 331, 338-341 (1983); *Gidwani v. Wasserman*, 373 Mass. 162, 166-167, 365 N.E.2d 827, 830-831 (1977); *O'Malley v. Putnam Safe Deposit Vaults, Inc.*, 17 Mass. App. Ct. 332, 342-343, 458 N.E.2d 752, 760 (1984); *Lawrence, supra*, or a natural "act of God," *L.G. Balfour Co. v. Ablondi & Boynton Corp.*, 3 Mass. App. Ct. 658, 661, 338 N.E.2d 841, 844 (1975). A defendant "is bound to anticipate and provide against what usually happens and what is likely to happen, but is not bound in like manner to guard against what is unusual and unlikely to happen, or what, as is sometimes said, is only remotely and slightly probable." *Zompanti v. Ferguson*, 336 Mass. 167, 169, 142 N.E.2d 903, 904 (1957), quoting *Falk v. Finkelman*, 268 Mass. 524, 527, 168 N.E. 89, 90 (1929).

Under this broader rule, the defendant is not excused by the contributory negligence of the victim unless it rises to the level of sole cause. *Campbell*, 394 Mass. at 87, 474 N.E.2d at 1069;

Commonwealth v. Mandell, 29 Mass. App. Ct. 504, 506 n.5, 562 N.E.2d 111, 112 n.5 (1990); *Commonwealth v. Haley*, 23 Mass. App. Ct. 10, 14-15, 498 N.E.2d 1063, 1067-1068 (1986); *O'Malley*, 17 Mass. App. Ct. at 343 n.10, 458 N.E.2d at 760 n.10; *Geisler*, 14 Mass. App. Ct. at 278-280, 438 N.E.2d at 381-382. See *Commonwealth v. Molari,* 31 Mass. App. Ct. 941, 942-943, 579 N.E.2d 1372, 1374 (1991) (undisclosed evidence of victim's prior ingestion of alcohol was not exculpatory, absent evidence of causal connection to accident). Nor is the defendant excused from liability for aggravated injuries suffered by a susceptible victim. *Carlson*, 447 Mass. at 83, 84, 849 N.E.2d at 793-794 (preexisting condition; victim's decision to forgo invasive life support); *Webber v. Old Colony St. Ry. Co.*, 210 Mass. 432, 442, 97 N.E. 74, 75 (1912) (preexisting condition); *Wallace v. Ludwig*, 292 Mass. 251, 256-259, 198 N.E. 159, 162-163 (1935) (consequently contracted disease).

While acknowledging the *Berggren* decision, the Appeals Court nevertheless recommends that judges in their vehicular homicide instructions continue to explain proximate cause in language drawn from murder cases, although this is concededly more favorable to the defendant than he or she is entitled to. *Commonwealth v. Shine*, 25 Mass. App. Ct. 613, 617 n.6, 521 N.E.2d 749, 751 n.6 (1988); *Diaz*, 19 Mass. App. Ct. at 37, 471 N.E.2d at 746-747. The model instruction *supra* follows that recommendation by closely paraphrasing the language expressly endorsed by the Appeals Court: that the defendant's acts must "in the natural and continuous sequence [have] produced the death and without which the death would not have occurred" and must have "necessarily set in operation all of the factors which ultimately caused the death." *Shine, supra.* The supplemental instruction, however, also adds language drawn from *Berggren* and omits the "without which the death would not have occurred" phrase from *Shine*, since "but for" definitions of proximate cause are not helpful where simultaneous causes are involved. See *O'Malley, supra; Nolan, supra,* § 202 at 311-312.

In empirical experiments, the term "proximate cause" is often misunderstood by jurors as "approximate cause." See Harrow & Harrow, "Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions," 79 Colum. L. Rev. 1306, 1353 (1979). The Restatement (Second) of Torts § 430 (1965) prefers the term "legal cause." The model instruction simply uses the term "cause," accompanied by a definition. If it is used, the term "proximate cause" should be used only in the singular voice and with the definite article, since "there cannot be more than one 'proximate cause' . . . . [although] there can be more than one cause which in the natural and continued sequence produces the death and without which the death would not have occurred." *Shine*, 25 Mass. App. Ct. at 616 n.5, 521 N.E.2d at 751 n.5. But see *Flynn, supra.* See also *Commonwealth v. Askew,* 404 Mass. 532, 535, 536 N.E.2d 341, 343 (1989) (words such as "dependent" or "independent" intervening cause and "superseding" cause, "although perhaps helpful categories for legal analysis and discussion, do not help a jury to understand the concept of proximate cause.")

9. **Viable fetus**. After August 16, 1984, prenatal injuries to a viable fetus resulting in its death, before or after birth, will support a vehicular homicide charge. *Commonwealth v. Caso*, 392 Mass. 799, 467 N.E.2d 1324 (1984). See *Commonwealth v. Lawrence*, 404 Mass. 378, 383-384, 536 N.E.2d 571, 575-576 (1989).

5.180 LEAVING THE SCENE OF AN ACCIDENT INVOLVING PROPERTY DAMAGE

G.L.c. 90 § 24[2][a]
March 2017

The defendant is charged with knowingly leaving the scene of an accident involving property damage. In order to prove the defendant guilty of this offense, the Commonwealth must prove four things beyond a reasonable doubt:

First: **That the defendant operated a motor vehicle;**

Second: **That while the defendant was operating the vehicle, (he) (she) caused damage to another vehicle or property either by colliding with it or in some other way;**

Third: **That the defendant *knew* (he) (she) (had collided with another's property) (or) (had in some way caused damage to another's property); and**

Fourth: **That after causing such damage, the defendant did not stop and make known (his) (her) name, home address, and the registration number of (his) (her) motor vehicle.**

A person "operates" a motor vehicle not only while doing all of the well-known things that drivers do as they travel on a street or highway, but also when doing any act which directly tends to set the vehicle in motion. The law is that a person is "operating" a motor vehicle whenever he or she is in the vehicle and intentionally manipulates some mechanical or electrical part of the vehicle — like the gear shift or the ignition — which, alone or in sequence, will set the vehicle in motion.

For the complete definitions of "Operation of a Motor Vehicle," see instruction 3.200.

A driver has a duty to immediately stop at the scene and offer the specific information required: name, home address and motor vehicle registration number. This duty is not satisfied by stopping at some remote place or by being passively willing to answer inquiries.

Commonwealth v. Martinez, 87 Mass. App. Ct. 582, 584-86 (2015);
Commonwealth v. Horsfall, 213 Mass. 232, 236 (1913).

SUPPLEMENTAL INSTRUCTIONS

1. *"Motor vehicle."* **law defines what a "motor vehicle" is as follows: "all vehicles constructed and designed for propulsion by power other than muscular power."**

(See G.L. c. 90, § 1 for the statutory definition of a "motor vehicle.")

2. *Stopped engine*. **To "operate" a motor vehicle within the meaning of the law, it is not necessary that the engine be running. A driver continues to operate his or her motor vehicle when it is stopped in the ordinary course of its operation for some reason that is fairly incidental to the vehicle's operation. A person is also considered to be "operating" a stationary vehicle**

when he or she manipulates some part of it, like the gear shift, so that it moves forward of its own weight.

3. *Circumstantial evidence of operation.* **You may find that the defendant was the operator of the motor vehicle even if no witness saw him (her) driving the vehicle, if there is enough circumstantial evidence to prove to you beyond a reasonable doubt that the vehicle was operated and that the defendant, and no one else, was the operator of that vehicle.**

4. *To whom information must be given.* **The statute requires that the specified information must be given to the person whose property has been damaged, if reasonably possible, and if not, to someone acting in their interest or to some public officer or other person at or near the place at the time of the injury.**

Commonwealth v. Horsfall, 213 Mass. 232, 236 (1913);

Commonwealth v. Donohue, 41 Mass. App. Ct. 91, 94 (1996).

5. *Extent of damage.* **The extent of the damage is not relevant except to the extent that it may be circumstantial evidence of whether or not the defendant knew that there had been a collision.**

NOTES:

1. **Circumstantial evidence.** Circumstantial evidence may support an inference that the defendant did not make himself known, *Commonwealth v. LaVoie,* 9 Mass. App. Ct. 918, 918-19 (1980), or that the defendant was the operator, *Commonwealth v. Smith*, 368 Mass. 126, 128 (1975); *Commonwealth v. Rand*, 363 Mass. 554, 561-62 (1973); *Commonwealth v. Swartz*, 343 Mass. 709, 712 (1962); *Commonwealth v. Henry*, 338 Mass. 786 (1958). *But see Commonwealth v. Shea,* 324 Mass. 710, 712-14 (1949) (defendant not shown to be driver where unknown person had been driving vehicle three hours earlier, and no evidence that defendant operated vehicle on that date).

2. **Collision.** "Collide" means to strike together. The statute applies whenever the defendant is in some way an actor, a partial cause in the collision, but not where the defendant is merely a passive participant (e.g., where a pedestrian falls or walks into the defendant's stopped vehicle). *Commonwealth v. Bleakney*, 278 Mass. 198, 201-02 (1932). An owner-passenger can be found guilty if he or she retained control over his chauffeur's operation of the vehicle. *Saltman, petitioner*, 289 Mass. 554, 561 (1935).

3. **Constitutionality.** The statutory obligation does not violate the privilege against self-incrimination. *California v. Byers*, 402 U.S. 424 (1971); *Commonwealth v. Joyce*, 326 Mass. 751, 753-57 (1951).

4. **Fault.** The statute applies whether or not the defendant was at fault, since the statute "focuses on causation, not fault." *Commonwealth v. Robbins*, 414 Mass. 444, 446-48 (1993).

5. **Good faith mistake.** It is not a defense that the defendant believed that he or she was known to persons at the scene. *Commonwealth v. Joyce*, 326 Mass. 751, 752-53 (1951); *Commonwealth v. Lewis,* 286 Mass. 256 (1934). *Commonwealth v. Horsfall,* 213 Mass. 232, 237 (1913), held that the defendant's good faith belief that he had taken the necessary steps to make himself known was a defense, but the statute was subsequently amended and that defense is no longer available, *Commonwealth v. Coleman*, 252 Mass. 241, 243-44 (1925).

6. **Not a continuing offense.** For purposes of the statute of limitations, the crime of leaving the scene of an accident is not a continuing offense. *Commonwealth v. Valchuis*, 40 Mass. App. Ct. 556, 561-62 (1996) (offense involving personal injury).

7. **Causal Relationship.** The Commonwealth must prove that the accident caused property damage. *Commonwealth v. Velasquez*, 76 Mass. App. Ct. 697, 699-701 (2010).

8. **Offering information without more violates statute.** A motorist must actually provide the required information. Merely offering to provide it is not sufficient to avoid liablity under G.L. c. 90, § 24(2)(a). It remains undecided whether an emergency or event such as road rage would excuse a motorist from compliance. *Commonwealth v. Martinez*, 87 Mass. App. Ct. 582, 585-86 & n.12, *rev. denied*, 473 Mass. 1101 (2015).

9. **Unit of prosecution is incident-based.** The offense is defined by the act of leaving the scene of the accident, not by the number of people injured. *See Commonwealth* v. *Constantino*, 443 Mass. 521, 524-27 (2005); *see also Commonwealth* v. *Henderson*, 89 Mass. App. Ct. 205, 209-11 (2016) (leaving scene of multi-vehicle crash constitutes a single offense).

10. **Only one penalty may be assessed.** "Only one penalty may be assessed . . . for a single act of leaving the scene . . . because 'the proscribed act is scene related, not victim related.'" *Commonwealth* v. *Henderson*, 89 Mass. App. Ct. 205, 210 (2016) (quoting *Commonwealth* v. *Constantino*, 443 Mass. 521, 524 (2005)).

5.190 LEAVING THE SCENE OF AN ACCIDENT INVOLVING PERSONAL INJURY NOT RESULTING IN DEATH

G.L. c. 90, § 24(2)(a½)(1)
Revised June 2016

The defendant is charged with knowingly leaving the scene of an accident involving personal injury. In order to prove the defendant guilty of this offense, the Commonwealth must prove four things beyond a reasonable doubt:

First: **That the defendant operated a motor vehicle;**

Second: **That (he) (she) operated it (on a way) (or) (in a place where the public has a right of access) (or) (upon a way or in a place where members of the public have access as invitees or licensees);**

Third: **That the defendant knowingly collided with or otherwise injured another person;**

Fourth: **That after such collision or injury, the defendant did not stop and make known (his) (her) name, home address, and the registration number of (his) (her) motor vehicle.**

At this point, the jury must be instructed on the definitions of "Operation of a Motor Vehicle" (Instruction 3.200) and "Public Way" (Instruction 3.280).

Statute 1991, c. 460 (effective January 30, 1992) removed the offense of leaving the scene of personal injury from G.L. c. 90, § 24(2)(a) and bifurcated it into two offenses: (1) the misdemeanor of leaving the scene of personal injury "not resulting in the death of any person" (G.L. c. 90, § 24[2][a½][1]), and (2) the felony of leaving the scene of personal injury resulting in a death in order "to avoid prosecution or evade apprehension" (G.L. c. 90, § 24[2][a½][2]). The District Court lacks final jurisdiction over the felony branch.

SUPPLEMENTAL INSTRUCTIONS

1. Duty to provide means of identification. **The purpose of this statute is to enable anyone who has been injured by a motor vehicle to obtain immediate and accurate information about the person in charge of that motor vehicle. It imposes an active and positive duty on the driver to immediately stop at the scene and offer the specific information required, in order to identify (him) (her) and to make it simple to find (him) (her) later. The statute is not satisfied by stopping at some remote place or by being**

passively willing to answer inquiries.

Commonwealth v. Horsfall, 213 Mass. 232, 236 (1913).

2. To whom information must be given. **By plain implication, the statute requires that the specified information must be given to the person who has been injured, if reasonably possible, and if not, to someone acting in their interest or to some public officer or other person at or near the place at the time of the injury.**

Horsfall, 213 Mass. at 236.

3. Extent of injury. **The extent of the injury is not relevant except to the extent that it may be circumstantial evidence of whether or not the defendant knew that there had been a collision.**

NOTES:

1. **Circumstantial evidence.** Circumstantial evidence may support an inference that the defendant did not make himself known, *Commonwealth v. LaVoie*, 9 Mass. App. Ct. 918, 918-919 (1980), or that the defendant was the operator, *Commonwealth v. Smith*, 368 Mass. 126, 128 (1975); *Commonwealth v. Rand*, 363 Mass. 554, 561-562 (1973); *Commonwealth v. Swartz*, 343 Mass. 709, 712 (1962); *Commonwealth v. Henry*, 338 Mass. 786 (1958). But see *Commonwealth v. Shea*, 324 Mass. 710, 712-714 (1949) (defendant not shown to be driver where unknown person had been driving vehicle three hours earlier, and no evidence that defendant operated vehicle on that date).

2. **Collision.** "Collide" means to strike together. The statute applies whenever the defendant is in some way an actor, a partial cause in the collision, but not where the defendant is merely a passive participant (e.g., where a pedestrian falls or walks into the defendant's stopped vehicle). *Commonwealth v. Bleakney*, 278 Mass. 198, 201-202 (1932). An owner-passenger can be found guilty if he or she retained control over his chauffeur's operation of the vehicle. *Saltman, petitioner*, 289 Mass. 554, 561 (1935).

3. **Constitutionality.** The statutory obligation does not violate the privilege against self-incrimination. *California v. Byers,* 402 U.S. 424 (1971); *Commonwealth v. Joyce*, 326 Mass. 751, 753-757 (1951).

4. **Fault.** The statute applies whether or not the defendant was at fault, since the statute "focuses on causation, not fault." *Commonwealth v. Robbins*, 414 Mass. 444, 446-448 (1993).

5. **Good faith mistake.** It is not a defense that the defendant believed that he or she was known to persons at the scene. *Commonwealth v. Joyce*, 326 Mass. at 752-753; *Commonwealth v. Lewis*, 286 Mass. 256 (1934). *Commonwealth v. Horsfall*, 213 Mass. 232, 237, held that the defendant's good faith belief that he had taken the necessary steps to make himself known was a defense, but the statute was subsequently amended and that defense is no longer available, *Commonwealth v. Coleman*, 252 Mass. 241, 243-244 (1925).

6. **Not a continuing offense.** For purposes of the statute of limitations, the crime of leaving the scene of an accident is not a continuing offense. *Commonwealth v. Valchuis*, 40 Mass. App. Ct. 556, 561-562 (1996).

7. **Causal Relationship.** The Commonwealth must prove that the accident caused the injury (where that is the basis of criminal liability). *Commonwealth v. Velasquez*, 76 Mass. App. Ct. 697, 699-701 (2010) (property damage case).

8. **Offering information without more violates statute.** A motorist must actually provide the required information. Merely offering to provide it is not sufficient to avoid liablity under G.L. c. 90, § 24(2)(a). It remains undecided whether an emergency or event such as road rage would excuse a motorist from compliance. *Commonwealth v. Martinez*, 87 Mass. App. Ct. 582, 585-86 & n.12, *rev. denied*, 473 Mass. 1101 (2015).

9. **Unit of prosecution is incident-based.** The offense is defined by the act of leaving the scene of the accident, not by the number of people injured. *See Commonwealth* v. *Constantino*, 443 Mass. 521, 524-27 (2005); *see also Commonwealth* v. *Henderson*, 89 Mass. App. Ct. 205, 209-11 (2016) (leaving scene of multi-vehicle crash constitutes a single offense).

10. **Only one penalty may be assessed.** "Only one penalty may be assessed . . . for a single act of leaving the scene . . . because 'the proscribed act is scene related, not victim related.'" *Commonwealth* v. *Henderson*, 89 Mass. App. Ct. 205, 210 (2016) (quoting *Commonwealth* v. *Constantino*, 443 Mass. 521, 524 (2005)).

11. **Statutory language "not resulting in death" is not element of offense.** See *Commonwealth v. Muir*, 84 Mass. App. Ct. 635, 639 (2013). This offense is a lesser included offense of leaving the scene of personal injury causing death. *Id.* See G.L. c. 90, § 24(2)(a½)(2). The District Court does not have jurisdiction over the latter offense. G.L. c. 218, § 26.

5.200 OPERATING AFTER SUSPENSION OR REVOCATION OF LICENSE

G.L. c. 90, § 23
Revised January 2013

1. OPERATING AFTER SUSPENSION OR REVOCATION OF LICENSE

The defendant is charged with having operated a motor vehicle after his (her) (driver's license) (right to drive in Massachusetts) had been (suspended) (revoked).

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

First: **That the defendant operated a motor vehicle;**

Second: **That at the time the defendant was operating a motor vehicle his (her) (driver's license) (right to drive in Massachusetts) had been (suspended) (revoked); and**

Third: **That the defendant**

If relevant to evidence. **or an agent of the defendant, such as a household member or employer**

had received notice that his (her) (driver's license) (right to drive in Massachusetts) had been or was about to be (suspended) (revoked).

See Instruction 3.200 (Operation of a Motor Vehicle).

II. OPERATING AFTER SUSPENSION RE REVOCATION OF LICENSE BECAUSE OF CERTAIN ALCOHOL-RELATED OFFENSES

G.L. c.90, s 23, second par.

The defendant is charged with having operated a motor vehicle after his (her) right to operate in Massachusetts had been (suspended) (revoked) (because of a violation of Section 24[1][a]) (pursuant to section 24D) (pursuant to section 24E) (pursuant to section 24G) (pursuant to section 24L) (pursuant to section 24N) of chapter 90 of our General Laws.

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

First: **That the defendant operated a motor vehicle;**

Second: **That at the time the defendant was operating a motor vehicle his (her) right to operate in Massachusetts had been revoked;**

Third: **That the defendant's right to operate was suspended or revoked pursuant to (a violation of section 24[1][a]) (section 24D) (section 24E) (section 24G) (section 24L) (section 24N) of chapter 90 of our General Laws; and**

Fourth: **That the defendant**

If relevant to evidence. **or an agent of the defendant, such as a household member or employer**

had received notice that his (her) right to operate in Massachusetts had been or was about to be (suspended) (revoked).

Commonwealth v. Groden, 26 Mass. App. Ct. 1024, 533 N.E.2d 1027 (1989) (statute does not violate ex post facto clause).

See Instruction 3.200 (Operation of a Motor Vehicle).

SUPPLEMENTAL INSTRUCTIONS

1. Proof of RMV-initiated suspension or revocation. **The Commonwealth is required to prove beyond a reasonable doubt that the defendant, or some agent of the defendant's such as a household member or employer, received notice from the Registrar of Motor Vehicles that the defendant's license or right to drive had been, or was about to be, suspended. The Commonwealth is not required to prove that the defendant had actual, personal knowledge of the contents of the notice.**

You may consider a properly attested copy of the official records of the Registry of Motor Vehicles as sufficient evidence that the defendant's (license) (right to operate a motor vehicle) was (suspended) (revoked). You are not required to accept it as sufficient evidence, but you may.

2. Proof of notice of suspension or revocation from RMV business record. **You may consider a properly attested copy of a business record of the Registry of Motor Vehicles as sufficient evidence that the Registrar properly notified the defendant of the (suspension) (revocation) of the defendant's right to operate a motor vehicle. You are not required to accept it as sufficient evidence, but you may.**

The judge must first determine that the record is admissible as a business record and that it does not violate the confrontation clause. See *Commonwealth v. Parenteau*, 460 Mass. 1, 948 N.E.2d 883 (2011).

See Instruction 3.840 on Admissibility of Business Records.

Upon the suspension or revocation of a license or right to operate, the Registrar is required to send written notice to the driver's last address as appearing on Registry records, or to his last and usual residence. G.L. c. 90, § 22(d).

The Commonwealth must prove receipt either of notice of actual suspension or notice of intent to suspend, *Commonwealth v. Crosscup*, 369 Mass. 228, 231 & n.2, 339 N.E.2d 731, 734 & n.2 (1975), and the defendant must be permitted to offer evidence of nonreceipt, Id., 369 Mass. at 240, 339 N.E.2d at 739. "Receipt" includes receipt by a household member, employer or other agent of the defendant; the Commonwealth is not required to prove actual personal knowledge on the defendant's part. Id., 369 Mass. at 231, 236, 239.

The Registrar's proper mailing of a letter is prima facie evidence of receipt by the addressee. Id., 369 Mass. at 239-240. See the notes to Instruction 3.260 (Prima Facie Evidence).

One who willfully evades notice may be deemed to have received constructive notice. *Commonwealth v. Hampton*, 26 Mass. App. Ct. 938, 525 N.E.2d 1341 (1988). However, see *Police Commissioner of Boston v. Robinson*, 47 Mass. App. Ct. 767, 774, 716 N.E.2d 652, 658 (1999) (fact that certified letter was unclaimed, absent evidence of awareness and ability to claim it or evidence of wilful disregard of it, does not warrant conclusion that defendant received constructive notice of license revocation).

3. Proof of court-initiated suspension or revocation. **The Commonwealth is required to prove beyond a reasonable doubt that the defendant received notice that his (her) right to operate had been (suspended) (revoked).**

You may, but are not required to, consider a properly attested copy of the official records of a court as sufficient evidence that the defendant's license was suspended, and that the Court properly notified the defendant of the (suspension) (revocation) of the defendant's right to operate a motor vehicle.

In some cases, suspension or revocation is initiated not by the Registrar but by the court or by operation of law. See, e.g., G.L. c. 90, §§ 24(1)(b) ("conviction of [O.U.I.] shall revoke the license or right to operate of the person so convicted" unless defendant is given a § 24D disposition), G.L. c. 90, § 24D (as part of a § 24D disposition, "the person's license or right to operate shall be suspended" by judge for specified duration), and G.L. c. 90, § 24N (where defendant being arraigned has breathalyzer reading of .08% or higher or has refused breath or blood testing and police failed to suspend or take license at time of stop, judge "shall immediately suspend the defendant's license or right to operate").

In such cases, notice may also be shown by "evidence demonstrating that the suspension was *communicated*" to the defendant at a court appearance. *Commonwealth v. Oyewole*, 470 Mass. 1015, 1016 (2014) (emphasis in the original). A docket entry that a defendant's license was suspended but which "does not state that the defendant was notified of the suspension" is not usfficient. *Id.*

NOTES:

1. **Operating after suspension for OUI-related offense does not require bifurcated trial.** The aggravated charge of operating after suspension or revocation because of an OUI-related offense (G.L. c. 90, § 23, ¶ 2) does not require a bifurcated trial under G.L. c. 278, § 11A (which requires a bifurcated trial when a defendant is charged with a second or subsequent offense with a more severe penalty). *Commonwealth v. Beaulieu*, 79 Mass. App. Ct. 100, 102 (2011); *Commonwealth v. Blake,* 52 Mass. App. Ct. 526, 529-30 (2001).

2. **Registrar's certificate of suspended or revoked status.** "A certificate of the registrar or his authorized agent that a license or right to operate motor vehicles . . . has not been restored or that the registrar has not issued a new license so to operate to the defendant . . . shall be admissible as evidence in any court of the commonwealth to prove the facts certified to therein, in any prosecution hereunder wherein such facts are material." G.L. c. 90, § 23, ¶ 5. However, a certification by the

registrar that an attached notice of suspension was "mailed on the date(s) appearing on the notice to the last address on file" is not admissible to prove notice as it goes beyond attesting to the authenticity of the record and is thus testimonial. *Commonwealth v. Parenteau*, 460 Mass. 1, 4, 8 (2011).

3. **RMV records require attestation.** Under G.L. c. 90, § 30, G.L. c. 233, § 76 and Mass. R. Crim. P. 40(a)(1), copies of official records of the Registry of Motor Vehicles are admissible in evidence if they are attested by the Registrar or his agent, that is, a written and signed certification that it is a true copy. A photocopy of the attestation does not satisfy this requirement. *Commonwealth v. Deramo*, 436 Mass. 40, 48 (2002) (photocopy of attestation insufficient). The attesting signature may be either holographic, stamped, or printed. See the notes to Instruction 2.540 (Subsequent Offense).

4. **Cruiser database check.** Registry notices that the defendant's license would be suspended if he did not comply with certain requirements, though possibly sufficient to prove notice, were insufficient to prove that the defendant's license was actually suspended. *Commonwealth* v. *Royal,* 89 Mass. App. Ct. 168, 173 n.7 (2016). A trooper's report that he checked the registry database, and the defendant's license came back with a status of suspended was inadmissible hearsay and could not be substitute for a properly certified registry driving history showing a suspension of a license. *Id.* at 171-73.

5. **Defendant's failure to report address change to RMV**. General Laws c. 90, § 26A(a) requires a licensed operator to notify the Registry of any change of residential or mailing address within thirty days. Query what effect a failure to do so has on the notice requirement in a prosecution under § 23. *Cf. Commonwealth v. Hampton*, 26 Mass. App. Ct. 938, 940 (in firearms prosecution where absence of license not an element of the offense, defendant herself was responsible for nonreceipt of license suspension notice by failing to report change of address as required by statute), *rev. denied*, 403 Mass. 1102 (1988).

6. **Clerk-magistrate's certificate of suspended status**. "A certificate of a clerk of court that a person's license or right to operate a motor vehicle was suspended for a specified period shall be admissible as prima facie evidence in any court of the commonwealth to prove the facts certified to therein in any prosecution commenced under this section." G.L. c. 90, § 23, ¶ 5.

7. **Public way not an element**. This offense does not require that the violation occur on a public way. *Commonwealth v. Murphy*, 409 Mass. 665, 667-68 (1991).

8. **Hardship license violation.** A defendant who operates a motor vehicle outside the hours of operation permitted by a hardship license issued after a license suspension cannot be charged with operating after suspension, G.L. c. 90, § 23, since that offense is defined as operation prior to the Registry's "issuance to him of a new license to operate." The appropriate charge is operating a motor vehicle without a license, G.L. c. 90, § 10. *Commonwealth v. Murphy*, 68 Mass. App. Ct. 152, 154-55, *rev. denied*, 449 Mass. 1102 (2007).

9. **Evidence of notice to defendant**. A business record that the suspension or revocation notice was mailed to the defendant on a given date, created by the Registry at the time the suspension or revocation notice was mailed to the defendant, is admissible at trial on the issue of the defendant's receipt of the notice. If the Registry later creates an attested record of the mailing for the purpose of trial, that record does not meet the requirements of the business records exception and is inadmissible as testimonial hearsay. G.L. c. 233, § 78; *Commonwealth v. Parenteau*, 460 Mass. 1, 5-10 (2011) (citing *Crawford v. Washington*, 541 U.S. 36, 59 (2004), *Melendez-Diaz v. Massachusetts,* 557 U.S. 305, 309-11 (2009), and *Commonwealth v. Trapp*, 396 Mass. 202, 208 (1985).

5.220 OPERATING AN UNINSURED MOTOR VEHICLE

G.L.c. 90 § 34J
2009 Edition

The defendant is charged with having operated an uninsured motor vehicle.

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

First: **That the defendant (operated a motor vehicle) (permitted someone else to operate a motor vehicle);**

Second: **That the operation took place (on a public highway) (on a private way laid out by statutory authority) (on a way dedicated to public use) (on a way under the control of park commissioners or a body with similar powers) (in a place to which the public has a right of access); and**

Third: **That the vehicle being operated was not insured at the time.**

See *Instruction 3.200* (Operation of a Motor Vehicle).

Compulsory insurance is required only "upon the ways of the commonwealth or in any place therein to which the public has a right of access." G.L. c. 90, § 34A. "Way" is defined as "any public highway, private way laid out under authority of statute, way dedicated to public use, or way under the control of park commissioners or body having like powers." G.L. c. 90, § 1.

SUPPLEMENTAL INSTRUCTION

Registry certificate of absence of record of insurance. **You may consider a properly-executed certificate from the Registry of Motor Vehicles as evidence of whether the vehicle was insured. You are not required to accept such evidence, but you may.**

The Commonwealth has the burden of proving as an element of a prosecution under G.L. c. 90, § 34J that the defendant's vehicle was uninsured, and cannot utilize G.L. c. 278, § 7 to shift this burden to the defendant. *Commonwealth v. Munoz*, 384 Mass. 503, 426 N.E.2d 1161 (1981).

The Commonwealth will normally do this with a certificate from the Registry of Motor Vehicles, which is required by G.L. c. 90, § 34I to maintain a record of all motor vehicle insurance policies. General Laws c. 90, § 34J provides that "[i]n proceedings under this section, written certification by the registrar of motor vehicles that the registry of motor vehicles has no record of a motor vehicle liability policy or bond or deposit in effect at the time of the alleged offense as required by the provisions of this chapter for the motor vehicle alleged to have been operated in violation of this section, shall be admissible as evidence in any court of the commonwealth and shall raise a rebuttable presumption that no such motor vehicle liability policy or bond or deposit was in effect for said vehicle at the time of the alleged offense. Such presumption may be rebutted and overcome by evidence that a motor vehicle liability policy or bond or deposit was in effect for such vehicle at the time of the alleged offense."

However, it is constitutionally impermissible to shift the burden of proof on any element of an offense by means of a rebuttable presumption, *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965 (1985); *Commonwealth v. Claudio*, 26 Mass. App. Ct. 218, 219-221, 525 N.E.2d 449, 450-451 (1988); *Commonwealth v. Crawford*, 18 Mass. App. Ct. 911, 912, 463 N.E.2d 1193, 1194 (1984), and therefore the model instruction accords only prima facie effect to such a certificate. See the notes to Instructions 3.240 (Presumption) and 3.260 (Prima Facie Evidence).

Since registration of motor vehicles is presently staggered at two-year intervals in Massachusetts, while compulsory insurance policies are in effect only for one year unless sooner canceled, the judge should carefully examine the contents of any certificate from Registry records before admitting it in evidence.

In cases where the authenticity of such a certificate is not disputed, jury confusion may be avoided by soliciting such a stipulation from the parties.

NOTE:

Nonresident motorist. Nonresident motorists whose vehicles are validly registered in their home state may be operated in Massachusetts without being registered here, if their state grants reciprocal privileges. Nor are they required to comply with the Commonwealth's compulsory insurance requirements unless the vehicle is operated here for more than 30 days in the aggregate in any year or the owner acquires a regular home or business here. G.L. c. 90, § 3; *Commonwealth v. Brann*, 23 Mass. App. Ct. 980, 504 N.E.2d 356 (1987).

5.240 OPERATING NEGLIGENTLY SO AS TO ENDANGER

G.L. c. 90 § 24[2][a]
2009 Edition

The defendant is charged with operating a motor vehicle negligently in a manner that might endanger the public. Section 24(2)(a) of chapter 90 of our General Laws provides as follows:

"Whoever,

upon any way

***or* in any place to which the public has a right of access,**

***or* [in] any place to which members of the public have access as invitees or licensees,**

operates a motor vehicle . . . negligently

so that the lives or safety of the public might be endangered . . . shall be punished . . . ."

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

***First:* That the defendant operated a motor vehicle;**

***Second:* That he (she) did so (on a way) (*or*) (in a place where the public has a right of access) (*or*) (in a place where members of the public have access as invitees or licensees); and**

Third: **That he (she) did so in a negligent manner so that the lives or safety of the public might have been endangered.**

At this point, the jury must be instructed on the definitions of "Operation of a Motor Vehicle" (Instruction 3.200) and "Public Way" (Instruction 3.280).

The third thing the Commonwealth must prove beyond a reasonable doubt is that the defendant drove negligently in a manner that might have endangered the lives or safety of other people.

A person acts negligently when he fails to use due care, that is, when he acts in a way that a reasonable person would not act. This can happen either by doing something that a reasonably prudent person would not do under those circumstances, or by failing to do something that a reasonably prudent person would do. The defendant acted negligently if he (she) drove in a way that a reasonable person would not have, and by doing so created an unnecessary danger to other people, a danger that he (she) could have avoided by driving more carefully.

A. If there was no accident. **A person can be found to have driven negligently even if no accident resulted, and even if there was no one else actually on the road to be put in danger. A person is negligent if he drives in a way that has the potential to cause an accident or to endanger anyone who might be on the road.**

B. If there was an accident. **The fact that an accident occurred is not by itself evidence that the defendant was negligent. You must examine all the evidence about how the accident happened in order to determine whether any negligence was involved, and if so, whether that negligence was the defendant's.**

In determining whether the defendant drove negligently in a manner that might have endangered the public, you should take into account all the facts of the situation: the defendant's rate of speed and manner of operation, the defendant's physical condition and how well he (she) could see and could control his (her) vehicle, the condition of the defendant's vehicle, what kind of a road it was and who else was on the road, what the time of day, the weather and the condition of the road were, what any other vehicles or pedestrians were doing, and any other factors that you think are relevant.

If you find that the defendant acted negligently, the defendant's intent is not relevant. You are not required to find that the defendant intended to act negligently or unlawfully. This is in that category of situations where public safety requires each driver to determine and to adhere to an objective standard of reasonable behavior. Therefore the defendant's subjective intent is irrelevant; the issue is whether or not he (she) drove as a reasonable person would have under the circumstances.

See also Instruction 3.180 (Negligence). For a supplemental instruction on violation of the law as evidence of negligence, see the supplemental instructions to Instruction 3.180. If the violation is speeding, see the supplemental instructions to Instruction 5.640 (Road Racing).

Commonwealth v. Burno, 396 Mass. 622, 624, 487 N.E.2d 1366, 1368 (1986) (potential danger to public is relevant factor for jury consideration); *Commonwealth v. Campbell*, 394 Mass. 77, 83 n.5 & 87, 474 N.E.2d 1062, 1067 n.5 & 1069 (1985) (speeding not negligence per se but can be considered with other evidence in determining negligence; victim's contributory negligence is not defense); *Commonwealth v. Jones*, 382 Mass. 387, 389-392, 416 N.E.2d 502, 504-506 (1981) (negligence to be determined by same standard as in tort law for purposes of vehicular homicide statute [G.L. c. 90, § 24G], which was taken almost verbatim from driving so as to endanger statute); *Commonwealth v. Charland*, 338 Mass. 742, 744, 157 N.E.2d 538, 539 (1959) (speed is relevant factor); *Commonwealth v. Gurney*, 261 Mass. 309, 312, 158 N.E. 832, 833 (1927) (relevant jury factors); *Commonwealth v. Vartanian*, 251 Mass. 355, 358, 146 N.E. 682, 683 (1925) (same); *Commonwealth v. Horsfall*, 213 Mass. 232, 235, 100 N.E. 362, 363 (1913) (reckless operation can occur even on deserted street); *Commonwealth v. Ferreira*, 70 Mass. App. Ct. 32, 872 N.E.2d 808 (2007) (conviction supported where defendant backed out of parking space in shopping center parking lot and then accelerated forward at about 20 m.p.h., causing the wheels to spin and the back end to fishtail, while the vehicle made a screeching noise); *Commonwealth v. Duffy*, 62 Mass. App. Ct. 921, 922 n.2, 818 N.E.2d 176, 179 n.2 (2004) (negligence to be determined by same standard as in tort law; speeding not negligence per se but can be considered with other evidence in determining negligence); *Commonwealth v. Gordon*, 15 Mass. App. Ct. 901, 443 N.E.2d 119 (1982), aff'd, 389 Mass. 351, 450 N.E.2d 572 (1983) (negligent inattention to driving plus glassy eyes and slurred speech will support conviction); *Commonwealth v. A Juvenile (No. 1)*, 383 Mass. 877, 878, 420 N.E.2d 312, 313 (1981) (offense is one for which juvenile may be transferred for trial as adult).

Prior to St. 1928, c. 281, this was a strict liability offense that did not include any requirement of negligence. That should be kept in mind when reviewing early decisions involving the former statute.

SUPPLEMENTAL INSTRUCTIONS

***1. Negligence or intoxication of other driver*.** **You have heard testimony suggesting that the driver of the other vehicle involved in this matter, *[name]* , was (negligent) (or) (intoxicated). It is up to you to decide whether or not to accept that testimony as accurate.**

If you *do* conclude that the other driver was (negligent) (or) (intoxicated), then you must determine what role that driver's (negligence) (or) (intoxication) played in this matter.

The other driver's driving is irrelevant to the defendant's guilt or innocence on this charge unless the other driver was the sole cause of what happened. The defendant is not excused merely because the other driver was (negligent) (or) (intoxicated), if the defendant's negligence was the direct cause of what happened, and the other driver's (negligence) (or) (intoxication) merely aggravated the result. On the other hand, if the other driver's (negligence) (or) (intoxication) was the sole cause of what happened and the defendant was not negligent, then the defendant must be found not guilty.

Commonwealth v. Galluzzo, 25 Mass. App. Ct. 568, 520 N.E.2d 1338 (1988) (judge must allow evidence of other driver's negligence if it would warrant a finding that the sole negligence was that of the other driver, but careful instructions are required to make clear that contributory negligence is not a defense). If additional language on supplemental and superseding causes is appropriate, the supplemental instruction to Instruction 5.160 (Homicide by a Motor Vehicle [Misdemeanor]) may be appropriately adapted.

2. Emergency situation. **In determining whether the defendant's conduct was negligent, you may consider whether there was a sudden emergency which required rapid decision. If there was, you must determine whether the defendant acted as a reasonable person would under similar emergency circumstances.**

Newman v. Redstone, 354 Mass. 379, 383, 237 N.E.2d 666, 669 (1968).

NOTE:

Victim's injuries. The alleged victim of a defendant charged with operating so as to endanger may be permitted to testify as to physical injuries sustained in the accident, since the nature and extent of such injuries are relevant to the issue of negligence. The judge must determine whether their prejudice outweighs their relevance. *Commonwealth v. Cohen,* 27 Mass. App. Ct. 1210, 1211, 545 N.E.2d 50, 51 (1989).

5.260 OPERATING RECKLESSLY

G.L. c. 90 § 24[2][a]
2009 Edition

The defendant is charged with operating a motor vehicle recklessly. Section 24(2)(a) of chapter 90 of our General Laws provides as follows:

"Whoever,

upon any way

***or* in any place to which the public has a right of access,**

***or* [in] any place to which members of the public have access as invitees or licensees,**

operates a motor vehicle recklessly . . .

shall be punished . . . ."

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

***First:* That the defendant operated a motor vehicle;**

***Second:* That he (she) did so (on a way) (or) (in a place where the public has a right of access) (or) (in a place where members of the public have access as invitees or licensees); and**

Third: **That he (she) did so in a reckless manner.**

At this point, the jury must be instructed on the definitions of "Operation of a Motor Vehicle" (Instruction 3.200) and "Public Way" (Instruction 3.280)

The third thing the Commonwealth must prove beyond a reasonable doubt is that the defendant drove recklessly. A person drives recklessly when he ignores the fact that his manner of driving is very likely to result in death or serious injury to someone, or he is indifferent to whether someone is killed or seriously injured.

It is not enough for the Commonwealth to prove that the defendant acted negligently — that is, acted in a way that a reasonably careful person would not. It must be shown that the defendant's actions went beyond mere negligence and amounted to recklessness. The defendant was reckless if he (she) knew, or should have known, that such actions would pose a grave danger of death or serious injury to others, but he (she) chose, nevertheless, to run the risk and go ahead.

A. If there was no accident. **A person can be found to have driven recklessly even if no accident resulted, and even if there was no one else actually on the road near him. A person is reckless if he consciously disregards, or is indifferent to, a significant possibility of serious injury to anyone else who might be on the road.**

If there was an accident. **The fact that an accident occurred is not by itself evidence that the defendant was reckless. You must examine all the evidence about how the accident happened in order to determine whether the defendant was at fault, and if so, whether the defendant's actions rose to the level of recklessness.**

In determining whether the defendant drove recklessly, you should take into account all the facts of the situation: the defendant's rate of speed and manner of operation, the defendant's physical condition and how well he (she) could see and could control his (her) vehicle, the condition of the defendant's vehicle, what kind of a road it was and who else was on the road, what the time of day, the weather and the condition of the road were, what any other vehicles or pedestrians were doing, and any other factors that you think are relevant.

The defendant must have intended his (her) acts, in the sense that they were not accidental. But it is not necessary that the defendant intended or foresaw the consequences of those acts, as long as a reasonable person would know that they were so dangerous that death or serious injury would probably result. This is in that category of cases where public safety requires each driver, once he knows what the situation is, to determine and to adhere to an objective standard of behavior.

"[B]y custom and usage the element of 'recklessness' has been of little or no significance in the application of the operating to endanger statute," *Commonwealth v. Jones*, 382 Mass. 387, 392, 416 N.E.2d 502, 506 (1981), because of the availability of the negligence branch of the statute, see *Commonwealth v. Guillemette*, 243 Mass. 346, 346, 137 N.E. 700, 701 (1923). See Instruction 5.240 (Operating Negligently so as to Endanger).

Commonwealth v. Catalina, 407 Mass. 779, 789, 556 N.E.2d 973, 979 (1990) (subjective awareness of reckless nature of conduct unnecessary; conduct which a reasonable person in similar circumstances would recognize as reckless suffices); *Commonwealth v. Olivo*, 369 Mass. 62, 67, 337 N.E.2d 904, 908 (1975) (recklessness depends on facts of case); *Commonwealth v. Horsfall*, 213 Mass. 232, 235, 100 N.E. 362, 363 (1913) (reckless operation can occur even on deserted street); *Commonwealth v. Welansky*, 316 Mass. 383, 397-401, 55 N.E.2d 902, 909-912 (1944) (definition of recklessness); *Commonwealth v. Sullivan*, 29 Mass. App. Ct. 93, 96, 557 N.E.2d 762, 764 (1990) (same); *Commonwealth v. Papadinis*, 23 Mass. App. Ct. 570, 574-575, 503 N.E.2d 1334, 1336 (1987), aff'd, 402 Mass. 73, 520 N.E.2d 1300 (1988) (same); Proposed Criminal Code of Massachusetts c. 263, § 16(d) (1972) (same).

5.300 OPERATING WITH A BLOOD ALCOHOL LEVEL OF .08% OR GREATER

G.L. c. 90 § 24[1]
June 2016

The defendant is charged with operating a motor vehicle while having a blood alcohol level of .08 percent or greater (and with operating a motor vehicle while under the influence of alcohol).

In order to prove the defendant guilty of operating a motor vehicle while having a blood alcohol level of .08 percent or greater, the Commonwealth must prove three things beyond a reasonable doubt:

First: **That the defendant operated a motor vehicle;**

Second: **That the defendant did so (on a public way) (or) (in a place where the public has a right of access) (or) (in a place where members of the public have access as invitees or licensees); and**

Third: **That at the time of operation, the percent of alcohol in the defendant's blood was .08 or greater.**

At this point, the jury must be instructed on the definitions of "Operation of a Motor Vehicle" (Instruction 3.200), "Public Way" (Instruction 3.280), and percentage of alcohol in the defendant's blood (which follows), unless these are stipulated. See instruction below regarding stipulations.

The third element that the Commonwealth must prove beyond a reasonable doubt is that at the time of operation the percent of alcohol in

the defendant's (breath) (blood) was .08 or greater. The law allows a defendant's blood alcohol level to be shown by a chemical test or analysis of (his) (her) breath or blood.

In deciding whether the Commonwealth has proved the defendant's blood alcohol level beyond a reasonable doubt, you may consider evidence, if any, about:

- **whether the test was administered within a reasonable time of operation;**
- **whether the person who gave the test was properly certified, and your assessment of (his) (her) credibility;**
- **the pre-test procedures that were employed;**
- **whether the testing device was in good working order at the time the test was administered;**
- **whether the test was administered properly;**
- **and any other evidence pertaining to the administration of the test.**

If there is a challenge whether the breath test was administered within a reasonable time, see Supplemental Instruction 1.

If any elements are stipulated. **Because the parties have stipulated (that the defendant was operating a motor vehicle) (and) (that the location was a public way) (that the location was one to which**

the public had a right of access) (and) (that the percent of alcohol in the defendant's blood was .08 or greater), the only element(s) the Commonwealth must prove beyond a reasonable doubt (is) (are) that the defendant ____*(elements)*____. If the Commonwealth has proved (that) (those) element(s) beyond a reasonable doubt, you should return a verdict of guilty. If it has not, you must find the defendant not guilty.

If there are no stipulations. **So there are three things that the Commonwealth must prove beyond a reasonable doubt:**

First: **That the defendant operated a motor vehicle;**

Second: **That the defendant did so (on a public way) (or) (in a place where the public has a right of access) (or) (in a place where members of the public have access as invitees or licensees); and**

Third: **That at the time (he) (she) operated the vehicle, the percent of alcohol in the defendant's blood was .08 or greater.**

If the Commonwealth has proven all three elements beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth has failed to prove one or more of these elements beyond a reasonable doubt, you must return a verdict of not guilty.

SUPPLEMENTAL INSTRUCTIONS

1. If there is an issue regarding any delay in testing. **A passage of up to three hours between testing and the time of operation may be reasonable, however the facts and circumstances of the case may suggest that a greater or lesser time period might apply. Ultimately it is up to you to decide what is reasonable.**

2. If the defendant is permitted to introduce additional test samples. **(You have heard testimony) (A document has been introduced in evidence reporting) that the defendant gave more than one breath sample, and that the results were ____*[results of each sample]*_____. By regulation, the result of the defendant's test is the lower reading. You may consider the additional sample(s) only on the issue of whether the test result was accurate.**

The Commonwealth may not introduce more than one test result. *Commonwealth v. Steele*, 455 Mass. 209, 213-14 (2009); *see* 501 C.M.R. § 2.15(2)(b).

NOTES:

1. **Statute now bifurcated.** Statute 2003, c. 28, § 1 (effective June 30, 2003) amended G.L. c. 90, § 24(1) so that it now punishes anyone who "operates a motor vehicle with a percentage, by weight, of alcohol in their blood of eight one-hundredths or greater, or while under the influence of intoxicating liquor" or specified drugs. The two alternatives comprise a single offense that may be committed in two different ways. *Commonwealth v. Colturi*, 448 Mass. 809 (2007). The "operating under the influence" alternative requires proof of operation "with a diminished *capacity* to operate safely," *Commonwealth v. Connolly*, 394 Mass. 169, 173 (1985), but not proof of any specific blood alcohol level, while the "per se" alternative requires proof of operation with a blood alcohol level of .08% or greater but not proof of diminished capacity. Consequently, evidence pertaining to impairment is not relevant to the offense of operating a motor vehicle with a blood alcohol level of .08 or greater.

2. **Model instruction.** The model instruction is based on *Colturi, supra* and *Commonwealth v. Zeininger*, 459 Mass. 775 (2011).

3. **Evidence in a per se case.** If the Commonwealth proceeds only on the per se offense, evidence about the defendant's behavior and appearance may not be relevant. The legislature has defined the crime in terms of the alcohol content of one's blood.

4. **Breath tests: challenges to particular test result**. Before the result of a breath test may be admitted, the Commonwealth must establish the existence of and compliance with the requirements of a periodic testing program for breath testing machines in accordance with G.L. c. 90, § 24K and regulations promulgated thereunder. *Commonwealth v. Barbeau*, 411 Mass. 782, 784-786 (1992). Those requirements of § 24K are met by the provision of 501 Code Mass. Regs. § 2.00 et. seq.

A breath test result is admissible only if the Commonwealth has introduced evidence that the machine was working properly. *Commonwealth v. Cochran*, 25 Mass. App. Ct. 260, 264 (1988). Beyond that minimum level, generally any delay in administering a blood alcohol test, *Commonwealth v. Marley*, 396 Mass. 433, 438-439 (1985), any weaknesses in the test operator's knowledge and skill, *Commonwealth v. Shea*, 356 Mass. 358, 361 (1969), or any procedural weaknesses in the administration of a particular test, *Commonwealth v. Malloy*, 15 Mass. App. Ct. 958 (1983); *Commonwealth v. Hazelton*, 11 Mass. App. Ct. 899, 900 (1980), are matters of weight for the jury and do not affect the admissibility of the test result.

The requirement that an arrestee "should be observed by the breath testing operator for at least 15 minutes prior to the administration of the test" (501 Code Mass. Regs. § 2.13(3)) does not require that such observation be done at the testing location or room. If the arresting officer is also the breathalyzer operator, the requirement could be satisfied by the officer's being continuously with the arrestee from the traffic stop until the test provided there is actual observation consistent with the regulation. Normally, compliance issues go to weight rather than admissibility, but if the prosecution fails to make a sufficient showing of compliance with the letter and purpose of the regulation, the test results must be suppressed. *Commonwealth v. Pierre,* 72 Mass. App. Ct. 230 (2008).

5. **Breath tests: expert testimony.** The Commonwealth may introduce a breath or blood test result to establish the level of alcohol in the defendant's blood at the time of operation without offering expert testimony to provide "retrograde extrapolation" (calculating what the defendant's blood alcohol level must have been at the time of the offense based on his or her subsequent blood alcohol level), provided the test was taken within a "reasonable time" after operation. This is usually up to three hours, although particular facts and circumstances may establish that a greater or lesser time period should be applied by the judge in his or her discretion. *Commonwealth v. Colturi,* 448 Mass. at 816-817. If expert testimony on retrograde extrapolation is proffered, it should be evaluated by the usual criteria of whether its methodology is scientifically valid, in general, and in the particular instance. *Commonwealth v. Senior*, 433 Mass. 453, 458-462 (2001); *Commonwealth v. Smith,* 35 Mass. App. Ct. 655, 662-664 (1993), *rev. denied*, 416 Masss 1111 (1994).

The defendant has the right to present a qualified expert to challenge the accuracy of the breath test result in the defendant's particular case. *Commonwealth v. Connolly*, 394 Mass. 169, 175 (1985); *Commonwealth v. Smythe*, 23 Mass. App. Ct. 348, 351-55 (1987). If there is expert testimony, see Instruction 3.640 ("Expert Witness").

6. **Section 24*O* notice.** While the requirement of G.L. c. 90, § 24*O* that defendants convicted of motor vehicle offenses should be given a written statement of the statutory provisions applicable to any subsequent violation "should be observed by the District Courts," failure to give a defendant such

notice is not a defense against a subsequent charge as a second offender. *Commonwealth v. Dowler,* 414 Mass. 212 (1993).

7. **Admissibility of breathalyzer records.** Certified copies of breathalyzer records are admissible under the business records exception to the hearsay rule. *Commonwealth v. Zeininger*, 459 Mass. 775, 781-89, *cert. denied*, 132 S. Ct. 462 (2011).

8**. Possible effect on breath test results of a required finding**. If the Commonwealth initially proceeds under both portions of the statute and the judge subsequently allows a motion for directed verdict on the per-se portion of the offense, the judge must determine whether or not to strike any breath test evidence, absent expert testimony. *See* *Commonwealth v. Colturi*, 448 Mass. 809, 817 (2007) ("if the per se and impaired ability theories of criminal liability are charged in the alternative . . . and so tried, we see no prejudice in the admission of breathalyzer test results without expert testimony . . . . If, however, the Commonwealth were to proceed only on a theory of impaired operation and offered a breathalyzer test result of .08 or greater, . . . it must present expert testimony establishing a relationship between the test results and intoxication as a foundational requirement of the admissibility of such tests" as otherwise "the jury would be left to guess at its meaning"). If the breath test results are allowed to remain in evidence, the box entitled "Limited use of a breath test result of .08 or greater" in Instruction 5.310 ("Operating Under the Influence of Intoxicating Liquor") should be incorporated at the point indicated.

5.301 SAMPLE JURY VERDICT SLIP

January 2013

COMMONWEALTH OF MASSACHUSETTS
DISTRICT COURT DEPARTMENT OF THE TRIAL COURT
_____ Division
Complaint No. _____
)
COMMONWEALTH)
)
vs.)
JURY VERDICT
)
_____)
We, the jury, unanimously return the following verdict:

OPERATING A MOTOR VEHICLE WITH A BLOOD ALCOHOL LEVEL OF .08% OR GREATER

___ **NOT GUILTY**

___ **GUILTY**

Date: _____
Signature:_____
Foreperson of the Jury

5.310 OPERATING UNDER THE INFLUENCE OF INTOXICATING LIQUOR

G.L. c. 90 § 24[1]
January 2013

The defendant is charged with operating a motor vehicle while under the influence of intoxicating liquor (in the same complaint which charges the defendant with operating a motor vehicle with a blood alcohol level of .08 percent or greater).

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

First: **That the defendant operated a motor vehicle;**

Second: **That the defendant did so (on a public way) (or) (in a place where the public has a right of access) (or) (in a place where members of the public have access as invitees or licensees); and**

Third: **That while operating the vehicle, the defendant was under the influence of intoxicating liquor.**

At this point, the jury must be instructed on the definitions of "Operation of a Motor Vehicle" (*Instruction 3.200*), "Public Way" (*Instruction 3.280*), and under the influence of intoxicating liquor (which follows), unless the defendant has stipulated to these elements. See instruction below regarding stipulations.

The third element which the Commonwealth must prove beyond a reasonable doubt is that the defendant was under the influence of intoxicating liquor while operating a motor vehicle. What does it mean to be "under the influence" of alcohol? Someone does not have to be drunk to be under the influence of alcohol. A person is under the influence of alcohol if he (she) has consumed enough alcohol to reduce his (her) ability to operate a motor vehicle safely, by decreasing his (her) alertness, judgment and ability to respond promptly. It means that a person has consumed enough alcohol to reduce his (her) mental clarity, self-control and reflexes, and thereby left him (her) with a reduced ability to drive safely.

The Commonwealth is not required to prove that the defendant actually drove in an unsafe or erratic manner, but it is required to prove that his (her) *ability* to drive safely was diminished by alcohol. The amount of alcohol necessary to do this may vary from person to person. You may rely on your experience and common sense about the effects of alcohol. You should consider any believable evidence about the defendant's alleged consumption of alcohol, as well as the defendant's appearance, condition, and behavior at the time.

Limited use of breath test result of .08 or greater. **You may also consider whether a (breath) (blood) test showed that the defendant had consumed any alcohol. However, no matter what the reading is, the (breath) (blood) test is not sufficient by itself to prove that the defendant was under the influence of alcohol.**

A result of a .08 or greater is not admissible on the issue of impairment without "expert testimony establishing a relationship between the test results and intoxication as a foundational requirement of the admissibility of such results." *Commonwealth v. Colturi*, 448 Mass. 809, 818 (2007); *Commonwealth v. Hubert*, 71 Mass. App. Ct. 661, further appellate review granted, 451 Mass. 1108 (2008). The evidence of a breath test is admissible only on the issue of whether the defendant consumed alcohol.

If the Commonwealth initially proceeds under both portions of the statute and the judge subsequently allows a motion for required finding on the per-se portion of the offense, the judge must determine whether or not to strike any breath test evidence, absent expert testimony. See *Colturi*, supra ("if the per se and impaired ability theories of criminal liability are charged in the alternative . . . and so tried, we see no prejudice in the admission of breathalyzer test results without expert testimony . . . . If, however, the Commonwealth were to proceed only on a theory of impaired operation and offered a breathalyzer test result of .08 or greater, . . . it must present expert testimony establishing a relationship between the test result and intoxication as a foundational requirement of the admissibility of such tests" since otherwise "the jury would be left to guess at its meaning"). If the breath test results are allowed to remain in evidence, the above insertion should be incorporated.

If there are stipulations **Because the parties have stipulated (that the defendant was operating a motor vehicle) (and) (that the location was a public way) (that the location was one to which the public had a right of access) (that the defendant was under the influence of intoxicating liquor), the only element(s) the Commonwealth must prove beyond a reasonable doubt is (are) that the defendant *(elements)*____. If the Commonwealth has proved (that) (those) element(s) beyond a reasonable doubt, you should return a verdict of guilty. If it has not, you must find the defendant not guilty.**

If there are no stipulations **So there are three things that the Commonwealth must prove beyond a reasonable doubt:**

First: **That the defendant operated a motor vehicle;**

Second: **That the defendant did so (on a public way) (or) (in a place where the public has a right of access) (or) (in a place where members of the public have access as invitees or licensees); and**

Third: **That while the defendant was operating the vehicle, he (she) was under the influence of intoxicating liquor.**

If the Commonwealth has proven all three elements beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth has failed to prove one or more of these elements beyond a reasonable doubt, you must return a verdict of not guilty.

SUPPLEMENTAL INSTRUCTIONS

1.If there is opinion evidence about the defendant's sobriety (optional).

You have heard testimony of (an opinion) (opinions) about the defendant's sobriety. Ultimately, it is for you as the jury to determine whether the defendant was under the influence of alcohol according to the definition I have provided. You may consider any opinion you have heard and accept it or reject it. In the end, you and you alone must decide whether the defendant was under the influence of intoxicating liquor.

2. If there is evidence of field sobriety tests (optional). **You have heard evidence in this case that the defendant performed "field sobriety tests." It is for you to decide if those tests demonstrate the defendant's ability to operate a motor vehicle safely was diminished. It is for you to determine whether to rely on this evidence. You may accept it or reject it and you may give it such weight as you think it deserves. In making your assessment, you may consider the nature of the tests, the circumstances under which they were given and performed, and all of the other evidence in this case.**

3. If there is evidence the defendant was not offered a field sobriety test.

There is evidence that there were no field sobriety tests. This is a factor you may consider in evaluating the evidence presented in this case. With respect to this factor, you should consider three questions:

First: **Whether the omitted tests were standard procedure or steps that would otherwise normally be taken under the circumstances;**

Second: **Whether the omitted tests could reasonably have been expected to lead to significant evidence of the defendant's guilt or innocence; and**

Third: **Whether the evidence provides a reasonable and adequate explanation for the omission of the tests or other actions.**

If you find that any omissions in the investigation were significant and not adequately explained, you may consider whether the omissions tend to affect the quality, reliability, or credibility of the evidence presented by the Commonwealth.

All of these considerations involve factual determinations that are entirely up to you, and you are free to give this matter whatever weight, if any, you deem appropriate based on all the circumstances.

A motorist's refusal to perform field sobriety tests when requested to do so by the police may not be admitted in evidence, since such evidence violates the privilege against self-incrimination under art. 12 of the Massachusetts Declaration of Rights. *Commonwealth v. McGrail*, 419 Mass. 774 (1995).

This supplemental instruction is available in the different situation where the police did not offer the defendant an opportunity to perform field sobriety tests, and the defense argues to the jury that this deprived the defendant of an opportunity to generate exculpatory evidence. See *Commonwealth v. Ames*, 410 Mass. 603, 609 (1991). The judge may also wish to consider leaving the matter to the parties to argue, see *Commonwealth v. Ly*, 19 Mass. App. Ct. 901, 901-902 (1984), unless an instruction is necessary to correct a suggestion that such tests are legally required. This instruction is based upon Instruction 3.740 ("Omissions in Police Investigation").

In instructing that such tests are not legally mandatory, the judge must avoid negating the defendant's right to build a defense on the grounds that available, probative testing was not performed by police. See *Commonwealth v. Gilmore*, 399 Mass. 741, 745 (1987); *Commonwealth v. Bowden*, 379 Mass. 472, 485-486 (1980); *Commonwealth v. Rodriguez*, 378 Mass. 296, 308 (1979); *Commonwealth v. Jackson*, 23 Mass. App. Ct. 975, 975-976 (1987); *Commonwealth v. Flanagan*, 20 Mass. App. Ct. 472, 475-477 & n.2 (1985).

4. If there is evidence both of alcohol and drug use. **The defendant may be found guilty of this offense if his (her) ability to operate a vehicle safely was diminished, and alcohol was one contributing cause of that diminished ability. It is not necessary that alcohol was the only or exclusive cause.**

If the defendant's ability to operate safely was diminished by alcohol, then he (she) has violated the statute even if some other factor tended to magnify the effect of the alcohol or contributed to his (her) diminished capacity to operate safely. It is not a defense that there was a second contributing cause so long as alcohol was *one* of the causes of the defendant's diminished capacity to operate safely.

If alcohol was not one of the causes of the defendant's diminished capacity to operate safely, the defendant must be found not guilty.

5. If breath test result of .05 or less is in evidence. **If the percentage of alcohol by weight in the defendant's blood was .05 percent or less, that is evidence from which you may infer that the defendant was *not* under the influence of intoxicating liquor. You are not required to reach that conclusion. You may consider the test result along with all the other evidence in the case to determine whether the Commonwealth has met its burden of proving beyond a reasonable doubt that the defendant was under the influence of intoxicating liquor.**

6. If breath test result of .06 or .07 is in evidence. **If the percentage of alcohol by weight in the defendant's blood was .06 percent or .07 percent, that is evidence which you may consider in determining whether the defendant had consumed any alcohol. However, you may not draw any inference from those results as to whether or not the defendant was under the influence of alcohol. To determine that issue, you must look to all the evidence in the case.**

> "In any prosecution for a violation of [G.L. c. 90, § 24(a)], evidence of the percentage, by weight, of alcohol in the defendant's blood at the time of the alleged offense, as shown by chemical test or analysis of his blood or as indicated by a chemical test or analysis of his breath, shall be admissible and deemed relevant to the determination of the question of whether such defendant was at such time under the influence of intoxicating liquor . . . . If such evidence is that such percentage was five one-hundredths or less, there shall be a permissible inference that such defendant was not under the influence of intoxicating liquor . . . . [;] if such evidence is that such percentage was more than five one-hundredths but less than eight one-hundredths there shall be no permissible inference." G.L. c. 90, § 24(1)(e).
>
> See Colturi, 448 Mass. at 817, as to instructing the jury on these statutory inferences.

NOTES:

1. **Statute now bifurcated.** Statute 2003, c. 28, § 1 (effective June 30, 2003) amended G.L. c. 90, § 24(1) so that it now punishes anyone who "operates a motor vehicle with a percentage, by weight, of alcohol in their blood of eight one-hundredths or greater, or while under the influence of intoxicating liquor" or specified drugs. The two alternatives comprise a single offense that may be committed in two different ways. *Commonwealth v. Colturi,* 448 Mass. 809 (2007). The "operating under the influence" alternative requires proof of operation "with a diminished *capacity* to operate safely," *Commonwealth v. Connolly,* 394 Mass. 169, 173 (1985), but not proof of any specific blood alcohol level, while the "per se" alternative requires proof of operation with a blood alcohol level of .08% or greater but not proof of diminished capacity.

2. **Model instruction.** The model instruction is based on *Colturi, supra*; *Commonwealth v. Tynes*, 400 Mass. 369, 374-375 (1987); *Connolly*, *supra*; *Commonwealth v. Bernier*, 366 Mass. 717, 720 (1975); and *Commonwealth v. Lyseth*, 250 Mass. 555 (1925).

It is correct to charge that a person need not be drunk to be under the influence of liquor, but it is error to instruct that the defendant need only be "influenced in some perceptible degree" by liquor, *Connolly, supra*, since "a conviction may rest only on proof that alcohol affected him in a *particular* way, i.e., by diminishing his capacity to drive safely" (emphasis in original). *Tynes, supra*. "[T]he Commonwealth must prove beyond a reasonable doubt that the defendant's consumption of alcohol diminished the defendant's ability to operate a motor vehicle safely. The Commonwealth need not prove that the defendant *actually drove* in an unsafe or erratic manner, but it must prove a diminished capacity to operate safely" (emphasis in original). *Connolly, supra*. A non-conforming charge is reversible error unless there is no objection and there is substantial evidence of unsafe operation. Contrast *Commonwealth v. Marley*, 396 Mass. 433 (1985) (reversible error); *Commonwealth v. Luiz,* 28 Mass. App. Ct. 973 (1990) (same); *Commonwealth v. Laurino*, 23 Mass. App. Ct. 983 (1987) (same); *Commonwealth v. Brochu*, 23 Mass. App. Ct. 937 (1986) (same), with *Commonwealth v. Bryer*, 398 Mass. 9 (1986) (harmless error); *Commonwealth v. Ranahan*, 23 Mass. App. Ct. 201 (1986) (same); *Commonwealth v. Haley*, 23 Mass. App. Ct. 10 (1986) (same); *Commonwealth v. Riley*, 22 Mass. App. Ct. 698 (1986) (same).

The model instruction appropriately uses the phrase "mental clarity, self-control, and reflexes" as examples or factors that the jury may use in determining whether the defendant's capacity to operate safely was impaired. The Commonwealth must prove such impairment beyond a reasonable doubt, but is not required to prove any of those particular three factors. *Commonwealth v. Riley,* 48 Mass. App. Ct. 463 (2000).

3. **Absence of breath test**. "Evidence that the defendant failed or refused to consent to [a blood alcohol] test shall not be admissible against him in a civil or criminal proceeding . . . ." G.L. c. 90, § 24(1)(e). Admission of such evidence would violate the privilege against self-incrimination under art. 12 of the Massachusetts Declaration of Rights. *Opinion of the Justices,* 412 Mass. 1201 (1992). The jury instruction that was formerly required by § 24(1)(e) whenever there is no evidence of blood alcohol level "tend[ed] to have the same effect as the admission of refusal evidence," and violated art. 12. *Commonwealth v. Zevitas*, 418 Mass. 677 (1994). That statutory requirement has now been repealed. See St. 2003, c. 28 (effective June 30, 2003).

Where there has been no breath test, a judge may give the instruction approved in *Commonwealth v. Downs*, 53 Mass. App. Ct. 195, 198 (2001) ("You are not to mention or consider in

anyway whatsoever, either for or against either side, that there is no evidence of a breathalyzer. Do not consider that in any way. Do not mention it. And put it completely out of your mind.”).

4. **Breath tests: statutory inferences.** In charging the jury as to the significance of blood or alcohol tests for the “under the influence” alternative, note that the third part of the former statutory inference in G.L. c. 90, § 24(1)(e) (“and if such evidence is that such percentage was eight one-hundredths or more, there shall be a permissible inference that such defendant was under the influence of intoxicating liquor”) has been deleted. Therefore, the jury may no longer be instructed in such terms. On the other hand, § 24(1)(e) continues to provide that “evidence of the percentage, by weight, of alcohol in the defendant's blood at the time of the alleged offense, as shown by chemical test or analysis of his blood or as indicated by a chemical test or analysis of his breath, shall be admissible and deemed relevant to the determination of the question of whether such defendant was at such time under the influence of intoxicating liquor.”

5. **Drugs as a contributing cause.** Supplemental Instruction 4, *supra,* is closely modeled on the language of, and the recommended instruction in, *Commonwealth v. Stathopoulos*, 401 Mass. 453, 456-457 & n.4 (1988). This situation, where both alcohol and illegal drugs are concurrent causes of the defendant’s *voluntary* intoxication, must be distinguished from that where a legally prescribed drug may have been the cause of the defendant’s *involuntary* intoxication. “[Where a defendant suffers intoxicating effects from prescription medication used as instructed . . . , if the defendant had reason to know that her use of alcohol might combine with her prescription medications to impair her mental faculties, and such a combined effect was in fact the cause of her diminished abilities, she would be deemed criminally responsible for her actions. If, on the other hand, she had no such foreknowledge, or if her mental defect existed wholly apart from any use of alcohol, the defense [of involuntary intoxication] would be available . . . . [T]he Commonwealth bears the burden of proving that the defendant’s intoxication was voluntary.” *Commonwealth v. Darch,* 54 Mass. App. Ct. 713, 715-716 (2002). See *Commonwealth v. Williams*, 19 Mass. App. Ct. 915, 916 (1984); *Commonwealth v. Wallace*, 14 Mass. App. Ct. 358 (1982); and note 4 to Instruction 5.400 (“OUI-Drugs”). No reported case has yet discussed whether the same rule applies to involuntary intoxication from licit but non-prescription drugs. If alcohol contributed to a defendant’s diminished ability to operate a motor vehicle safely, the defendant is not entitled to an instruction that she should be acquitted if she did not know of the potential effects of mixing her medication with alcohol. *Commonwealth v. Bishop*, 78 Mass. App. Ct. 70 (2010).

6. **Subsequent offenses.** See Instruction 2.540 (“Subsequent Offenses”). To be convicted of a second offense OUI, the first conviction must have preceded the date of the second offense (and not merely the date of the second conviction). *Commonwealth v. Hernandez*, 60 Mass. App. Ct. 416 (2004).

7. **Videotapes**. Videotapes are admissible if they are relevant, they provide a fair representation of what they purport to depict, and they are not otherwise barred by an exclusionary rule. A videotape of the defendant being booked in an open area of a station house does not offend the Fourth Amendment (because no “search” is involved), does not violate the Sixth Amendment (where the right to counsel has not attached at the time of arrest), and its video portion does not violate the Fifth Amendment (since the defendant’s condition and actions are not “testimonial”). With respect to the audio portion, the defendant’s responses to standard booking questions do not require a valid *Miranda* waiver to be admissible, since they do not involve “custodial interrogation,” but any answers to questions about the defendant’s drinking must be excised from the videotape unless there was a valid *Miranda* waiver. *Commonwealth v. Mahoney*, 400 Mass. 524, 526-530 (1987); *Commonwealth v. Carey*, 26 Mass. App. Ct. 339, 340-342 (1988). See *Commonwealth v. Harvey*, 397 Mass. 351, 357-

359 (1986) (videotape of protective custody); *Commonwealth v. Cameron*, 25 Mass. App. Ct. 538 (1988) (lost police videotape).

8. **§ 24*O* notice.** While the requirement of G.L. c. 90, § 24*O* that defendants convicted of motor vehicle offenses should be given a written statement of the statutory provisions applicable to any subsequent violation "should be observed by the District Courts," failure to give a defendant such notice is not a defense against a subsequent charge as a second offender. *Commonwealth v. Dowler*, 414 Mass. 212 (1993).

5.311 SAMPLE JURY VERDICT SLIP

January 2013

COMMONWEALTH OF MASSACHUSETTS
DISTRICT COURT DEPARTMENT OF THE TRIAL COURT
_____ Division
Complaint No. _____
)
COMMONWEALTH)
)
vs.)
JURY VERDICT
)
_____)
We, the jury, unanimously return the following verdict:

OPERATING A MOTOR VEHICLE UNDER THE INFLUENCE OF INTOXICATING LIQUOR

___ **NOT GUILTY**

___ **GUILTY**

Date: _____
Signature:_____
Foreperson of the Jury

5.400 OPERATING UNDER THE INFLUENCE OF DRUGS

G.L. c. 90 § 24[1]
January 2013

The defendant is charged with operating a motor vehicle while under the influence of (marihuana) (narcotic drugs) (depressants) (stimulant substances) (the vapors of glue).

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

First: **That the defendant operated a motor vehicle;**

Second: **That he (she) operated it (on a way) (or) (in a place where the public has a right of access) (or) (in a place where members of the public have access as invitees or licensees); and**

Third: **That while the defendant was operating the vehicle, he (she) was under the influence of (marihuana) (a narcotic drug, as I will define it for you in a moment) (a depressant, as I will define it for you in a moment) (a stimulant substance, as I will define it for your in a moment) (the vapors of glue).**

At this point, the jury must be instructed on the definitions of "Operation of a Motor Vehicle" (Instruction 3.200), "Public Way" (Instruction 3.280), and the relevant drug, see G.L. c. 90C, § 1 ("Marihuana," "Narcotic Drug," "Depressant or Stimulant Substance").

What does it mean to be "under the influence" of (marihuana) (narcotic drugs) (depressants) (stimulant substances) (the vapors of glue)? Someone is "under the influence" of such a drug whenever he (she) has consumed enough of it to reduce his (her) ability to operate a motor vehicle safely by diminishing (his) (her) alertness, judgment, and ability to respond promptly.

This would include anyone who has consumed enough (marihuana) (narcotic drugs) (depressants) (stimulant substances) (the vapors of glue) to reduce his (her) mental clarity, self-control and reflexes, and thereby left him (her) with a reduced ability to drive safely.

The Commonwealth is not required to prove that the defendant *actually drove* in an unsafe or erratic manner, but it must prove that the defendant had a diminished *capacity* or *ability* to drive safely.

You are to decide this from all the believable evidence in this case, together with any reasonable inferences that you draw from the evidence. You may consider evidence about the defendant's appearance, condition and behavior at the time, in order to determine whether the defendant's ability to drive safely was impaired.

So there are three things the Commonwealth must prove beyond a reasonable doubt: *First,* that the defendant operated a motor vehicle; *Second,* that he (she) operated it (on a way) (in a place where the public has a right of access) (in a place where members of the public have access as invitees or licensees); and *Third,* that he (she) operated it while under the influence of (marihuana) (narcotic drugs) (depressants) (stimulant substances) (the vapors of glue).

If there are stipulations. **The parties have stipulated that (the defendant was operating a motor vehicle) (the vehicle was [on a public way] (or) [in a place where the public has a right of access] (or) [in a place where members of the public have access as invitees or licensees]) (was under the influence of drugs). Therefore, you are to deliberate only as to whether the Commonwealth proved beyond a reasonable doubt that (the defendant was operating a motor vehicle) (the vehicle was [on a public way] (or) [in a place where the public has a right of access] (or) [in a place where members of the public have access as invitees or licensees]) (the defendant was under the influence of [marijuana] [narcotic drugs] [depressants] [stimulant substances] [the vapors of glue]). If the Commonwealth has proved (that) (those) element(s) beyond a reasonable doubt, you should return a verdict of guilty. If it has not, you must find the defendant not guilty.**

If there are no stipulations. **If any one of those three things has not been proved beyond a reasonable doubt, then you must find the defendant not guilty.**

See the citations and notes under Instruction 5.300 (OUI-Liquor or .08% Blood Alcohol).

NOTES:

1. **Proving that heroin, codeine or cocaine are narcotic drugs.** The definition of "narcotic drug" in G.L. c. 94C, § 1 includes "opium and opiate" and "coca leaves" and refers generally to their derivatives, but does not expressly list heroin, codeine or cocaine. The Commonwealth may prove that heroin or codeine are derivatives of opium, or that cocaine is a derivative of coca leaves, either: (1) by presenting expert testimony, or (2) by asking the trial judge to take judicial notice of the fact. If the Commonwealth fails to do either, the defendant must be acquitted. *Commonwealth v. Green*, 408 Mass. 48, 50, 556 N.E.2d 387, 389 (1990) (codeine); *Commonwealth v. Finegan*, 45 Mass. App. Ct. 921, 923, 699 N.E.2d 1228, 1229 (1998) (heroin). See *Commonwealth v. Thomas G. Hickey,* 48 Mass. App. Ct. 1112, 721 N.E.2d 15 (No. 98-P-2154, December 20, 1999) (unpublished opinion under Appeals Court Rule 1:28) (cocaine).

2. **Proving non-barbiturate depressants and non-amphetamine stimulants.** The definition of this offense in G.L. c. 90, § 24 prohibits operation of a vehicle "while under the influence of . . . marijuana, narcotic drugs, depressants or stimulant substances, all as defined in section one of chapter ninety-four C, or the vapors of glue." The definition of "depressant" in G.L. c. 94C, § 1 includes barbiturates as well as drugs "which contain[ ] . . . any derivative of barbituric acid which the United States Secretary of Health, Education, and Welfare has by regulation designated as habit forming." The definition of "stimulant substance" in § 1 includes amphetamines and also drugs "which contain[ ] . . .any substance which the United States Secretary of Health, Education, and Welfare has by regulation designated as habit forming because of its stimulant effect on the central nervous system or its hallucinogenic effect."

When a prosecution rests on ingestion of a non-barbiturate depressant or a non-amphetamine stimulant, the Commonwealth must prove that it contains a substance that has been so designated by the U.S. Attorney General. The Commonwealth may do this by offering expert testimony to that effect, offering the regulations in evidence, or asking the judge to take judicial notice of the regulations and to submit them to the jury. *Commonwealth v. Ferola,* 72 Mass. App. Ct. 170, 889 N.E.2d 436 (2008).

3. **Voluntary intoxication by both liquor and illegal drugs.** Where the defendant has ingested both alcohol and illegal drugs, see Supplemental Instruction 11 to Instruction 5.300 (OUI-Liquor or .08% Blood Alcohol), which is based on the recommended instruction in *Commonwealth v. Stathopoulos*, 401 Mass. 453, 456-457 & n.4, 517 N.E.2d 450, 452-453 & n.4 (1988).

This situation, where both alcohol and drugs are concurrent causes of the defendant's *voluntary* intoxication, must be distinguished from that where a legally prescribed drug may have been the cause of the defendant's *involuntary* intoxication (see note 4, *infra*). "[Where a defendant suffers intoxicating effects from prescription medication used as instructed . . . , if the defendant had reason to know that her use of alcohol might combine with her prescription medications to impair her mental faculties, and such a combined effect was in fact the cause of her diminished abilities, she would be deemed criminally responsible for her actions. If, on the other hand, she had no such foreknowledge, or if her mental defect existed wholly apart from any use of alcohol, the defense [of involuntary intoxication] would be available . . . . [T]he Commonwealth bears the burden of proving that the defendant's

intoxication was voluntary." *Commonwealth v. Darch*, 54 Mass. App. Ct. 713, 715-716, 767 N.E.2d1096, 1098-1099 (2002).

4. **Involuntary intoxication by legal medication**. The OUI statute punishes only "the voluntary consumption of alcohol or drugs whose consequences are known or should be known to the user," although "[i]n the case of alcohol . . . the effects of liquor upon the mind and actions . . . are well known to everybody . . . The same assumption applies where there is a voluntary consumption (usually illicit) of statutorily defined drugs obtained other than through a physician's prescription." *Commonwealth v. Wallace*, 14 Mass. App. Ct. 358, 360-361 & n.7, 439 N.E.2d 848, 850-851 & n.7 (1982).

A defendant is entitled to be acquitted if his or her intoxication was caused by involuntary intoxication by licit prescription medication. This requires that the defendant had not received warnings as to its use, had no reason to anticipate the intoxicating effects of the medication, and had no reason to inquire of his or her physician concerning the possible effects of the medication. *Id.*, 14 Mass. App. Ct. at 365 & n.15, 439 N.E.2d at 852-853 & n.15. Evidence of voluntary consumption of licit drugs should be admitted only after it is established on voir dire that the medication could in fact have so affected the vehicle's operation and that the *Wallace* standards are satisfied. *Commonwealth v. Williams*, 19 Mass. App. Ct. 915, 916, 471 N.E.2d 394, 395 (1984). It is not clear whether the same rule applies to licit but non-prescription drugs; the *Williams* case does not indicate whether prescription medicine was involved and there have been no subsequent decisions involving non-prescription drugs.

Dispensing pharmacists are required to label prescription medications with any directions for use or cautions contained in the prescription or in the current United States Pharmacopeia or other accepted authoritative source. G.L. c. 94C, § 21; 247 Code Mass. Regs. § 7.00(20).

5.500 OPERATING UNDER THE INFLUENCE CAUSING SERIOUS INJURY

G.L. c. 90 § 24L
2009 Edition

I. FELONY BRANCH

The defendant is charged with causing serious bodily injury by operating a motor vehicle under the influence of (intoxicating liquor) (marihuana) (narcotic drugs) (depressants) (stimulant substances) (the vapors of glue) and by operating it (recklessly) (negligently so that the lives or safety of the public might be endangered). Section 24L(1) of chapter 90 of our General Laws provides as follows:

"Whoever,

upon any way

***or* in any place to which the public has a right of access,**

***or* upon any way or in any place to which members of the public have access as invitees or licensees,**

operates a motor vehicle while under the influence of

(intoxicating liquor) (marihuana) (narcotic drugs) (certain depressants) (certain stimulant substances) (the vapors of glue) . . .

***and* so operates a motor vehicle (recklessly) (negligently so that the lives or safety of the public might be endangered),**

and **by . . . such operation . . . causes serious bodily injury, shall be punished . . . .”**

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

First: **That the defendant operated a motor vehicle;**

Second: **That he (she) operated it (on a way) (or) (in a place where the public has a right of access) (or) (in a place where members of the public have access as invitees or licensees);**

Third: **That while the defendant was operating the vehicle, he (she) was under the influence of (intoxicating liquor) (marihuana) (a narcotic drug, as defined in our statute) (a depressant, as defined in our statute) (a stimulant substance, as defined in our statute) (the vapors of glue);**

Fourth:

Based on the complaint, use only one of the following, unless they are charged in the alternative:

A. Reckless operation. **That the defendant operated the vehicle in a manner which is considered “reckless” under the laws of our Commonwealth;**

B. Negligent operation. **That the defendant operated the vehicle in a negligent manner so that the lives and safety of the public might have been endangered;**

and *Fifth:* That the defendant's actions caused serious bodily injury to someone.

At this point, the jury must be instructed on the definitions of "Operation of a Motor Vehicle" (Instruction 3.200) and "Public Way" (Instruction 3.280).

The third thing the Commonwealth must prove is that when the defendant was operating his (her) vehicle, he (she) was under the influence of (intoxicating liquor) (marihuana) (narcotic drugs) (depressants) (stimulant substances) (the vapors of glue).

If applicable, the jury must be instructed at this point on the definition of "Marihuana," "Narcotic Drug," or "Depressant or Stimulant Substance" from G.L. c. ~~90C~~[94C], § 1.

If the evidence suggests that the defendant was under the influence of drugs rather than alcohol, the following four paragraphs should be replaced with the equivalent paragraphs from *Instruction 5.400* (OUI-Drugs).

What does it mean to be "under the influence" of alcohol? A person does not have to be drunk or unconscious to be "under the influence" of alcohol. Someone is "under the influence" whenever he has consumed enough alcohol to reduce his ability to operate a motor vehicle safely.

The purpose of the statute is to protect the public from any driver whose alertness, judgment and ability to respond promptly have been lessened by alcohol. This would include someone who is drunk, but it would also include anyone who has consumed enough alcohol to reduce his mental clarity, self-control and reflexes, and thereby left him with a reduced ability to drive safely. The amount of alcohol necessary to do this may vary from person to person.

The Commonwealth is not required to prove that the defendant *actually drove* in an unsafe or erratic manner, but it must prove that the defendant had a diminished *capacity* or *ability* to drive safely.

You are to decide this from all the believable evidence in this case, together with any reasonable inferences that you draw from the evidence. You may rely on your experience and common sense about the effects of alcohol. You should evaluate all the believable evidence about the defendant's appearance, condition and behavior at the time, in order to determine whether the defendant's ability to drive safely was diminished by alcohol.

Here the jury must be instructed either on "Operating Negligently so as to Endanger" (Instruction 5.240) or "Operating Recklessly" (Instruction 5.260).

The fifth and final thing which the Commonwealth must prove is that the defendant's actions were the cause of serious bodily injury to someone, that is, they directly and substantially set in motion a chain of events that produced the serious injury in natural and continuous sequence. A bodily injury is "serious" if it had any one of the following four characteristics: (1) it created a substantial risk of death; (2) it involved total disability; (3) it involved the loss of any bodily function for a substantial period of time; or (4) it involved substantial impairment of any bodily function for a substantial period of time.

SUPPLEMENTAL INSTRUCTION

Possible verdicts involving lesser included offenses. **There are four possible verdicts that you may render in this case. Depending on your evaluation of what has been proved, you will find the defendant either guilty as charged, or not guilty, or guilty only of one or the other of two lesser included offenses.**

If the Commonwealth has proved all five elements of this offense to you beyond a reasonable doubt, you should return a verdict that the defendant is guilty of the offense as charged.

If the Commonwealth has failed to prove that the defendant drove (recklessly) (negligently so that the lives and safety of the public might have been endangered), but has proved the other four elements beyond a reasonable doubt — that the defendant operated a motor vehicle (on a public way) (***[substitute for public way]*** **) while under the influence of (intoxicating liquor) (marihuana) (narcotic drugs) (depressants) (stimulant substances) (the vapors of glue), and thereby caused someone serious bodily injury — then you should return a verdict that the defendant is guilty of that lesser offense, as indicated on the verdict slip.**

The third possibility is that the Commonwealth has not proved that the defendant caused serious bodily injury to anyone, but has proved beyond a reasonable doubt that the defendant operated a motor vehicle (on a public way) (*[substitute for public way]*) while under the influence of (intoxicating liquor) (marihuana) (narcotic drugs) (depressants) (stimulant substances) (the vapors of glue). In that case, you should return a verdict that the defendant is guilty of the lesser offense of operating a motor vehicle under the influence of (intoxicating liquor) (marihuana) (narcotic drugs) (depressants) (stimulant substances) (the vapors of glue).

Finally, if the Commonwealth has not proved at least three things beyond a reasonable doubt — that the defendant operated a motor vehicle (on a public way) (*[substitute for public way]*) while under the influence of (intoxicating liquor) (marihuana) (narcotic drugs) (depressants) (stimulant substances) (the vapors of glue) — then you must find the defendant not guilty.

Where both lesser included offenses are instructed on, see the appendix to this instruction for a sample jury verdict slip.
See the supplemental instructions, citations and notes under Instruction 5.300 (OUI-Liquor or .08% Blood Alcohol).

II. MISDEMEANOR BRANCH

The defendant is charged with causing serious bodily injury by operating a motor vehicle under the influence of (intoxicating liquor) (marihuana) (narcotic drugs) (depressants) (stimulant substances) (the vapors of glue). Section 24L(2) of chapter 90 of our General Laws provides as follows:

"Whoever,

upon any way

or in any place to which the public has a right of access,

or upon any way or in any place to which members of the public have access as invitees or licensees,

operates a motor vehicle

while under the influence of (intoxicating liquor) (marihuana) (narcotic drugs) (certain depressants) (certain stimulant substances) (the vapors of glue) . . .

***and* by . . . such operation . . . causes serious bodily injury,**

shall be punished . . . ."

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

***First:* That the defendant operated a motor vehicle;**

Second: **That he (she) operated it (on a way) (or) (in a place where the public has a right of access) (or) (in a place where members of the public have access as invitees or licensees);**

Third: **That while the defendant was operating the vehicle, he (she) was under the influence of (intoxicating liquor) (marihuana) (a narcotic drug, as defined in our statute) (a depressant, as defined in our statute) (a stimulant substance, as defined in our statute) (the vapors of glue);**

and *Fourth:* That the defendant's actions caused serious bodily injury to someone.

At this point, the jury must be instructed on the definitions of "Operation of a Motor Vehicle" (Instruction 3.200) and "Public Way" (Instruction 3.280).

The third thing the Commonwealth must prove is that when the defendant was operating his (her) vehicle, he (she) was under the influence of (intoxicating liquor) (marihuana) (narcotic drugs) (depressants) (stimulant substances) (the vapors of glue).

If applicable, the jury must be instructed at this point on the definition of "Marihuana," "Narcotic Drug," or "Depressant or Stimulant Substance" from G.L. c. ~~90C~~94C, § 1.
If the evidence suggests that the defendant was under the influence of alcohol, here insert the four paragraphs starting with "What does it mean . . ." on pp. 3-4, supra. If the evidence suggests that the defendant was under the influence of drugs, here insert the equivalent paragraphs from Instruction 5.400 (OUI-Drugs).

The fourth and final thing which the Commonwealth must prove is that the defendant's actions were the cause of serious bodily injury to someone, that is, they directly and substantially set in motion a chain of events that produced the serious injury in natural and continuous sequence. A bodily injury is "serious" if it had any one of the following four characteristics: (1) it created a substantial risk of death; (2) it involved total disability; (3) it involved the loss of any bodily function for a substantial period of time; or (4) it involved substantial impairment of any bodily function for a substantial period of time.

See the supplemental instructions, citations and notes under *Instruction 5.300* (OUI-Liquor or .08% Blood Alcohol).

5.501 SAMPLE JURY VERDICT FORM

January 2013

COMMONWEALTH OF MASSACHUSETTS
DISTRICT COURT DEPARTMENT OF THE TRIAL COURT
_____ Division
Complaint No. _____
)
COMMONWEALTH)
)
vs.)
)
_____)

JURY VERDICT

We, the jury, unanimously return the following verdict:
(Check only one of the following four choices:)

___ 1. We find the defendant **NOT GUILTY** of the offense charged or any lesser included offense.

___ 2. We find the defendant **GUILTY** as charged, of the offense of operating a motor vehicle on a way, or in a place to which the public has a right of access, or on a way or in a place to which members of the public have access as invitees or licensees, while under the influence of *[tailor to complaint]* , and so operating a motor vehicle *[tailor to complaint]* , and by such operation causing serious bodily injury to a person. *General Laws chapter 90, section 24L(1).*

___ 3. We find the defendant **GUILTY** only of the lesser included offense of operating a motor vehicle on a way, or in a place to which the public has a right of access, or on a way or in a place to which members of the public have access as invitees or licensees, while under the influence of *[tailor to complaint]* and by such operation causing serious bodily injury to a person. *General Laws chapter 90, section 24L(2).*

___ 4. We find the defendant **GUILTY** only of the lesser included offense of operating a motor vehicle on a way, or in a place to which the public has a right of access, or on a way or in a place to which members of the public have access as invitees or licensees, while under the influence of *[tailor to complaint]* . *General Laws chapter 90, section 24(1).*

Date: _____
Signature:_____
Foreperson of the Jury

5.520 FAILURE TO HAVE IGNITION INTERLOCK DEVICE

G.L. c. 90, § 24S(a)
Issued May 2014

The defendant is charged with failing to have an ignition interlock device.

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

First: **That the defendant operated a motor vehicle;**

Second: **That (he) (she) did so on a (public way) (place to which members of the public have access as invitees or licensees);**

Third**: That the motor vehicle driven by the defendant was not equipped with a certified functioning ignition interlock device; and**

Fourth: **That (his) (her) license to operate was restricted to operating only vehicles with such a device.**

At this point, the jury must be instructed on the definitions of "Operation of a Motor Vehicle" (Instruction 3.200) and "Public Way" (Instruction 3.280).

The term "certified ignition interlock device" means an alcohol breath screening device that prevents a vehicle from starting if it detects a blood alcohol concentration over a preset limit of .02 or 20 mg of alcohol per 100 ml of blood.

NOTES:

1. **Statute is not violated if defendant's license has been revoked.** "[A] license simply cannot be both restricted and revoked at the same time." *Commonwealth v. Pettit*, 83 Mass. App. Ct. 401, 404 (2013).

2. **Statutory definition of "certified ignition interlock device."** A "certified ignition interlock device" shall mean "an alcohol breath screening device that prevents a vehicle from starting if it detects a blood alcohol concentration over a preset limit of .02 or 20 mg of alcohol per 100 ml of blood." G.L. c. 90, § 24S(b).

3. Certification of ignition interlock devices is entrusted to the Registrar of Motor Vehicles, who publishes a list of certified types of devices. 540 C.M.R. § 25.05.

5.530 DISABLING AN IGNITION INTERLOCK DEVICE

G.L. c. 90, § 24T(a)
Issued May 2014

The defendant is charged with (interfering with) (tampering with) an ignition interlock device.

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

First: **That a vehicle was equipped with an ignition interlock device;**

Second: **That the device was certified;**

Third**: That the defendant intentionally (interfered with) (tampered with) the device; and**

Fourth: **That the defendant did so with the intent to disable the device.**

The term "certified ignition interlock device" means an alcohol breath screening device that prevents a vehicle from starting if it detects a blood alcohol concentration over a preset limit of .02 or 20 mg of alcohol per 100 ml of blood.

See Instruction 3.120 (Specific Intent).

NOTES:

1. **Statutory definition of "certified ignition interlock device."** A "certified ignition interlock device" shall mean "an alcohol breath screening device that prevents a vehicle from starting if it detects a blood alcohol concentration over a preset limit of .02 or 20 mg of alcohol per 100 ml of blood." G.L. c. 90, § 24T(b).

2. Certification of ignition interlock devices is entrusted to the Registrar of Motor Vehicles, who publishes a list of certified types of devices. 540 C.M.R. § 25.05r.

5.600 OPERATING WITHOUT BEING LICENSED

(G.L. c.90 § 10)
2009 Edition

The defendant is charged with operating a motor vehicle without being licensed to do so. Section 10 of chapter 90 of our General Laws provides as follows:

"No person . . . shall operate a motor vehicle upon any way . . . . unless licensed by the registrar [of motor vehicles] [with certain exceptions that are not relevant here]."

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

***First:* That the defendant operated a motor vehicle;**

***Second:* That the defendant did so on a way; and**

***Third:* That the defendant did so without having a valid license to operate a motor vehicle, issued by the Registrar of Motor Vehicles.**

At this point, the jury must be instructed on the definition of "Operation of a Motor Vehicle" (Instruction 3.200) and the definition of "way" in G.L. c. 90, § 1, which may be excerpted from Instruction 3.280.

Watson v. Forbes, 307 Mass. 383, 384-385, 30 N.E.2d 228, 229 (1940) (not a defense that defendant was never notified of expiration of license); *Santa Maria v. Trotto*, 297 Mass. 442, 446, 9 N.E.2d 540, 543 (1937) (license is required only for operation on "way"); *Commonwealth v. Magarosian*, 261 Mass. 228, 158 N.E. 771 (1927) (defendant licensed to operate one category of vehicle is unlicensed with respect to other categories of vehicles).

NOTES:

1. **Burden of proof as to unlicensed status**. In a prosecution for operating an uninsured auto (G.L. c. 90, § 34J), the Commonwealth has the burden of proving that the defendant's vehicle is uninsured, and cannot utilize G.L. c. 278, § 7 to shift this burden to the defendant, since lack of "insurance is an element of the crime charged, not a mere license or authority [and] cannot be viewed as an affirmative defense . . ." *Commonwealth v. Munoz*, 384 Mass. 503, 507, 426 N.E.2d 1161, 1163

(1981). It appears that the same rationale would apply to the issue of license in a prosecution under G.L. c. 90, § 10.

The Commonwealth will normally prove the defendant's unlicensed status by means of a certificate from the Registry of Motor Vehicles. See G.L. c. 90, § 30; G.L. c. 233, § 76.

2. **Not a civil motor vehicle infraction**. Operating without being licensed (G.L. c. 90, § 10) is a criminal offense and not a civil motor vehicle infraction. G.L. c. 90C, § 3(A), par. 1.

3. **Statutory exceptions.** General Laws c. 90, § 10 contains seven exceptions to the requirement of a Massachusetts license: (1) a person who is licensed in another state or country, has applied for a Massachusetts license but has not yet been given a driver's test, and has been issued a 60-day temporary permit by the Registry of Motor Vehicles; (2) a person who possesses a valid Massachusetts learner's permit; (3) a person who is licensed in another state and who is accompanying a spouse who is a member of the armed forces on assignment to Massachusetts; (4) a member of the armed forces on active duty who has a license issued by the state of his or her domicile; (5) a member of the armed forces within 45 days of returning from active duty outside the United States who has a license issued by the armed forces in a foreign country; (6) a nonresident who is licensed in the state or country where the vehicle is registered, but for not more than 30 days in the aggregate annually or beyond 30 days after acquiring a regular abode or place of business within Massachusetts unless Massachusetts liability insurance requirements are met; and (7) a nonresident who is licensed in the state or country of his or her domicile, if it grants reciprocal privileges to Massachusetts residents, but for not more than 30 days in the aggregate annually or beyond 30 days after acquiring a regular abode or place of business within Massachusetts unless Massachusetts liability insurance requirements are met.

5.620 REFUSAL TO OBEY POLICE OFFICER

G.L. c. 90 § 25
2009 Edition

The defendant is charged with the offense that is commonly referred to as refusing to obey a police officer. Section 25 of chapter 90 of our General Laws provides as follows:

"Any person who, while operating or in charge of a motor vehicle, (shall refuse, when requested by a police officer, to give his name and address or the name and address of the owner of such motor vehicle, or who shall give a false name or address,)

(or) (. . . shall refuse or neglect to stop when signaled to stop by any police officer who is in uniform or who displays his badge conspicuously on the outside of his outer coat or garment,)

(or) (. . . refuses, on demand of [any police] officer [who is in uniform or who displays his badge conspicuously on the outside of his outer coat or garment], to produce his license to operate such vehicle or his certificate of registration . . .)

(or) (. . . refuses, on demand of [any police] officer [who is in uniform or who displays his badge conspicuously on the outside of his outer coat or garment], to sign his name in the presence of such officer . . .) shall be punished . . . ."

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

First: **That the defendant was operating or in charge of a motor vehicle;**

Second: **That the police officer was either in uniform or had his (her) badge conspicuously displayed on the outside of his clothing;**

Third: **That the defendant (refused to give his [her] name and address to the officer upon request) (refused to give the name and address of the owner of the motor vehicle to the officer upon request) (gave the officer a false name and address) (refused or neglected to stop when signaled to do so by the officer) (refused to produce his [her] license and registration upon the officer's request) (refused to sign his [her] name in the presence of the officer); and**

Fourth: **That the defendant realized that the police officer had made such a command, and the defendant intentionally disobeyed it.**

Commonwealth v. Schiller, 377 Mass. 10, 12, 384 N.E.2d 624, 626 (1979) (statute applies only to person in active control of a vehicle, either in it or in physical proximity to it); *Commonwealth v. Materia*, 350 Mass. 785, 785, 218 N.E.2d 122, 123 (1966); *Commonwealth v. Sullivan*, 311 Mass. 177, 178, 40 N.E.2d 261, 262 (1942) (badge requirement is to inform driver that person making demand has authority to do so). For the definition of "police officer," see G.L. c. 90, § 1; for a definition of "operation of a motor vehicle," see Instruction 3.200. A violation of G.L. c. 90, § 25 is a criminal offense and not a civil motor vehicle infraction. See G.L. c. 90C, § 3(A), first par.

Despite the statute's literal requirement that the police officer either be in uniform or "display[] his badge conspicuously on the outside of his outer coat or garment," it is sufficient if in some other manner "the defendant was effectively notified that he was being told to stop by a police officer." *Commonwealth v. Gray*, 423 Mass. 293, 295, 667 N.E.2d 1125 (1996) (sufficient for officer in unmarked cruiser pulling alongside motorist to flash strobe lights and hold up badge); *Commonwealth v. Ross*, 73 Mass. App. Ct. 181, — N.E.2d — (2008) (where motorist was attempting to hit unmarked cruiser pulling alongside, sufficient for officer to use siren, blue lights and strobe lights and shout "pull over," without displaying badge).

The statute also penalizes anyone who refuses “to permit such officer to take the license or certificate in hand for the purpose of examination,” anyone who without reasonable excuse fails to surrender his license, registration or number plate on demand, and anyone who “refuses or neglects to produce his license when requested by a court . . . .” The model instruction may be appropriately adapted for such situations.

5.640 ROAD RACING

G.L. c. 90 § 24[2][a]
2009 Edition

The defendant is charged with (operating a motor vehicle on a bet or wager or in a race) (speeding to set a record). Section 24(2)(a) of chapter 90 of our General Laws provides as follows:

“Whoever

upon any way

***or* in any place to which the public has a right of access,**

***or* [in] any place to which members of the public have access as invitees or licensees,**

operates a motor vehicle . . .

(upon a bet or wager or in a race)
(or) . . .

(for the purpose of making a record and thereby violates [the speeding laws]) . . .

shall be punished . . . .”

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

First: **That the defendant operated a motor vehicle;**

Second: **That he (she) did so (on a way) (or) (in a place where the public has a right of access) (or) (in a place where members of the public have access as invitees or licensees); and**

Third: **That the defendant (did so upon a bet or wager or in a race) (violated the speeding laws for the purpose of making a record).**

See Instructions 3.200 (Operation of a Motor Vehicle) and 3.280 (Public Way).

SUPPLEMENTAL INSTRUCTIONS

1. "Race." **A motor vehicle race is a competition between the drivers of two or more vehicles to excel in the rate of acceleration or in the speed of their respective vehicles. Direct evidence of an agreement to race is not required if the circumstances support an inference that the defendant entered into an agreement, either express or implied, to engage in a race.**

Nelson v. Nelson, 343 Mass. 220, 222, 177 N.E.2d 887, 888 (1961).

2. "Violated the speeding laws". **It is a violation of the speeding laws to operate a motor vehicle at a rate of speed that is faster than is reasonable and proper at that particular place and time, considering the traffic conditions at the time, the use to which that particular road was put at that particular time and at other times, and the safety of the public at all times. In determining this, you may consider such specifics as the time of day, the weather conditions, the volume of traffic, the length and width of the street, what sort of road it is, the type of neighborhood, the number of pedestrians, and any other factors which you believe are relevant to the reasonableness of a driver's speed.**

To aid you in that determination, our law provides that if a driver operates faster than the speed limit posted for that stretch of road, you may consider that as evidence that the driver was operating faster than is reasonable and proper.

If no speed limit was posted, it is evidence that the driver was operating faster than is reasonable and proper if the driver operated more than

(30 miles per hour for 1/8 of a mile in a thickly-settled or business district)

(50 miles per hour for 1/4 of a mile on a divided highway outside a thickly-settled or business district)

(40 miles per hour for 1/4 of a mile on any road outside a thickly-settled or business district, other than a divided highway)

(20 miles per hour within a school district established under regulations of the Department of Public Works).

See *Instruction 3.260* (Prima Facie Evidence).
G.L. c. 90, § 17; Conrad v. Mazman, 287 Mass. 229, 234-235, 191 N.E. 765, 767 (1934) (error to instruct on prima facie factors without supporting evidence); Commonwealth v. Bosworth, 257 Mass. 212, 218, 153 N.E. 455, 456 (1926) (statutory factors include actual traffic at time, potential as well as actual road use, and safety of public at all times).

3. "Making a record". **The word "record" here has its ordinary meaning; that is, the best performance, surpassing all others involved in that event.**

NOTE:

Separate offense of drag racing. General Laws c. 90, § 17B defines a separate offense of operating, or permitting operation of, a motor vehicle "in a manner where the owner or operator accelerates at a high rate of speed in competition with another operator, whether or not there is an agreement to race, causing increased noise from skidding tires and amplified noise from racing engines." A violation of § 17B is a criminal offense for a licensed operator (¶ 1), but a civil motor vehicle infraction for a holder of a junior operator's license or learner's permit (¶ 2).

5.660 USE OF VEHICLE WITHOUT AUTHORITY

G.L. c. 90 § 24[2][a]
2009 Edition

The defendant is charged with knowingly using a motor vehicle without authority. Section 24(2)(a) of chapter 90 of our General Laws provides that ". . . whoever uses a motor vehicle without authority knowing that such use is unauthorized . . ." shall be punished.

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

First: **That the defendant used a motor vehicle;**

Second: **That at the time he (she) used that motor vehicle, he (she) did so without the permission of the owner, or the permission of some other person who possessed the legal right of control ordinarily exercised by the owner; and**

Third: **That at the time he (she) used the motor vehicle, the defendant *knew* that he (she) was not authorized to use that vehicle.**

A person "uses" a motor vehicle within the meaning of the law if he rides in it, either as the driver or as a passenger. It is not necessary that the defendant personally drove or controlled the vehicle, only that he (she) rode in it while it moved.

The Commonwealth may prove that the defendant was not authorized to use the vehicle either by testimony from the owner or other person in charge of the vehicle, or through inferences that you are reasonably able to draw from all the circumstances.

Finally, the defendant must have *known* that his (her) use of the motor vehicle was unauthorized. If it has been proved that the defendant was a passenger in the vehicle, that fact alone does not establish that he (she) *knew* that he (she) was not authorized to use it. You should consider all of the circumstances, and any reasonable inferences which you can draw from the evidence, in determining whether the defendant had actual knowledge that his (her) use of the vehicle was unauthorized. If the defendant did *not* know that his (her) use was unauthorized, you must find him (her) not guilty.

NOTES:

1. **Knowledge.** Mere presence is not enough to support an inference of guilty knowledge, and therefore the owner's testimony that he had not authorized use of the vehicle is not enough, without more, to convict a defendant-passenger of knowledge that the use was unauthorized. *Commonwealth v. Boone,* 356 Mass. 85, 87, 248 N.E.2d 279, 280 (1969); *Commonwealth v. Conway,* 2 Mass. App. Ct. 547, 554, 316 N.E.2d 757, 761-762 (1974). Mere presence plus consciousness-of-guilt evidence is similarly insufficient. *Commonwealth v. Butler,* 7 Mass. App. Ct. 918, 389 N.E.2d 431 (1979); *Commonwealth v. Johnson,* 6 Mass. App. Ct. 956, 383 N.E.2d 541 (1978). However, presence coupled with other incriminating evidence can be sufficient to permit an inference of knowledge. *Id.; Commonwealth v. Porter,* 15 Mass. App. Ct. 331, 445 N.E.2d 631 (1983) (inference of knowledge from unexplained, or incredible explanation of, possession of recently stolen vehicle).

2. **Lack of authority**. Authorization apparently may be given either by the owner or "by one who in law possesses the right of control ordinarily vested in the owner." *Commonwealth v. Coleman,* 252 Mass. 241, 243, 147 N.E. 552, 553 (1925). See *Commonwealth v. Campbell,* 352 Mass. 387, 402, 226 N.E.2d 211, 221 (1967). The owner or controller's testimony is not always essential; lack of authority can be inferred from circumstantial evidence (e.g. of stealth). See *Commonwealth v. Patti,* 10 Mass. App. Ct. 857, 857-858, 407 N.E.2d 1301, 1301-1302 (1980).

3. **Larceny of motor vehicle as lesser included offense**. Use of a motor vehicle without authority is a lesser included offense of larceny of a motor vehicle (G.L. c. 266, § 28), without the element of intending to deprive the owner of possession permanently. *Commonwealth v. Giannino,* 371

Mass. 700, 703, 358 N.E.2d 1008, 1010 (1977); *Commonwealth v. Linder,* 17 Mass. App. Ct. 967, 967, 458 N.E.2d 744, 745 (1983).

4. **Public way**. "Public way" is not an element of the crime of use of a motor vehicle without authority. *Commonwealth v. Morris M.*, 70 Mass. App. Ct. 688, 876 N.E. 2d 462, 488 (2007) (rejecting dictum in *Commonwealth* v. *Giannino,* 371 Mass. at 702, suggesting that "in a public way" is a fourth element of offense).

5. **Use**. The statutory term "use" includes use as a passenger. *Coleman, supra.* However, "use" requires some movement of the vehicle; merely sitting on the passenger side of a stationary motor vehicle in a parking lot is insufficient. *Linder, supra.*

6. **Not lesser included offense of receiving stolen motor vehicle.** Use without authority is not a lesser included offense of the crime of receiving a stolen motor vehicle. *Commonwealth v. Bynoe*, 49 Mass. App. Ct. 687, 691, 732 N.E.2d 340, 344 (2000). Consequently, an acquittal on the latter would not bar a prosecution on the former. *Id.*

5.700 OPERATING A BOAT WITH A BLOOD ALCOHOL LEVEL OF .08% OR GREATER

G.L. c. 90B, § 8(a)(1), May 2017

The defendant is charged with operating a (boat) (vessel) while having a blood alcohol level of .08 percent or greater (and with operating a (boat) (vessel) while under the influence of alcohol).

In order to prove the defendant guilty of operating a (boat) (vessel) while having a blood alcohol level of .08 percent or greater, the Commonwealth must prove three things beyond a reasonable doubt:

First: **That the defendant operated a (boat) (vessel);**

Second: **That the (boat) (vessel) was operated on the waters of the Commonwealth; and**

Third: **That at the time of operation, the percent of alcohol in the defendant's blood was .08 or greater.**

To prove the first element, the Commonwealth must prove the defendant operated a (boat)(vessel). A person operates a (boat)(vessel) when he (she) navigates, pilots, drives or otherwise controls the movement of it.

(The statutory definition for operation in 90B, § 1, is to "navigate or otherwise use a motorboat or vessel.")

If necessary, instruct on whichever definition below applies:

<u>Boat</u>

A boat, also referred to as a motorboat, is a watercraft propelled by machinery, whether or not such machinery is the principal source of propulsion.

G.L. c. 90B, § 1

Vessel

A vessel is a craft for traveling on water. It includes watercraft of every description, (except a seaplane) used or capable of being used as a means of transportation on the water. Ships, boats, and jet skis are examples of vessels.

G.L. c. 90B, § 1

Instruct on whichever definition below applies if necessary:

Inland Waters

The waters of the Commonwealth include all inland waters except ponds that are less than ten acres in area, owned by one person, and not open to the public.

Coastal Waters

The waters of the Commonwealth include all coastal waters within the rise and fall of the tide *and* the marine limits of the jurisdiction of the Commonwealth.

G.L. c. 90B, § 1

The third element that the Commonwealth must prove beyond a reasonable doubt is that at the time of operation the percent of alcohol in the defendant's (breath) (blood) was .08 or greater. The law allows a defendant's blood alcohol level to be shown by a chemical test or analysis of (his) (her) breath or blood.

In deciding whether the Commonwealth has proved the defendant's blood alcohol level beyond a reasonable doubt, you may consider evidence, if any, about:

- **whether the test was administered within a reasonable time of operation;**
- **whether the person who gave the test was properly certified, and your assessment of (his) (her) credibility;**
- **the pre-test procedures that were employed;**
- **whether the testing device was in good working order at the time the test was administered;**
- **whether the test was administered properly;**
- **and any other evidencepertaining to the pertaining to the administration of the test.**

If there is a challenge whether the breath test was administered within a reasonable time, see Supplemental Instruction.

<u>If any elements are stipulated.</u> **Because the parties have stipulated (that the**

defendant was operating a (boat) (vessel) (and) (that the location was on the waters of the Commonwealth) (and) (that the percent of alcohol in the defendant's blood was .08 or greater), the only element(s) the Commonwealth must prove beyond a reasonable doubt (is) (are) that the defendant_____*(elements)*_____.

If the Commonwealth has proved (that) (those) element(s) beyond a reasonable doubt, you should return a verdict of guilty. If it has not, you must find the defendant not guilty.

If there are no stipulations. **So there are three things that the Commonwealth must prove beyond a reasonable doubt:**

First: **That the defendant operated a (boat) (vessel);**

Second: **That the defendant did so on the waters of the Commonwealth; and**

Third: **That at the time (he) (she) operated the (boat) (vessel), the percent of alcohol in the defendant's blood was .08 or greater.**

If the Commonwealth has proven all three elements beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth has failed to prove one or more of these elements beyond a reasonable doubt, you must return a verdict of not guilty.

SUPPLEMENTAL INSTRUCTIONS

1. If there is an issue regarding any delay in testing. **A passage of up to three hours between testing and the time of operation may be reasonable, however the facts and circumstances of the case may suggest that a greater or lesser time period might apply. Ultimately it is up to you to decide what is reasonable.**

2. If the defendant is permitted to introduce additional test samples. **(You have heard testimony) (A document has been introduced in evidence reporting) that the defendant gave more than one breath sample, and that the results were** *[results of each sample]* **. By regulation, the result of the defendant's test is the lower reading. You may consider the additional sample(s) only on the issue of whether the test result was accurate.**

The Commonwealth may not introduce more than one test result. *Commonwealth v. Steele*, 455 Mass. 209, 213-14 (2009); *see* 501 C.M.R. § 2.15(2)(b).

NOTES:

1. **Statute now bifurcated.** Statute 2003, c. 28, § 1 (effective June 30, 2003) amended G.L. c. 90, § 24(1) so that it now punishes anyone who "operates a motor vehicle with a percentage, by weight, of alcohol in their blood of eight one-hundredths or greater, or while under the influence of intoxicating liquor" or specified drugs. The two alternatives comprise a single offense that may be committed in two different ways. *Commonwealth v. Colturi*, 448 Mass. 809, 810 (2007). The "operating under the influence" alternative requires proof of operation "with a diminished *capacity* to operate safely," *Commonwealth v. Connolly*, 394 Mass. 169, 173 (1985) (emphasis in the original), but not proof of any specific blood alcohol level, while the "per se" alternative requires proof of operation with a blood alcohol level of .08% or greater but not proof of diminished capacity. Consequently, evidence pertaining to impairment is not relevant to the offense of operating a motor vehicle with a blood alcohol level of .08 or greater.

2. **Model instruction.** The model instruction is based on *Commonwealth v. Colturi*, 448 Mass. 809, 816-17 (2007), and *Commonwealth v. Zeininger*, 459 Mass. 775, 778-81, *cert. denied*, 132 S. Ct. 462 (2011).

3. **Evidence in a per se case.** If the Commonwealth proceeds only on the per se offense, evidence about the defendant's behavior and appearance may not be relevant. The legislature has defined the crime in terms of the alcohol content of one's blood.

4. **Breath tests: challenges to particular test result.** Before the result of a breath test may be admitted, the Commonwealth must establish the existence of and compliance with the requirements of a periodic testing program for breath testing machines in accordance with G.L. c. 90, § 24K and regulations promulgated thereunder. *Commonwealth v. Barbeau*, 411 Mass. 782, 784-86 (1992). Those requirements of § 24K are met by the provisions of 501 C.M.R. § 2.00 *et seq.*

A breath test result is admissible only if the Commonwealth has introduced evidence that the machine was working properly. *Commonwealth v. Cochran*, 25 Mass. App. Ct. 260, 264 (1988). Beyond that minimum level, generally any delay in administering a blood alcohol test, *Commonwealth v. Marley*, 396 Mass. 433, 438-39 (1985), any weaknesses in the test operator's knowledge and skill, *Commonwealth v. Shea*, 356 Mass. 358, 361 (1969), or any procedural weaknesses in the administration of a particular test, *Commonwealth v. Malloy*, 15 Mass. App. Ct. 958, 958, *rev. denied*, 389 Mass. 1101 (1983); *Commonwealth v. Hazelton*, 11 Mass. App. Ct. 899, 900 (1980), are matters of weight for the jury and do not affect the admissibility of the test result.

The requirement that the breath test operator "shall observe the arrestee for no less than 15 minutes immediately prior to the administration of the breath test," 501 C.M.R. § 2.13(3), does not require that such observation be done at the testing location or room. If the arresting officer is also the breathalyzer operator, the requirement could be satisfied by the officer's being continuously with the arrestee from the traffic stop until the test provided there is actual observation consistent with the regulation. Normally, compliance issues go to weight rather than admissibility, but if the prosecution fails to make a sufficient showing of compliance with the letter and purpose of the regulation, the test results must be suppressed. *Commonwealth v. Pierre*, 72 Mass. App. Ct. 230, 232-35 (2008).

5. **Breath tests: expert testimony.** The Commonwealth may introduce a breath or blood test result to establish the level of alcohol in the defendant's blood at the tim e of operation without offering expert testimony to provide "retrograde extrapolation" (calculating what the defendant's blood alcohol level must have been at the time of the offense based on his or her subsequent blood alcohol level), provided the test was taken within a "reasonable time" after operation. This is usually up to three hours, although particular facts and circumstances may establish that a greater or lesser time period should be applied by the judge in his or her discretion. *Commonwealth v. Colturi*, 448 Mass. 809, 816-17 (2007). If expert testimony on retrograde extrapolation is proffered, it should be evaluated by the usual criteria of whether its methodology is scientifically valid, in general, and in the particular instance. *Commonwealth v. Senior*, 433 Mass. 453, 458-62 (2001); *Commonwealth v. Smith*, 35 Mass. App. Ct. 655, 662-64 (1993), *rev. denied*, 416 Mass. 1111 (1994).

The defendant has the right to present a qualified expert to challenge the accuracy of the breath test result in the defendant's particular case. *Commonwealth v. Connolly*, 394 Mass. 169, 175 (1985); *Commonwealth v. Smythe*, 23 Mass. App. Ct. 348, 351-55 (1987). If there is expert testimony, see Instruction 3.640 ("Expert Witness").

6. **Section 24*O* notice.** Although the requirement of G.L. c. 90, § 24*O* that defendants convicted of motor vehicle offenses should be given a written statement of the statutory provisions applicable to any subsequent violation "should be observed by the District Courts," failure to give a defendant such notice is not a defense against a subsequent charge as a second offender. *Commonwealth v. Dowler*, 414 Mass. 212, 216 (1993).

7. **Admissibility of breathalyzer records.** Certified copies of breathalyzer records are admissible under the business records exception to the hearsay rule. *Commonwealth v. Zeininger*, 459 Mass. 775, 781-89, *cert. denied*, 132 S. Ct. 462 (2011).

8. **Possible effect on breath test results of a required finding.** If the Commonwealth initially proceeds under both portions of the statute and the judge subsequently allows a motion for directed verdict on the per-se portion of the offense, the judge must determine whether or not to strike any breath test evidence, absent expert testimony. *See* *Commonwealth v. Colturi*, 448 Mass. 809, 817 (2007) ("if the per se and impaired ability theories of criminal liability are charged in the alternative . . . and so tried, we see no prejudice in the admission of breathalyzer test results without expert testimony . . . . If, however, the Commonwealth were to proceed only on a theory of impaired operation and offered a breathalyzer test result of .08 or greater, . . . it must present expert testimony establishing a relationship between the test results and intoxication as a foundational requirement of the admissibility of such tests" as otherwise "the jury would be left to guess at its meaning"). If the breath test results are allowed to remain in evidence, the box entitled "Limited use of a breath test result of .08 or greater" in Instruction 5.310 ("Operating Under the Influence of Intoxicating Liquor") should be incorporated at the point indicated.

5.710 OPERATING A BOAT WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR

G.L. c. 90B, § 8(a)(1) May 2017

The defendant is charged with operating a (boat) (vessel) while under the influence of intoxicating liquor.

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

***First*: That the defendant operated a (boat)(vessel);**

***Second*: That the defendant did so on the waters of the**

Commonwealth; and

***Third*: That while operating the (boat)(vessel), the defendant was under the influence of intoxicating liquor.**

To prove the first element, the Commonwealth must prove the defendant operated a (boat)(vessel). A person operates a (boat)(vessel) when he (she) navigates, pilots, drives or otherwise controls the movement of it.

(The statutory definition for operation in 90B, § 1, is to "navigate or otherwise use a motorboat or vessel."

If necessary, instruct on whichever definition below applies:

Boat

A boat, also referred to as a motorboat, is a watercraft propelled by machinery, whether or not such machinery is the principal source of propulsion.

G.L. c. 90B, § 1

Vessel

A vessel is a craft for traveling on water. It includes watercraft of every description, (except a seaplane) used or capable of being used as a means of transportation on the water. Ships, boats, and jet skis are examples of vessels.

G.L. c. 90B, § 1

To prove the second element of the offense, the Commonwealth must prove that the (boat)(vessel) was operated on the waters of the Commonwealth.

Instruct on whichever definition below applies:

Inland Waters

The waters of the Commonwealth include all inland waters except ponds that are less than ten acres in area, owned by one person, and not open to the public.

Coastal Waters

The waters of the Commonwealth include all coastal waters within the rise

and fall of the tide *and* the marine limits of the jurisdiction of the Commonwealth.

G.L. c. 90B, § 1

The third element which the Commonwealth must prove beyond a reasonable doubt is that the defendant was under the influence of intoxicating liquor while operating a (boat) (vessel). What does it mean to be "under the influence" of alcohol? Someone does not have to be drunk to be under the influence of alcohol. A person is under the influence of alcohol if he has consumed enough alcohol to reduce his (her) ability to operate a (boat) (vessel) safely, by decreasing his alertness, judgment, and ability to respond promptly. It means that a person has consumed enough alcohol to reduce his (her) mental clarity, self-control and reflexes, and thereby left him (her) with a reduced ability to operate safely.

The Commonwealth is not required to prove that the defendant actually operated in an unsafe or erratic manner, but is required to prove that his (her) ability to operate safely was diminished by alcohol. The amount of alcohol necessary to do this may vary from person to person. You may rely on your experience and common sense about the effects of alcohol. You should consider any believable evidence about the defendant's alleged consumption of alcohol, as well as the defendant's

appearance, condition, and behavior at the time.

If there are stipulations.

Because the parties have stipulated (that the defendant was operating a (boat) (vessel) (and) (that the location was the waters of the Commonwealth) (that the defendant was under the influence of intoxicating liquor), the only element(s) the Commonwealth must prove beyond a reasonable doubt (is) (are) that the defendant [element(s)]**. If the Commonwealth has proved (that) (those) element(s) beyond a reasonable doubt, you should return a verdict of guilty. If it has not, you must find the defendant not guilty.**

If there are no stipulations.

So there are three things that the Commonwealth must prove beyond a reasonable doubt:

***First*: That the defendant operated a (boat)(vessel);**

***Second*: That the defendant did so on the waters of the Commonwealth; and**

***Third*: That while operating the (boat)(vessel), the defendant was under the influence of intoxicating liquor.**

If the Commonwealth has proven all three elements beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth has failed to prove one or more of these elements beyond a reasonable doubt, you must return a verdict of not guilty.

[*If the per se offense is charged, add language from model Instruction* 5.700.]

SUPPLEMENTAL INSTRUCTIONS

1. If there is evidence both of alcohol and drug use. **The defendant may be found guilty of this offense if his (her) ability to operate a (boat) (vessel) safely was diminished, and alcohol was one contributing cause of that diminished ability. It is not necessary that alcohol was the only or exclusive cause.**

If the defendant's ability to operate safely was diminished by alcohol, then he (she) has violated the statute even if some other factor tended to magnify the effect of the alcohol or contributed to his (her) diminished capacity to operate safely. It is not a defense that there was a second contributing cause so long as alcohol was *one* of the causes of the defendant's diminished capacity to operate safely.

If alcohol was not one of the causes of the defendant's diminished capacity to operate safely, the defendant must be found not guilty.

Commonwealth v. Stathopoulos, 401 Mass. 453, 457 (1988).

2. Waters within the jurisdiction of the Commonwealth. **The waters of the commonwealth extend to the outer limits of the territorial sea of the United States. The territorial sea of the United States extends 12 nautical miles from the baseline shore. The baseline shore is defined by the low water mark.**

NOTES:

1. **Boats vs. vessels.** Boats are a subset of vessels. G.L. c. 90B, § 1.

2. **Statute now bifurcated.** Statute 2003, c. 28, § 28 (effective June 30, 2003) amended G.L. c. 90B, § 8 so that it now punishes anyone who operates a vessel "with a percentage, by weight, of alcohol in their blood of eight one-hundredths or greater, or while under the influence of intoxicating liquor" or specified drugs. The two alternatives comprise a single offense that may be committed in two different ways. *Commonwealth v. Colturi,* 448 Mass. 809, 810 (2007). The "operating under the influence" alternative requires proof of operation "with a diminished *capacity* to operate safely," *Commonwealth v. Connolly,* 394 Mass. 169, 173 (1985), but not proof of any specific blood alcohol level, while the "per se" alternative requires proof of operation with a blood alcohol level of .08% or greater but not proof of diminished capacity.

3. **Model instruction.** It is correct to charge that a person need not be drunk to be under the influence of liquor, but it is error to instruct that the defendant need only be "influenced in some perceptible degree" by liquor, *Connolly, supra*, since "a conviction may rest only on proof that alcohol affected him in a *particular* way, i.e., by diminishing his capacity to drive safely" (emphasis in original). *Commonwealth v. Tynes,* 400 Mass. 369, 374-75 (2007). "The Commonwealth must prove beyond a reasonable doubt that the defendant's consumption of alcohol diminished the defendant's ability to operate a [vessel] safely. The Commonwealth need not prove that the defendant *actually drove* in an unsafe or erratic manner, but it must prove a diminished capacity to operate safely." *Commonwealth v. Connolly, 394 Mass. 169, 173 (1985).*

The model instruction appropriately uses the phrase "mental clarity, self-control, and reflexes" as examples or factors that the jury may use in determining whether the defendant's capacity to operate safely was impaired. The Commonwealth must prove such impairment beyond a reasonable doubt, but is not required to prove any of those particular three factors. *Commonwealth v. Riley,* 48 Mass. App. Ct. 463, 465 (2000).

4. **Absence of breath test**. "Evidence that the defendant failed or refused to consent to [a blood alcohol] test shall not be admissible against him in a civil or criminal proceeding . . . ." G.L. c. 90, § 24(1)(e).

Where there has been no breath test, a judge may give the instruction approved in *Commonwealth v. Downs*, 53 Mass. App. Ct. 195, 198 (2001) ("You are not to mention or consider in anyway whatsoever, either for or against either side, that there is no evidence of a breathalyzer. Do not consider that in any way. Do not mention it. And put it completely out of your mind.").

5. **Breath test in non per-se case.** If the Commonwealth proceeds only on a theory of impaired operation and offers breath test results, it must present expert testimony establishing a relationship between the test results and intoxication as a foundational requirement of the admissibility of such results. *Commonwealth v. Colturi*, 448 Mass. 809, 818 (2007).

6. **Impairment**. "Evidence that the defendant drove his motorboat in a clockwise direction, which contravened the customary counterclockwise traffic pattern on the lake; that the boat 'kept

coming, kept going' after the collision and 'continu[ed] on [its] route'; and that one witness perceived 'a very distinct and clear smell of alcohol' upon loading the victim onto the boat. In addition to the fact of the collision, which is corroborative of the other evidence of driving while intoxicated, this evidence tended to show that the defendant's earlier consumption of alcohol and marijuana diminished his capacity to operate the vessel safely." *Commonwealth v. Morse*, 468 Mass. 360, 378 (2014).

7. **Statutory definition of waters of the commonwealth**. The waters of the commonwealth are defined in G.L. c. 1, § 3, as extending to the outer limits of the territorial sea of the United States. Those outer limits are defined in 43 U.S.C. 1331(e) which references Presidential Proclamation No. 5298 dated December 27, 1988 and the 1982 United Nations Convention of the Law of the Sea. The extent of the waters of the Commonwealth may be limited by boundaries established between the commonwealth and adjacent coastal states. G.L. c. 1, § 3.

8. **Possible effect on breath test results of a required finding**. If the Commonwealth initially proceeds under both portions of the statute and the judge subsequently allows a motion for directed verdict on the *per se* portion of the offense, the judge must determine whether or not to strike any breath test evidence, absent expert testimony. *See* *Commonwealth v. Colturi*, 448 Mass. 809, 817 (2007) ("if the *per se* and impaired ability theories of criminal liability are charged in the alternative . . . and so tried, we see no prejudice in the admission of breathalyzer test results without expert testimony . . . . If, however, the Commonwealth were to proceed only on a theory of impaired operation and offered a breathalyzer test result of .08 or greater, . . . it must present expert testimony establishing a relationship between the test results and intoxication as a foundational requirement of the admissibility of such tests" as otherwise "the jury would be left to guess at its meaning"). If the breath test results are allowed to remain in evidence, the box entitled "Limited use of a breath test result of .08 or greater" in Instruction 5.310 ("Operating Under the Influence of Intoxicating Liquor") should be incorporated at the point indicated.

OFFENSES AGAINST THE PERSON

6.100 AFFRAY

G.L. c. 277, § 39
Revised May 2014

The defendant is charged with violating the law by engaging in an affray with others. In order to prove the defendant guilty of this offense, the Commonwealth must prove three things beyond a reasonable doubt:

First: **That the defendant fought with one or more other persons;**

Second: **That the fighting took place in a public place; and**

Third: **That at least one person who was lawfully present in the public place was put in fear as a result of the fighting that occurred.**

With regard to the first element, fighting is the use of physical force or violence or any threat to immediately use such force or violence.

NOTES:

1. **Lawful presence.** Affray is a common law offense, but the term "affray" is defined by G.L. c. 277, § 39: "Affray. – Fighting together of two or more persons in a public place to the terror of the persons lawfully there." Lawful presence in the public place of the person placed in fear is a required element of proof of affray. The purpose for which any person is present is irrelevant. *Commonwealth v. Nee*, 83 Mass. App. Ct. 441, 447 (2013) (victims placed in fear were lawfully present). See *District Attorney for Norfolk Dist. v. Quincy Div. of Dist. Court Dep't*, 444 Mass. 176, 180-181 (2005).

2. **Self-defense.** "Nothing in the definition of affray precludes a defendant so charged from asserting self-defense or defense of another in justification of his conduct." *Nee*, 83 Mass. App. Ct. at 449 n.8. See "Self-Defense" (Instruction 9.260).

3. **Sentencing.** Since the General Laws do not specify a penalty for common law affray, a convicted defendant should be punished under G.L. c. 279, § 5, which provides for "such sentence, according to the nature of the crime, as conforms to the common usage and practice in the commonwealth." See *Nee*, 83 Mass. App. Ct. at 445 n.4.

4. **Alignment.** The Commonwealth is not required to prove that the defendant and other participants were on the same or opposing sides. *Nee*, 83 Mass. App. Ct. at 447.

6.120 ASSAULT

G.L. c. 265 § 13A[a]
2009 Edition

The defendant is charged with having committed an assault upon *[alleged victim]*. Section 13A of chapter 265 of our General Laws provides that "Whoever commits an assault . . . upon another shall be punished . . . ."

An assault may be committed in either of two ways. It is *either* an attempted battery *or* an immediately threatened battery. A battery is a harmful or an unpermitted touching of another person. So an assault can be either an attempt to use some degree of physical force on another person — for example, by throwing a punch at someone — or it can be a demonstration of an apparent intent to use immediate force on another person — for example, by coming at someone with fists flying. The defendant may be convicted of assault if the Commonwealth proves *either* form of assault.

In order to establish the first form of assault — an attempted battery — the Commonwealth must prove beyond a reasonable doubt that the defendant intended to commit a battery — that is, a harmful or an unpermitted touching — upon *[alleged victim]* , took some overt step toward accomplishing that intent, and came reasonably close to doing so. With this form of assault, it is not necessary for the Commonwealth to show that *[alleged victim]* was put in fear or was even aware of the attempted battery.

In order to prove the second form of assault — an imminently threatened battery — the Commonwealth must prove beyond a reasonable doubt that the defendant intended to put *[alleged victim]* in fear of an imminent battery, and engaged in some conduct toward *[alleged victim]* which *[alleged victim]* reasonably perceived as imminently threatening a battery.

Here instruct on Intent (Instruction 3.120), since both branches of assault are specific intent offenses. If additional language on the first branch of assault is appropriate, see Instruction 4.120 (Attempt).

Commonwealth v. Barbosa, 399 Mass. 841, 845 n.7, 507 N.E.2d 694, 696 n.7 (1987) (an assault is "any manifestation, by a person, of that person's present intention to do another immediate bodily harm"); *Commonwealth v. Delgado*, 367 Mass. 432, 435-437 & n.3, 326 N.E.2d 716, 718-719 & n.3 (1975) ("an act placing another in reasonable apprehension that force may be used is sufficient for the offense of criminal assault"; words threatening future harm are insufficient to constitute an assault unless "they put the other in reasonable apprehension of an imminent harmful or offensive contact with his person"); *Commonwealth v. Chambers*, 57 Mass. App. Ct. 47, 49, 781 N.E.2d 37, 40 (2003) (threatened-battery branch "requires proof that the defendant has engaged in objectively menacing conduct with the intent of causing apprehension of immediate bodily harm on the part of the target"); *Commonwealth v. Musgrave*, 38 Mass. App. Ct. 519, 649 N.E.2d 784 (1995), aff'd, 421 Mass. 610, 659 N.E.2d 284 (1996) (threatened-battery branch of assault requires specific intent to put victim in fear or apprehension of immediate physical harm); *Commonwealth v. Spencer*, 40 Mass. App. Ct. 919, 922, 663 N.E.2d 268, 271 (1996) (same); *Commonwealth v. Enos*, 26 Mass. App. Ct. 1006, 1008, 530 N.E.2d 805, 807 (1988) (necessary intent inferable from defendant's overt act putting another in reasonable fear, irrespective of whether defendant intended actual injury); *Commonwealth v. Domingue*, 18 Mass. App. Ct. 987, 990, 470 N.E.2d 799, 802 (1984) (assault is "an overt act undertaken with the intention of putting another person in fear of bodily harm and reasonably calculated to do so, whether or not the defendant actually intended to harm the victim"). See *Commonwealth v. Hurley*, 99 Mass. 433, 434 (1868) (assault by joint venture by intentionally inciting assault by others); *Commonwealth v. Joyce*, 18 Mass. App. Ct. 417, 421-422, 426-430, 467 N.E.2d 214, 217-218, 220-222 (1984) (assault by joint venture).

NOTES:

1. **Aggravated forms of offense**. It is an aggravated form of assault if it causes serious bodily injury, or if the defendant knows or has reason to know that the victim is pregnant, or if the defendant knows that the victim has an outstanding abuse restraining order against the defendant. G.L. c. 265, § 13A(b). An additionally-aggravated sentence is provided for subsequent offenses.

2. **Assault with a dangerous weapon** (G.L. c. 265, § 15B[b]) has one element in addition to those required for simple assault: that the assault was done by means of a dangerous weapon. *Commonwealth v. Burkett,* 5 Mass. App. Ct. 901, 903, 370 N.E.2d 1017, 1020 (1977). J.R. Nolan, *Criminal Law* § 323 (1976). See *Commonwealth v. Nardi,* 6 Mass. App. Ct. 180, 181-184, 374 N.E.2d 323, 324-326 (1978). Simple assault is a lesser included offense of assault with a dangerous weapon, but assault and battery is not. *A Juvenile v. Commonwealth,* 404 Mass. 1001, 533 N.E.2d 1312 (1989).

Assault with a dangerous weapon on a person 60 years or older (G.L. c. 265, § 15B[a]) is an aggravated form of the offense. The Commonwealth must charge and prove that the victim was 60 years of age or older. The jury may consider the victim's physical appearance as one factor in determining age, but appearance alone is not sufficient evidence of age unless the victim is of "a marked extreme" age, since "[e]xcept at the poles, judging age on physical appearance is a guess . . . ." *Commonwealth v. Pittman*, 25 Mass. App. Ct. 25, 28, 514 N.E.2d 857, 859 (1987). Pror to St. 1995, c. 297, § 6 (effective March 17, 1996), the aggravated offense covered persons 65 years or older.

3. **Multiple victims of single assault**. Where the defendant assaults multiple victims in a single act, the defendant may be convicted of multiple counts of assault and, in the judge's discretion, given consecutive sentences. *Commonwealth v. Dello Iacono,* 20 Mass. App. Ct. 83, 89-90, 478 N.E.2d 144, 148-149 (1985) (firing gun into house with several residents).

4. **Simultaneous assault and property destruction**. A single act may support simultaneous convictions of assault by means of a dangerous weapon upon the victim who was assaulted and of malicious destruction of property (G.L. c. 266, § 127) with respect to

the area where the victim was standing. *Domingue, supra* (firing gun in order to damage bar and frighten bartender).

5. **Statement of reasons required if imprisonment not imposed.** A jury session judge sentencing for this or one of the other crimes against persons found in G.L. c. 265 who does not impose a sentence of incarceration "shall include in the record of the case specific reasons for not imposing a sentence of imprisonment," which shall be a public record. G.L. c. 265, § 41.

6. **Victim's apprehension or fear.** The first (attempted battery) branch of assault does not require that the victim was aware of or feared the attempted battery. *Commonwealth v. Slaney,* 345 Mass. 135, 138-139, 185 N.E.2d 919, 922 (1962); *Commonwealth v. Richards*, 363 Mass. 299, 303, 293 N.E.2d 854, 857-858 (1973); *Commonwealth v. Gorassi,* 432 Mass. 244, 248, 733 N.E.2d 106, 110 (2000).

The second (threatened battery) branch of assault requires that the victim was aware of the defendant's objectively menacing conduct. *Chambers,* 57 Mass. App. Ct. at 48-52, 781 N.E.2d at 39-42. Some older decisions seem to suggest that under the second branch of assault the victim must have feared as well as perceived the threatened battery. This may have resulted from the inherent ambiguity of the term "apprehend," which may signify either. *Chambers, supra,* concluded that subjective fear is not an element of either branch. Other recent decisions appear to be in accord. See *Commonwealth v. Melton,* 436 Mass. 291, 295 n.4, 763 N.E.2d 1092, 1096 n.4 (2002); *Gorassi,* 432 Mass. at 248-249, 733 N.E.2d at 110; *Commonwealth v. Gordon,* 407 Mass. 340, 349, 553 N.E.2d 915, 920 (1990); *Slaney,* 345 Mass. at 139-141, 185 N.E.2d at 922-923; *Richards,* 363 Mass. at 303-304, 293 N.E.2d at 857-858. See also the extended discussion of this issue in R.G. Stearns, *Massachusetts Criminal Law: A Prosecutor's Guide* (28th ed. 2008). The model instruction requires perception, but not subjective fear, by the victim under the second branch of assault.

7. **Assault with intent to murder & assault with intent to kill.** Assault with intent to murder (G.L. c. 265, § 15) requires assault, specific intent to kill, and malice. The lesser included offense of assault with intent to kill (G.L. c. 265, § 29) requires assault, specific intent to kill, and absence of malice. "[P]erhaps the simplest and most distinct way to describe the difference" is that the lesser offense has an additional element — namely, the presence of mitigation provided by reasonable provocation, sudden combat, or excessive force in self-defense. If there is no evidence of mitigation, the Commonwealth satisfies its burden on the issue of malice simply by proving specific intent to kill. *Commonwealth v. Nardone,* 406 Mass. 123, 130-132, 546 N.E.2d 359, 364-365 (1989); *Commonwealth v. Bourgeois,* 404 Mass. 61, 65, 533 N.E.2d 638, 641 (1989). Assault with intent to kill is, in effect, an assault with intent to commit manslaughter. *Commonwealth v. Cowie,* 28 Mass. App. Ct. 742, 745, 556 N.E.2d 103, 105 (1990). Neither offense is within the final jurisdiction of the District Court.

8. **Armed assault in a dwelling** (G.L. c. 265, § 18A), which is not within the final jurisdiction of the District Court, requires proof of: (1) entry of a dwelling while armed; (2) an assault on someone in the dwelling; and (3) accompanying the assault, a specific intent to commit a felony. The intended felony may be a compounded assault charge (such as ABDW) and need not be an additional, factually distinct felony. *Commonwealth v. Donoghue*, 23 Mass. App. Ct. 103, 111-113, 499 N.E.2d 832, 838 (1986). W here the Commonwealth alleges that the intended felony is an attack on a second victim, it must prove specific intent to commit that second attack. *Commonwealth v. Smith*, 42 Mass. App. Ct. 906, 907, 674 N.E.2d 1096, 1098 (1997). Since § 18A does not require that the weapon be used in the assault, it does not have assault by means of a dangerous weapon (G.L. c. 265, § 15B) as a lesser included offense. *Commonwealth v. Flanagan*, 17 Mass. App. Ct. 366, 371-372, 458 N.E.2d 777, 781 (1984).

9. **Verdict slip.** Where the jury is presented with a lesser included offense of assault, and the Commonwealth proceeds upon the alternate theories of an attempted battery or an imminently threatened battery, the jury need not be unanimous as to the theory and a special verdict slip requiring the jury to elect between the theories is not proper. *Commonwealth v. Arias*, 78 Mass. App. Ct. 429, 433, 939 N.E.2d 1169, 1173 (2010). A verdict slip need not distinguish between a conviction for an attempted battery and a threatened battery even when the Commonwealth proceeds upon both theories. The jury may return a unanimous verdict for assault even if they are split between the two theories. "Because attempted battery and threatened battery 'are closely related,' *Commonwealth v. Santos*, 440 Mass. 281, 289 (2003), we do not require that a jury be unanimous as to which theory of assault forms the basis for their verdict; a jury may find a defendant guilty of assault if some jurors find the defendant committed an attempted battery (because they are convinced the defendant intended to strike the victim and missed) and the remainder find that he committed a threatened battery (because they are convinced that the defendant intended to frighten the victim by threatening an assault). See *id.* at 284, 289 (jury were not required to be unanimous as to which form of assault was relied on to satisfy assault element of armed robbery)." *Commonwealth v. Porro*, 458 Mass. 526, 393 N.E.2d 1157 (2010). See also *Commonwealth v. Arias*, *supra*.

6.121 SAMPLE JURY VERDICT FORM WHEN JURY CHARGED ON BOTH BRANCHES OF ASSAULT

Revised January 2013

COMMONWEALTH OF MASSACHUSETTS
DISTRICT COURT DEPARTMENT OF THE TRIAL COURT
_____ Division
Complaint No. _____
)
COMMONWEALTH))
vs.)
)
JURY VERDICT
_____)

We, the jury, unanimously return the following verdict:

__ 1. We find the defendant **NOT GUILTY** as charged of the offense of assault *(General Laws chapter 265, section 13A).*

__ 2. We find the defendant **GUILTY** as charged of the offense of assault *(General Laws chapter 265, section 13A).*

Date: _____
Signature: _____

Foreperson of the Jury

6.140 ASSAULT AND BATTERY

G.L. c. 265 § 13A[a]
June 2016

I. INTENTIONAL ASSAULT AND BATTERY

The defendant is charged with having committed an intentional assault and battery upon ___*[alleged victim]*___ .

In order to prove that the defendant is guilty of having committed an intentional assault and battery, the Commonwealth must prove three things beyond a reasonable doubt:

First: **That the defendant touched the person of** __*[alleged victim]*__ **, without having any right or excuse for doing so;**

Second: **That the defendant intended to touch** __*[alleged victim]*__ **; and**

Third: **That the touching was *either* likely to cause bodily harm to** __*[alleged victim]*__ **, *or* was offensive and done without (his) (her) consent.**

If additional language on intent is appropriate. **As I mentioned before, to prove an intentional assault and battery, the Commonwealth must prove beyond a reasonable doubt that the defendant *intended* to touch** ___*[alleged victim]*___ **, in the sense that the defendant consciously and deliberately intended the touching to occur, and that the touching was not merely accidental or negligent. The Commonwealth is not required to prove that the defendant specifically intended to cause injury to** ___*[alleged victim]*___ **.**

A touching is offensive and without consent when it amounts to an unprivileged and unjustified affront to the alleged victim's integrity.

If the touching was indirect. **A touching may be direct, as when a person strikes another, or it may be indirect as when a person sets in motion some force or instrumentality that strikes another.**

The model instruction does not separately define assault, since "[e]very battery includes an assault" as a lesser included offense. *Commonwealth v. Burke*, 390 Mass. 480, 482 (1983); *see* *Commonwealth v. Porro*, 458 Mass. 526, 533-35 (2010). If the evidence would also permit a jury finding of simple assault, the jury should be instructed on lesser included offenses (Instruction 2.280), followed by Instruction 6.120 (Assault), beginning with the second paragraph.

Commonwealth v. Ford, 424 Mass. 709, 711 (1997) (assault and battery is a general intent crime and does not require specific intent to injure the victim, but its intentional branch requires an intentional touching, and not merely an intentional act resulting in a touching); *Burke*, 390 Mass. at 482-83, 487 (any touching likely to cause bodily harm is a battery regardless of consent, but an offensive but nonharmful battery requires lack of consent or inability to consent); *Commonwealth v. McCan*, 277 Mass. 199, 203 (1931) ("An assault and battery is the intentional and unjustified use of force upon the person of another, however slight, or the intentional doing of a wanton or grossly negligent act causing personal injury to another"); *accord* *Commonwealth v. Bianco*, 390 Mass. 254, 263 (1983) (same); *Commonwealth v. Campbell*, 352 Mass. 387, 397 (1967) (same); *Commonwealth v. Musgrave*, 38 Mass. App. Ct. 519, 521 (1995) (approving instruction for threatened-battery branch of assault that "when we say intentionally we mean that [defendant] did so consciously and voluntarily and not by accident, inadvertence or mistake"), *aff'd*, 421 Mass. 610 (1996); *Commonwealth v. Moore*, 36 Mass. App. Ct. 455, 457-60 (1994) (intentional branch of assault and battery requires proof "that the defendant intended that a touching occur" and not merely "proof that the defendant did some intentional act, the result of which was a touching of the victim"); *Commonwealth v. Ferguson*, 30 Mass. App. Ct. 580, 584 (1991) (intentional branch of assault and battery requires proof "that the defendant's conduct was intentional, in the sense that it did not happen accidentally"); *see* *Commonwealth v. Bianco*, 388 Mass. 358, 366-367 (1983) (assault and battery by joint venture); *Commonwealth v. Collberg*, 119 Mass. 350, 353 (1876) (mutual consent is no defense to cross-complaints of assault and battery; "such license is void, because it is against the law").

II RECKLESS ASSAULT AND BATTERY

A. If intentional assault and battery was already charged on. **There is a second way in which a person may be guilty of an assault and battery. Instead of intentional conduct, it involves reckless conduct that results in bodily injury.**

B. If intentional assault and battery was not already charged on. **The defendant is charged with having committed an assault and battery** upon *[alleged victim]* **by reckess conduct.**

In order to prove that the defendant is guilty of having committed an assault and battery by reckless conduct, the Commonwealth must prove two things beyond a reasonable doubt:

First: **That the defendant intentionally engaged in actions which caused bodily injury to** *[alleged victim]***. The injury must be sufficiently serious to interfere with the alleged victim's health or comfort. It need not be permanent, but it must be more than trifling. For example, an act that only shakes up a person or causes only momentary discomfort would not be sufficient.**

And *second:* That the defendant's actions amounted to reckless conduct.

It is not enough for the Commonwealth to prove that the defendant acted negligently — that is, acted in a way that a reasonably careful person would not. It must be shown that the defendant's actions went beyond mere negligence and amounted to recklessness. The defendant acted recklessly if (he) (she) knew, or should have known, that such actions were very likely to cause substantial harm to someone, but (he) (she) ran that risk and went ahead anyway.

The defendant must have intended (his) (her) acts which resulted in the touching, in the sense that those acts did not happen accidentally.

If relevant to the evidence. **If you find that the defendant's acts occurred by accident, then you must find the defendant not guilty.**

But it is not necessary that (he) (she) intended to injure or strike the alleged victim, or that (he) (she) foresaw the harm that resulted. If the defendant actually realized in advance that (his) (her) conduct was very likely to cause substantial harm and decided to run that risk, such conduct would of course be reckless. But even if (he) (she) was not conscious of the serious danger that was inherent in such conduct, it is still reckless conduct if a reasonable person, under the circumstances as they were known to the defendant, would have recognized that such actions were so dangerous that it was very likely that they would result in substantial injury.

Commonwealth v. Burno, 396 Mass. 622, 625-627 (1986) ("the intentional commission of a wanton or reckless act (something more than gross negligence) causing physical or bodily injury to another"; injury must have "interfered with the health or comfort of the victim. It need not have been permanent, but it must have been more than transient and trifling. For example, if an alleged victim were shaken up but by his own admission not injured, or if an alleged victim were to have a sore wrist for only a few minutes, the 'injury' in each instance would be transient and trifling at most.") (citation omitted); *Commonwealth v. Welch*, 16 Mass. App. Ct. 271, 273-77("The law recognizes . . . an alternative form of assault and battery in which proof of a wilful, wanton and reckless act which results in personal injury to another substitutes for . . . intentional conduct"; elements are [1] that the act involved a high degree of likelihood that substantial harm would result to another, and [2] that the victim suffered physical injury as a result of that act), *rev. denied*, 390 Mass. 1102 (1983); *see also* *Commonwealth v. Grey*, 399 Mass. 469, 472 n.4 (1987) (" 'The standard of wanton or reckless conduct is at once subjective and objective' . . . . It depends on what the defendant knew (subjective) and how a reasonable person would have acted (objective) knowing those facts.") (quoting *Commonwealth v. Welansky*, 316 Mass. 383, 398 (1944)); *Commonwealth v. Godin*, 374 Mass. 120, 129 (1977) (standard "is at once both a subjective and objective standard, and is based in part on the knowledge of facts which would cause a reasonable man to know that a danger of serious harm exists. Such knowledge has its roots in experience, logic, and common sense, as well as in formal legal standards."); *Commonwealth v. Welansky*, 316 Mass. 383, 399 (1944) ("Wanton or reckless conduct amounts to what has been variously described as indifference to or disregard of probable consequences").

SUPPLEMENTAL INSTRUCTION

Victim inured while escaping. **The defendant may be convicted of assault and battery if the Commonwealth has proved beyond a reasonable doubt that the defendant caused __*[alleged victim]*__ reasonably to fear an immediate attack from the defendant, which then led (him) (her)**

to try to (escape) (*or*) (defend) (himself) (herself) from the defendant, and in doing so injured (himself) (herself).

Commonwealth v. Parker, 25 Mass. App. Ct. 727, 731, 734, *rev. denied*, 402 Mass. 1104 (1988).

NOTES:

1. **No verdict slip or specific unanimity instruction required where both intentional and reckless assault and battery are alleged.** Where the evidence warrants instructing on both intentional assault and battery and reckless assault and battery, the jurors need not be unanimous on whether the assault and battery was intentional or reckless. The judge, therefore, need not give a specific unanimity instruction or provide verdict slips for the jury to indicate the basis of its verdict. *Commonwealth v. Mistretta*, 84 Mass. App. Ct. 906, 906-07, *rev. denied*, 466 Mass. 1108 (2013). This is because "the forms of assault and battery are . . . closely related subcategories of the same crime." *Id.* at 907. "Specific unanimity is not required, because they are not 'separate, distinct, and essentially unrelated ways in which the same crime can be committed.' " *Id.* (quoting *Commonwealth v. Santos*, 440 Mass. 281, 288 (2003)).

2. **Abuse prevention order admissible in evidence.** In a prosecution for assault and battery, a judge may admit evidence of prior circumstances under which the alleged victim had obtained an abuse prevention order under G.L. c. 209A against the defendant. While such evidence is not admissible to show bad character or propensity to commit the assault and battery, it is admissible to provide a full picture of the attack, which otherwise might have appeared as an essentially inexplicable act of violence. *Commonwealth v. Leonardi*, 413 Mass. 757, 762-64 (1992).

3. **Assault and battery on public employees.** General Laws c. 265, § 13D provides, "Whoever commits an assault and battery upon any public employee when such person is engaged in the performance of his duties at the time of such assault and battery, shall be punished . . . ." This offense contains two elements in addition to those required for assault and battery: (1) that the victim was a public employee who was engaged in the performance of his duty at the time, and (2) that the defendant knew that the victim was such an employee who was engaged in the performance of his duty at that time. *Commonwealth v. Moore*, 36 Mass. App. Ct. 455, 461 (1994). Assault and battery on a public employee may be done recklessly as well as intentionally, and intent to strike the public employee is not required under the recklessness analysis. *Commonwealth v. Correia*, 50 Mass. App. Ct. 455, 457-58 (2000). However, the court added, "There is no explicit scienter requirement for the[] elements [of reckless assault and battery] in the statute. Assuming, without deciding, the existence of such a requirement, compare *Commonwealth v. Francis*, 24 Mass. App. Ct. 576, 577-578 & n.2 (1987); *Commonwealth v. Lawson*, 46 Mass. App. Ct. 627, 629-630 (1999), there is ample evidence here supporting the inference of the requisite knowledge on the part of the defendant." *Id.* at 459 n.6; *see also* *Commonwealth v. McCrohan*, 34 Mass. App. Ct. 277, 282 (1993) (jury could properly find that police officer was "engaged in the performance of his duty" while responding in a neighboring town pursuant to a mutual aid agreement under G.L. c. 40, § 8G); *Commonwealth v. Francis*, 24 Mass. App. Ct. 576, 577, 581 (1987) (similar statute, G.L. c. 127, § 38B, requires specific intent to strike a person known to be a correctional officer); *Commonwealth v. Rosario*, 13 Mass. App. Ct. 920, 920 (1982) (defendant who inadvertently struck police officer while intending to strike someone else may be convicted only of lesser included offense of assault and battery); *see* *Commonwealth v. Sawyer*, 142 Mass. 530, 533 (1886); *Commonwealth v. Kirby*, 56 Mass. (2 Cush.) 577, 579 (1849).

4. **Related offenses.** General Laws c. 127, § 38B sets forth the separate offense of assault or assault and battery on a correctional officer, which is within the final jurisdiction of the District Court. St. 2010, c. 74. General Laws c. 265, § 13F sets forth the separate offense of assault and battery on a person with an intellectual disability; a first offense is within the final jurisdiction of the District Court, though a subsequent offense is not. General Laws c. 265, § 13*I* sets forth the separate offense of assault or assault and battery on an emergency medical technician or an ambulance operator or ambulance

attendant, while treating or transporting a person in the line of duty, which is within the final jurisdiction of the District Court. Among the offenses in G.L. c. 265, § 13J are: (1) assault and battery on a child under 14 causing bodily injury (which is within the final jurisdiction of the District Court) and (2) assault and battery on a child under 14 causing substantial bodily injury (which is not). There are separate aggravated forms of assault and battery if the victim is 60 years or older or is disabled, and the assault results in bodily injury (G.L. c. 265, § 13K[b]) or serious bodily injury (G.L. c. 265, § 13K[c]); both offenses are within the final jurisdiction of the District Court.

5. **Medical testimony.** In a prosecution for assault and battery, medical testimony about the victim's injuries is admissible to establish that the defendant's assault on the victim was intentional and not accidental. *Commonwealth v. Gill*, 37 Mass. App. Ct. 457, 463-64 (1994).

6. **Transferred intent.** An instruction on transferred intent indicates that the Commonwealth need only prove intent as to one of the intended victims and does not have to prove intent specifically directed at each of the actual victims. *Commonwealth v. Melton*, 436 Mass. 291, 299 n.11 (2002). "It is a familiar rule that one who shoots intending to hit A., and accidentally hits and injures B., is liable for an assault and battery on B." *Commonwealth v. Hawkins*, 157 Mass. 551, 553 (1893); *accord* *Commonwealth v. Drumgold*, 423 Mass. 230, 259 (1996); *Commonwealth v. Pitts*, 403 Mass. 665, 668-69 (1989); *Commonwealth v. Puleio*, 394 Mass. 101, 109-10 (1985); *Commonwealth v. Ely*, 388 Mass. 69, 76 n.13 (1983).

7. **Statement of reasons required if imprisonment not imposed.** A jury session judge sentencing for this or one of the other crimes against persons found in G.L. c. 265 who does not impose a sentence of incarceration "shall include in the record of the case specific reasons for not imposing a sentence of imprisonment," which shall be a public record. G.L. c. 265, § 41.

6.160 ASSAULT AND BATTERY CAUSING SERIOUS INJURY

G.L. c. 265 § 13A[b][i]
2009 Edition

The defendant is charged with having committed (an intentional) (or) (a reckless) assault and battery causing serious injury to *[the alleged victim]*.

G.L. c. 265, § 13A(b)(i).

If the Commonwealth relies solely upon a theory of intentional assault and battery, continue with "I" below. If the Commonwealth relies upon both intentional and reckless theories, continue with both "I" and "II.A" below. If the Commonwealth relies solely upon a theory of reckless assault and battery, skip to "II.B" below.

I. INTENTIONAL ASSAULT AND BATTERY CAUSING SERIOUS BODILY INJURY

In order to prove an intentional assault and battery causing serious injury, the Commonwealth must prove four things beyond a reasonable doubt:

First: **That the defendant touched the person of *[the alleged victim]* without having any right or excuse for doing so;**

Second: **That the defendant intended to touch *[the alleged victim]* ;**

Third: **That the touching was either likely to cause bodily harm to *[the alleged victim]* or was done without his (her) consent; and**

Fourth: **That the touching caused serious bodily injury to *[the alleged victim]* . The defendant's touching must have directly caused the serious injury or must have directly and substantially set in motion a chain of events that produced the serious injury in a natural and continuous sequence.**

A bodily injury is "serious" if it results in (a permanent disfigurement) (a loss or impairment of a bodily function, limb or organ) (a substantial risk of death).

If additional language on intent is appropriate. **As I just mentioned, to prove an intentional assault and battery, the Commonwealth must prove beyond a reasonable doubt that the defendant *intended* to touch *[the alleged victim]* , in the sense that the defendant consciously and deliberately intended the touching to occur, and that the touching was not merely accidental or negligent. The Commonwealth is not required to prove that the defendant specifically intended to cause injury to *[the alleged victim]* .**

II. RECKLESS ASSAULT & BATTERY CAUSING SERIOUS INJURY

A. Continue here if the jury is charged on both intentional and reckless assault and battery. **There is a second way in which a person may commit the crime of assault and battery causing serious injury. Instead of intentional conduct, it involves a reckless touching that results in bodily injury.**

B. Begin here if the jury is charged solely on reckless assault and battery. **The defendant is (also) charged with having committed an assault and battery by reckless conduct causing serious injury to *[the alleged victim]* .**

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

First: **That the defendant acted recklessly; and**

Second: **That the defendant's reckless conduct included an intentional act which resulted in serious bodily injury to *[the alleged victim]* .**

It is not enough for the Commonwealth to prove that the defendant acted negligently — that is, acted in a way that a reasonably careful person would not. It must be shown that the defendant's actions went beyond mere negligence and amounted to recklessness. The defendant acted recklessly if he (she) knew, or should have known, that such actions were very likely to cause substantial harm to someone, but he (she) ran that risk and went ahead anyway.

The defendant must have intended his (her) acts which resulted in the touching, in the sense that those acts did not happen accidentally. But it is not necessary that he (she) intended to injure or strike the alleged victim, or that he (she) foresaw the harm that resulted. If the defendant actually realized in advance that his (her) conduct was very likely to cause substantial harm and decided to run that risk, such conduct would of course be reckless. But even if he (she) was not conscious of the serious danger that was inherent in such conduct, it is still reckless conduct if a reasonable person, under the circumstances as they were known to the defendant, would have recognized that such actions were so dangerous that it was very likely that they would result in substantial injury.

Commonwealth v. Burno, 396 Mass. 622, 627, 487 N.E.2d 1366 (1986).

A serious bodily injury is one that involves (permanent disfigurement) (a loss or impairment of a bodily function, limb or organ) (a substantial risk of death).

This instruction differs from Instruction 6.140 (Reckless Assault and Battery) because in a prosecution for the former the Commonwealth need prove only "a bodily injury . . . sufficiently serious to interfere with the alleged victim's health or comfort." *Commonwealth v. Burno*, 396 Mass. 622, 625-627, 487 N.E.2d 1366, 1368-1370 (1986). But in a prosecution for assault and battery with serious injury, the statute requires proof of permanent disfigurement, loss or impairment of a bodily function, limb or organ, or substantial risk of death.

SUPPLEMENTAL INSTRUCTION

Victim injured while escaping. **As I mentioned earlier, the defendant's touching must have directly caused the *[alleged victim's]* injury or must have directly and substantially set in motion a chain of events that produced the injury in a natural and continuous sequence. Here you have heard some evidence suggesting that *[alleged victim]* was injured while escaping from *[place]*. To establish that element of the offense — that the defendant caused the injury which occurred as a result of the escape — the Commonwealth must prove beyond a reasonable doubt: (1) that the defendant caused *[the alleged victim]* reasonably to fear an immediate attack from the defendant; (2) that this fear led him (her) to try to (escape) (or) (defend himself [herself]) from the defendant; and (3) *[the alleged victim]* received a serious bodily injury from or during that attempt to (escape) (or) (defend).**

Commonwealth v. Parker, 25 Mass. App. Ct. 727, 522 N.E.2d 2 (1988).

Here the jury must be instructed on "Accident" (*Instruction 9.100*) if the issue of accident is supported by the evidence.

6.180 ASSAULT AND BATTERY ON A PERSON PROTECTED BY AN ABUSE PREVENTION ORDER

May 2017

The defendant is charged with having committed (an intentional) (or) (a reckless) assault and battery on *[the alleged victim]* **when the defendant knew at the time that a court had issued an order protecting** *[the alleged victim]* **from abuse by (him) (her).**

G.L. c. 265, § 13A(b)(iii).

If the Commonwealth relies solely upon a theory of intentional assault and battery, continue with "I" below. If the Commonwealth relies upon both intentional and reckless theories of assault and battery, continue with both "I" and "II.A" below. If the Commonwealth relies solely upon a theory of reckless assault and battery, skip to "II.B" below.

I. INTENTIONAL ASSAULT AND BATTERY ON A PERSON PROTECTED BY AN ABUSE RESTRAINING ORDER

In order to prove an intentional assault and battery upon a person protected by a court order, the Commonwealth must prove six things beyond a reasonable doubt:

First: **That the defendant touched the person of** *[the alleged victim]* **without having any right or excuse for doing so;**

Second: **That the defendant intended to touch** *[the alleged victim;*

Third: **That the touching was either likely to cause bodily harm to** *[the alleged victim]* **or was offensive and done without (her) (his) consent;**

***Fourth*: That a court had issued an order (or) (a judgment) pursuant to chapter 209A of our General Laws against the defendant ordering (him) (her):**

(to [vacate] [and] [stay away from] particular premises)

(or) (to stay a certain distance away from *[the alleged victim]* **)**

(or) (not to contact *[the alleged victim]* **)**

(or) (not to abuse *[the alleged victim]* **).**

Fifth: **That the order was in effect at the time of the alleged assault and battery; and**

Sixth: **That the defendant knew that the pertinent term(s) of the order (was) (were) in effect.**

To prove that the defendant had knowledge of the order's terms, there must be proof that the defendant received a copy of the order or learned of it in some other way.

Commonwealth v. Welch, 58 Mass. App. Ct. 408, 790 N.E.2d 718, 58 (2003).

If additional language on intent is appropriate. **As I just mentioned, to prove an intentional assault and battery, the Commonwealth must prove beyond a reasonable doubt that the defendant *intended* to touch** *[the alleged victim]***, in the sense that the defendant consciously and deliberately intended the touching to occur, and that the touching was not merely accidental or negligent. The Commonwealth is not required to prove that the defendant specifically intended to cause injury to** *[the alleged victim]* **.**

II. RECKLESS ASSAULT AND BATTERY ON A PERSON PROTECTED BY AN ABUSE RESTRAINING ORDER

A. Continue here if the jury is to be charged on both intentional and reckless assault and battery.

There is a second way in which a person may commit the crime of assault and battery on a person protected by an abuse prevention order. Instead of intentional conduct, it involves a reckless touching that results in bodily injury.

B. Begin here if the jury is to be charged solely on reckless assault and battery. **The defendant is (also) charged with having committed an assault and battery by reckless conducton a person protected by an abuse prevention order. In order to prove the defendant guilty of this offense, the Commonwealth must prove the following five things beyond a reasonable doubt:**

First: **That the defendant acted recklessly;**

Second: **That the defendant's reckless conduct included an intentional act which resulted in bodily injury to** *[the alleged victim]* _____**;**

Third: **That a court had issued (an order) (or) (a judgment) pursuant to chapter 209A of our General Laws against the defendant ordering (him) (her):**

(to [vacate] [and] [stay away from] particular premises)

(or) (to stay a certain distance away from [*the alleged victim*] **)**

(or) (not to contact [*the alleged victim*] **)**

(or) (not to abuse [*the alleged victim*] **).**

Fourth: **That the order was in effect at the time of the alleged reckless conduct; and**

Fifth: **That the defendant knew that the pertinent term(s) of the order (was) (were) in effect.**

It is not enough for the Commonwealth to prove that the defendant acted negligently — that is, acted in a way that a reasonably careful person would not. It must be shown that the defendant's actions went beyond mere negligence and amounted to recklessness. The defendant acted recklessly if (he) (she) knew, or should have known, that such actions were very likely to cause substantial harm to someone, but (he) (she) ran that risk and went ahead anyway.

The defendant must have intended (his) (her) acts which resulted in the touching, in the sense that those acts did not happen accidentally. But it is not necessary that (he) (she)

intended to injure or strike the alleged victim, or that (he) (she) foresaw the harm that resulted. If the defendant actually realized in advance that (his) (her) conduct was very likely to cause substantial injury and decided to run that risk, such conduct would of course be reckless. But even if (he) (she) was not conscious of the serious danger that was inherent in such conduct, it is still reckless conduct if a reasonable person, under the circumstances as they were known to the defendant, would have recognized that such actions were so dangerous that it was very likely that they would result in substantial injury

Commonwealth v. Burno, 396 Mass. 622, 487 N.E.2d 1366 (1986).

The injury must be sufficiently serious to interfere with the alleged victim's health or comfort. It need not be permanent, but it must be more than trifling. For example, an act that only shakes up a person or causes only momentary discomfort would not be sufficient.

SUPPLEMENTAL INSTRUCTION

Victim injured while escaping. **As I mentioned earlier, the defendant's touching must have directly caused the** *[alleged*

victim's] **injury or must have directly and substantially set in motion a chain of events that produced the injury in a natural and continuous sequence. Here you have heard some evidence suggesting that** *[alleged victim]* **was injured while escaping from** *[place]* **. To establish that element of the offense — that the defendant caused the injury which occurred as a result of the escape — the Commonwealth must prove beyond a reasonable doubt: (1) that the defendant caused** *[the alleged victim]* **reasonably to fear an immediate attack from the defendant; (2) that this fear led (him) (her) to try to (escape) (or) (defend himself) (defend herself) from the defendant; and (3) that** *[the alleged victim]* **received more than a trifling bodily injury from or during that attempt to (escape) (or) (defend).**

Commonwealth v. Parker, 25 Mass. App. Ct. 727, 522 N.E.2d 2 (1988).

Here the jury must be instructed on "Accident" (Instruction 9.100) if the issue of accident is supported by the evidence.

NOTES:

1. **Violations of other types of restraining orders.** This instruction is for assault and battery on a person protected by orders issued pursuant to G.L. c. 209A, §§ 3, 4 and 5. Violations of other restraining orders, specifically G.L. c. 208, §§ 18, 34B, 34C; G. L. c. 209, § 32 and G. L. c. 209C, §§ 15 or 20, are also criminally punishable under G.L. 265, § 13A(b)(iii), and the elements of the offense are the same for each type of order. The instruction should be modified by inserting the proper statutory reference.

2. **Assault on a protected person.** If the Commonwealth charges assault only on a person protected by an abuse prevention order, pursuant to G.L. c. 265 § 13A (b)(iii), the jury must be instructed on "Assault" (Instruction 6.120) in addition to an instruction which includes the fourth, fifth and

sixth elements provided in the "Intentional Assault and Battery on a Protected Person" instruction provided above.

3. See Instruction 6.300 (Assault and Battery by Means of a Dangerous Weapon) for additional notes.

6.200 ASSAULT AND BATTERY ON A PREGNANT WOMAN

May 2017

The defendant is charged with having committed (an intentional) (or) (a reckless) assault and battery on [the alleged victim] **when** [the alleged victim] **was pregnant and the defendant knew, or had reason to know, that she was pregnant.**

G.L. c. 265, § 13A(b)(ii).

If the Commonwealth relies solely upon a theory of intentional assault and battery, continue with "I" below. If the Commonwealth relies upon both intentional and reckless theories, continue with both "I" and "II.A" below. If the Commonwealth relies solely upon a theory of reckless assault and battery, skip to "II.B" below.

I. INTENTIONAL ASSAULT AND BATTERY ON A PREGNANT WOMAN

In order to prove an intentional assault and battery upon a pregnant woman, the Commonwealth must prove five things beyond a reasonable doubt:

First: That the defendant touched the person of [the alleged victim] **without having any right or excuse for doing so;**

Second: That the defendant intended to touch [the alleged victim]**;**

Third: That the touching was either likely to cause bodily harm to [the alleged victim] **or was offensive and done without her consent;**

Fourth: That [the alleged victim] **was pregnant at the time of the alleged assault and battery; and**

Fifth: That the defendant knew, or had reason to know, that [the alleged victim] **was pregnant.**

You should consider all the circumstances and any reasonable inferences which you draw from the evidence to determine whether the Commonwealth has proved beyond a reasonable doubt that the defendant knew or had reason to know that [the alleged victim] **was pregnant.**

If additional language on intent is appropriate. **As I just mentioned, to prove an intentional assault and battery, the Commonwealth must prove beyond a reasonable doubt that the defendant intended to touch [the alleged victim], in the sense that the defendant consciously and deliberately intended the touching to occur, and that the touching was not merely accidental or negligent. The Commonwealth is not required to prove that the defendant specifically intended to cause injury to** [the alleged victim] **.**

II. RECKLESS ASSAULT AND BATTERY ON A PREGNANT WOMAN

A. Continue here if the jury is charged on both intentional and reckless assault and battery. **There is a second way in which a person may commit the crime of assault and battery on a pregnant woman. Instead of intentional conduct, it involves a reckless touching that results in bodily injury.**

B. Begin here if the jury is charged solely on reckless assault and battery. **The defendant is (also) charged with having committed an assault and battery upon a pregnant woman,** [the alleged victim]**, by reckless conduct, thereby causing bodily injury.**

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

First: That the defendant acted recklessly;

Second: That the defendant's reckless conduct included an intentional act which resulted in serious bodily injury to [the alleged victim] **.**

Third: That [the alleged victim]**was pregnant at the time of the alleged assault and battery; and**

Fourth: That the defendant knew, or had reason to know, that she was pregnant.

The Commonwealth must prove the injury was sufficiently serious to interfere with the alleged victim's health or comfort. It need not be permanent, but it must be more than trifling. For example, an act that only shakes up a person or causes only momentary discomfort would not be sufficient.

It is not enough for the Commonwealth to prove that the defendant acted negligently — that is, acted in a way that a reasonably careful person would not. It must be shown that the defendant's actions went beyond mere negligence and amounted to recklessness. The defendant acted recklessly if he (she) knew, or should have known, that such actions were very likely to cause substantial harm to someone, but he (she) ran that risk and went ahead anyway.

The defendant must have intended his (her) acts which resulted in the touching, in the sense that those acts did not happen accidentally. But it is not necessary that he (she) intended to injure or strike the alleged victim, or that he (she) foresaw the harm that resulted. If the defendant actually realized in advance that his (her) conduct was very likely to cause substantial harm and decided to run that risk, such conduct would of course be reckless. But even if he (she) was not conscious of the serious danger that was inherent in such conduct, it is still reckless conduct if a reasonable person, under the circumstances as they were known to the defendant, would have recognized that such actions were so dangerous that it was very likely that they would result in substantial injury.

Commonwealth v. Burno, 396 Mass. 622, 627, 487 N.E.2d 1366 (1986).

SUPPLEMENTAL INSTRUCTION

Victim injured while escaping. **As I mentioned earlier, the defendant's touching must have directly caused the** [alleged victim's] **injury or must have directly and substantially set in motion a chain of events that produced the injury in a natural and continuous sequence. Here you have heard some evidence suggesting that [alleged victim] was injured while escaping from** [place]**. To establish that element of the offense — that the defendant caused the injury which occurred as a result of the escape — the Commonwealth must prove beyond a reasonable doubt: (1) that** [the alleged victim] **was pregnant at the time; (2) that the defendant caused [the alleged victim] reasonably to fear an immediate attack from the defendant; (3) that this fear led her to try to (escape) (or) (defend herself) from the defendant; and (4) that** [the alleged victim] **received more than a trifling bodily injury from or during that attempt to (escape) (or) (defend).**

Commonwealth v. Parker, 25 Mass. App. Ct. 727, 522 N.E.2d 2 (1988).

Here the jury must be instructed on "Accident" (Instruction 9.100) if the issue of accident is supported by the evidence.

6.210 ASSAULT AND BATTERY ON A POLICE OFFICER OR PUBLIC EMPLOYEE

G.L. c. 265 § 13D
Issued May 2011

I. INTENTIONAL ASSAULT AND BATTERY

The defendant is charged with having committed an intentional assault and battery upon a police officer (public employee) in violation of section 13D of chapter 265 of our General Laws.

In order to prove that the defendant is guilty of having committed an intentional assault and battery on a police officer (public employee), the Commonwealth must prove six things beyond a reasonable doubt:

First: **That the defendant touched the person of** ***[the alleged victim]*** **, without having any right or excuse for doing so;**

Second: **That the defendant intended to touch** ***[the alleged victim]*** **;**

Third: **That the touching was *either* likely to cause bodily harm to** ***[the alleged victim]*** **, *or* was done without his (her) consent;**

Fourth**: That** ***[the alleged victim]*** **was a police officer (public employee);**

Fifth**: That the defendant knew** ***[the alleged victim]*** **was a police officer (public employee); and**

Sixth**: That** ***[the alleged victim]*** **was engaged in the performance of his (her) duty at the time of the alleged incident.**

If additional language on intent is appropriate. **As I mentioned before, to prove an intentional assault and battery, the Commonwealth must prove beyond a reasonable doubt that the defendant *intended* to touch *[the alleged victim]* , in the sense that the defendant consciously and deliberately intended the touching to occur, and that the touching was not merely accidental or negligent. The Commonwealth is not required to prove that the defendant specifically intended to cause injury to *[the alleged victim]* .**

The model instruction does not separately define assault, since "[e]very battery includes an assault" as a lesser included offense. *Commonwealth v. Burke*, 390 Mass. 480, 482, 457 N.E.2d 622, 624 (1983). If the evidence would also permit a jury finding of simple assault, the jury should be instructed on lesser included offenses (Instruction 2.280), followed by Instruction 6.120 (Assault), beginning with the second paragraph.
Commonwealth v. Ford, 424 Mass. 709, 677 N.E.2d 1149 (1997) (assault and battery is a general intent crime and does not require specific intent to injure the victim, but its intentional branch requires an intentional touching, and not merely an intentional act resulting in a touching); *Burke*, 390 Mass. at 482-483, 487, 457 N.E.2d at 624, 627 (any touching likely to cause bodily harm is a battery regardless of consent, but an offensive but nonharmful battery requires lack of consent or inability to consent); *Commonwealth v. McCan*, 277 Mass. 199, 203, 178 N.E. 633, 634 (1931) ("An assault and battery is the intentional and unjustified use of force upon the person of another, however slight, or the intentional doing of a wanton or grossly negligent act causing personal injury to another"); *Commonwealth v. Bianco*, 390 Mass. 254, 263, 454 N.E.2d 901, 907 (1983) (same); *Commonwealth v. Campbell*, 352 Mass. 387, 397, 226 N.E.2d 211, 218 (1967) (same); *Commonwealth v. Musgrave*, 38 Mass. App. Ct. 519, 521, 649 N.E.2d 784, 786 (1995), aff'd, 421 Mass. 610, 659 N.E.2d 284 (1996) (approving instruction for threatened-battery branch of assault that "when we say intentionally we mean that [defendant] did so consciously and voluntarily and not by accident, inadvertence or mistake"); *Commonwealth v. Moore*, 36 Mass. App. Ct. 455, 457-460, 632 N.E.2d 1234, 1236-1238 (1994) (intentional branch of assault and battery requires proof "that the defendant intended that a touching occur" and not merely "proof that the defendant did some intentional act, the result of which was a touching of the victim"); *Commonwealth v. Ferguson*, 30 Mass. App. Ct. 580, 584, 571 N.E.2d 411, 414 (1991) (intentional branch of assault and battery requires proof "that the defendant's conduct was intentional, in the sense that it did not happen accidentally"). See *Commonwealth v. Bianco*, 388 Mass. 358, 366-367, 446 N.E.2d 1041, 1047 (1983) (assault and battery by joint venture); *Commonwealth v. Collberg*, 119 Mass. 350, 353 (1876) (mutual consent is no defense to crosscomplaints of assault and battery; "such license is void, because it is against the law"); *Commonwealth v. Rubeck*, 64 Mass. App. Ct. 396, 401, 833 N.E.2d 650, 654 (2005) (no substantial risk of miscarriage of justice from omitting separate instruction that parent may use reasonable but not excessive force to discipline child because it is merely an elaboration of "right or excuse" language).

II. RECKLESS ASSAULT AND BATTERY

A. *If intentional assault and battery was already charged on.* There is a second way in which a person may be guilty of an assault and battery on a police officer (public employee). Instead of intentional conduct, it involves reckless conduct that results in bodily injury.

B. *If intentional assault and battery was not already charged on.* The defendant is charged with having committed an assault and battery upon a police officer (public employee) by reckless conduct. Section 13A of chapter 265 of our General Laws provides that "Whoever commits . . . an assault and battery upon a police officer (public employee) shall be punished . . . ."

In order to prove that the defendant is guilty of having committed an assault and battery upon a police officer (public employee) by reckless conduct, the Commonwealth must prove five things beyond a reasonable doubt:

***First:* That the defendant intentionally engaged in actions which caused bodily injury to *[the alleged victim]* ;**

***Second:* That the defendant's actions amounted to reckless conduct;**

***Third*: That *[the alleged victim]* was a police officer (public employee);**

***Fourth*: That the defendant knew *[the alleged victim]* was a police officer (public employee); and**

***Fifth*: That *[the alleged victim]* was engaged in the performance of his (her) duty at the time of the alleged incident.**

To prove the first element, the Commonwealth must prove that the defendant intended the act(s) which resulted in the injury in the sense that those acts did not happen accidentally. The Commonwealth must also prove that the injury was sufficiently serious to interfere with the alleged victim's health or comfort. It need not be permanent, but it must be more than trifling. For example, an act that only shakes up a person or causes only momentary discomfort would not be sufficient.

To prove the second element, the Commonwealth must prove that the defendant's actions amounted to reckless conduct. It is not enough for the Commonwealth to prove that the defendant acted negligently — that is, acted in a way that a reasonably careful person would not. It must be shown that the defendant's actions went beyond mere negligence and amounted to recklessness. The defendant acted recklessly if he (she) knew, or should have known, that such actions were very likely to cause substantial harm to someone, but he (she) ran that risk and went ahead anyway. The Commonwealth must prove that the defendant intended his (her) acts which resulted in the touching, in the sense that those acts did not happen accidentally.

If relevant to the evidence. **If you find that the defendant's acts occurred by accident, then you must find the defendant not guilty.**

But it is not necessary that he (she) intended to injure or strike the alleged victim, or that he (she) foresaw the harm that resulted. If the defendant actually realized in advance that his (her) conduct was very likely to cause substantial harm and decided to run that risk, such conduct would of course be reckless. But even if he (she) was not conscious of the serious danger that was inherent in such conduct, it is still reckless conduct if a reasonable person, under the circumstances as they were known to the defendant, would have recognized that such actions were so dangerous that it was very likely that they would result in substantial injury.

Commonwealth v. Burno, 396 Mass. 622, 625-627, 487 N.E.2d 1366, 1368-1370 (1986) ("the intentional commission of a wanton or reckless act (something more than gross negligence) causing physical or bodily injury to another"; injury must have "interfered with the health or comfort of the victim. It need not have been permanent, but it must have been more than transient and trifling . . . . For example, if an alleged victim were shaken up but by his own admission not injured, or if an alleged victim were to have a sore wrist for only a few minutes, the 'injury' in each instance would be transient and trifling at most"); *Commonwealth v. Welch*, 16 Mass. App. Ct. 271, 273-277, 450 N.E.2d 1100, 1102-1104 (1983) ("The law recognizes . . . an alternative form of assault and battery in which proof of a wilful, wanton and reckless act which results in personal injury to another substitutes for . . . intentional conduct"; elements are [1] that the act involved a high degree of likelihood that substantial harm would result to another, and [2] that the victim suffered physical injury as a result of that act). See also *Commonwealth v. Grey*, 399 Mass. 469, 472 n.4, 505 N.E.2d 171, 174 n.4 (1987) ("'The standard of wanton or reckless conduct is at once subjective and objective' . . . . It depends on what the defendant knew (subjective) and how a reasonable person would have acted (objective) knowing those facts"); *Commonwealth v. Godin*, 374 Mass. 120, 129, 371 N.E.2d 438, 444, cert. denied, 436 U.S. 917 (1977) (standard "is at once both a subjective and objective standard, and is based in part on the knowledge of facts which would cause a reasonable man to know that a danger of serious harm exists. Such knowledge has its roots in experience, logic, and common sense, as well as in formal legal standards"); *Commonwealth v. Welansky*, 316 Mass. 383, 399, 55 N.E.2d 902, 910 (1944) ("Wanton or reckless conduct amounts to what has been variously described as indifference to or disregard of probable consequences").

SUPPLEMENTAL INSTRUCTION

Victim injured while escaping. **The defendant may be convicted of assault and battery if the Commonwealth has proved beyond a reasonable doubt that the defendant caused *[alleged victim]* reasonably to fear an immediate attack from the defendant, which then led him (her) to try to (escape) (*or*) (defend) himself (herself) from the defendant, and in doing so injured himself (herself).**

Commonwealth v. Parker, 25 Mass. App. Ct. 727, 522 N.E.2d 2 (1988).

NOTES:

1. **Verdict slip where there are alternate theories of guilt.** If the evidence would warrant a guilty verdict for the offense of assault and battery on more than one theory of culpability, the judge must provide the jury with a verdict slip to indicate the theory or theories on which the jury bases its verdict and, on request, instruct the jurors that they must agree unanimously on the theory of culpability. *Commonwealth v. Accetta,* 422 Mass. 642, 646- 647, 664 N.E.2d 830, 833 (1996); *Commonwealth v. Plunkett,* 422 Mass. 634, 640, 422 N.E.2d 833, 837 (1996); *Commonwealth v. Barry,* 420 Mass. 95, 112, 648 N.E.2d 732, 742 (1995). See the appendix for a sample verdict slip that may be used when an assault and battery charge is submitted to the jury under both the intentional and reckless branches of assault and battery, and without any lesser included offenses. W here the jury is presented with a lesser included offense of assault, and the Commonwealth proceeds upon the alternate theories of an attempted battery or an imminently threatened battery the jury need not be unanimous as to the theory and a special verdict slip requiring the jury to elect between the theories is not proper. *Commonwealth v. Arias*, 78 Mass. App. Ct. 429, 433, 939 N.E.2d 1169, 1173 (2010).

2. **Intent.** An intent to strike the police officer or public employee is not required under the recklessness analysis. *Commonwealth v. Correia*, 50 Mass. App. Ct. 455, 457-458, 737 N.E.2d 1264, 1266 (2000). However, the court added, "There is no explicit scienter requirement for the[] elements [of reckless assault and battery] in the statute. Assuming, without deciding the existence of such a requirement, compare *Commonwealth v. Francis*, 24 Mass. App. Ct. 576, 577-578 & n.2, 511 N.E.2d 38, 40 & n.2 (1987); *Commonwealth v. Lawson*, 46 Mass. App. Ct. 627, 629-630, 708 N.E.2d 148, 149-150 (1999), there is ample evidence here supporting the inference of the requisite knowledge on the part of the defendant." *Id.*, 50 Mass. App. Ct. at 459 n.6, 737 N.E.2d at 1267 n.6. See also *Commonwealth v. McCrohan,* 34 Mass. App. Ct. 277, 282, 610 N.E.2d 326, 330 (1993) (jury could properly find that police officer was "engaged in the performance of his duty" while responding in a neighboring town pursuant to a mutual aid agreement under G.L. c. 40, § 8G); *Commonwealth v. Deschaine*, 77 Mass. App. Ct. 506, 932 N.E.2d 854 (2010), *Commonwealth v. Francis*, 24 Mass. App. Ct. 576, 577, 581, 511 N.E.2d 38, 40, 41-42 (1987) (similar statute, G.L. c. 127, § 38B, requires specific intent to strike a person known to be a correctional officer); *Commonwealth v. Rosario*, 13 Mass. App. Ct. 920, 920, 430 N.E.2d 866, 866 (1982) (defendant who inadvertently struck police officer while intending to strike someone else may only be convicted of lesser included offense of assault and battery). See *Commonwealth v. Sawyer*, 142 Mass. 530, 533, 8 N.E. 422, 424 (1886); *Commonwealth v. Kirby*, 2 Cush. 577, 579 (1849).

3. **Related offenses.** General Laws c. 127, § 38B sets forth the separate offense (which is not within the final jurisdiction of the District Court) of assault or assault and battery on a correctional officer.

Effective November 2, 2010: General Laws c. 265, § 13F also sets forth the separate offense of assault and battery on a person with an intellectual disability; a first offense is within the final jurisdiction of the District Court, though a subsequent offense is not. "Whoever commits an assault and battery on a person with an intellectual disability knowing such person to have an intellectual disability shall for the first offense be punished by imprisonment in a house of correction for not more than two and one-half years or by imprisonment in the state prison for not more than five years . . . . This section shall not apply to the commission of an indecent assault and battery by a person with an intellectual disability upon another person with an intellectual disability."

General Laws c. 265, § 13*I* sets forth the separate offense of assault or assault and battery on an emergency medical technician or an ambulance operator or ambulance attendant, while treating or transporting a person in the line of duty.

There are separate aggravated forms of assault and battery if the victim is 60 years or older or is disabled, and the assault results in bodily injury (G.L. c. 265, § 13K[b]) or serious bodily injury (G.L. c. 265, § 13K[c]); both offenses are within the final jurisdiction of the District Court.

4. **Medical testimony.** In a prosecution for assault and battery, medical testimony about the victim's injuries is admissible to establish that the defendant's assault on the victim was intentional and not accidental. *Commonwealth v. Gill*, 37 Mass. App. Ct. 457, 463-464, 640 N.E.2d 798, 803 (1994).

5. **Transferred intent**. An instruction on transferred intent indicates that the Commonwealth need only prove intent as to one of the intended victims and does not have to prove intent specifically directed at each of the actual victims. *Commonwealth v. Melton*, 436 Mass. 291, 299 n.11, 763 N.E.2d 1092, 1099 n.11 (2002). "It is a familiar rule that one who shoots, intending to hit A., and accidentally hits and injures B., is liable for an assault and battery on B." *Commonwealth v. Hawkins*, 157 Mass. 551, 553, 32 N.E. 862, 863 (1893). Accord, *Commonwealth v. Drumgold,* 423 Mass. 230, 259, 668 N.E.2d 300, 319 (1996); *Commonwealth v. Pitts*, 403 Mass. 665, 668-669, 532 N.E.2d 34, 36 (1989); *Commonwealth v. Puleio*, 394 Mass. 101, 109-110, 474 N.E.2d 1078, 1083-1084 (1985); *Commonwealth v. Ely*, 388 Mass. 69, 76 n.13, 544 N.E.2d 1276, 1281 n.13 (1983).

6. **Statement of reasons required if imprisonment not imposed**. A jury session judge sentencing for this or one of the other crimes against persons found in G.L. c. 265 who does not impose a sentence of incarceration "shall include in the record of the case specific reasons for not imposing a sentence of imprisonment," which shall be a public record. G.L. c. 265, § 41.

6.220 ASSAULT AND BATTERY ON A CHILD UNDER 14 CAUSING BODILY INJURY

G.L. c. 265, § 13J(b ¶ 1)
Issued May 2011

The defendant is charged under G.L. c. 265, § 13J, with having committed an assault and battery on and thereby caused bodily injury to a child under 14 years of age.

I. INTENTIONAL ASSAULT AND BATTERY

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

First: **That *[the alleged victim]* was a person under 14 years of age;**

Second: **That the defendant touched the person of *[the alleged victim]*, without having any right or excuse for doing so;**

Third: **That the defendant intended to touch *[the alleged victim]*; and**

***Fourth*: That *[the alleged victim]* suffered bodily injury.**

If additional language on intent is appropriate. **As I mentioned before, to prove an intentional assault and battery, the Commonwealth must prove beyond a reasonable doubt that the defendant *intended* to touch *[the alleged victim]* , in the sense that the defendant consciously and deliberately intended the touching to occur, and that the touching was not merely accidental or negligent. The Commonwealth is not required to prove that the defendant specifically intended to cause injury to *[the alleged victim]* .**

To prove the fourth element, the Commonwealth must prove that *[the alleged victim]* suffered a bodily injury. Under the law, a bodily injury is a substantial impairment of the physical condition, including:

(a burn)

(a fracture of any bone)

(a subdural hematoma)[1]

(any injury to any internal organ)

(any injury which occurs as the result of repeated harm to any bodily function or organ including human skin)

(any physical condition which substantially imperils a child's health or welfare).

II RECKLESS ASSAULT AND BATTERY

A. If intentional assault and battery was already charged on. **There is a second way in which a person may be guilty of an assault and battery. Instead of intentional conduct, it involves reckless conduct that results in bodily injury.**

B. If intentional assault and battery was not already charged on. **The defendant is charged under G.L. c. 265, § 13J, with having committed an assault and battery upon *[the alleged victim]* by reckless conduct and thereby caused bodily injury to a child under 14 years of age.**

In order to prove that the defendant is guilty of having committed an assault and battery on and thereby caused injury to a child under 14 years of age by reckless conduct, the Commonwealth must prove three things beyond a reasonable doubt:

First: **That *[the alleged victim]* was a person under 14 years of age;**

Second: **That the defendant intentionally engaged in actions which caused bodily injury to *[the alleged victim]* ; and**

Third: **That the defendant's actions amounted to reckless conduct.**

To prove the second element, the Commonwealth must prove that the defendant acted consciously and deliberately and not accidentally. It must further prove that his actions caused a bodily injury which is defined as a substantial impairment of the physical condition, including:

(a burn)

(a fracture of any bone)

(a subdural hematoma)[1]

(any injury to any internal organ)

(any injury which occurs as the result of repeated harm to any bodily function or organ including human skin)

(any physical condition which substantially imperils a child's health or welfare).

To prove the third element, the Commonwealth must prove that the defendant acted wantonly or recklessly. It is not enough for the Commonwealth to prove that the defendant acted negligently — that is, in a manner that a reasonably careful person would not. It must be shown that the defendant's actions went beyond mere negligence and amounted to recklessness. The defendant acted recklessly if he (she) knew, or should have known, that his (her) [actions were] [failure to act was] very likely to result in bodily harm to *[the alleged victim]* but he (she) ran that risk and [went ahead anyway] [failed to act anyway].

It is not necessary that the defendant intended that *[the alleged victim]* be harmed or that he (she) foresaw the harm that resulted. If the defendant actually realized in advance that his (her) conduct was very likely to result in bodily injury to *[the alleged victim]* and decided to run that risk, such conduct would of course be reckless. But even if he (she) was not conscious of the serious danger that was inherent in such conduct, it is still reckless conduct if a reasonable person, under the circumstances as they were known to the defendant, would have recognized that such actions were so dangerous that it was very likely that they would result in bodily harm to *[the alleged victim]* .

G.L. c. 265, § 15A(b). Ford, 424 Mass. at 711, 677 N.E.2d at 1151 (the recklessness branch of assault and battery with a dangerous weapon requires proof of an "intentional commission of a wanton or reckless act (something more than gross negligence) causing physical or bodily injury to another" by means of a dangerous weapon).

If relevant to the evidence. **If you find that the defendant's acts occurred by accident, then you must find the defendant not guilty.**

Commonwealth v. Burno, 396 Mass. 622, 625-627, 487 N.E.2d 1366, 1368-1370 (1986) ("the intentional commission of a wanton or reckless act (something more than gross negligence) causing physical or bodily injury to another"; injury must have "interfered with the health or comfort of the victim. It need not have been permanent, but it must have been more than transient and trifling . . . . For example, if an alleged victim were shaken up but by his own admission not injured, or if an alleged victim were to have a sore wrist for only a few minutes, the 'injury' in each instance would be transient and trifling at most"); *Commonwealth v. Welch*, 16 Mass. App. Ct. 271, 273-277, 450 N.E.2d 1100, 1102-1104 (1983) ("The law recognizes . . . an alternative form of assault and battery in which proof of a wilful, wanton and reckless act which results in personal injury to another substitutes for . . . intentional conduct"; elements are [1] that the act involved a high degree of likelihood that substantial harm would result to another, and [2] that the victim suffered physical injury as a result of that act). See also *Commonwealth v. Grey*, 399 Mass. 469, 472 n.4, 505 N.E.2d 171, 174 n.4 (1987) ("'The standard of wanton or reckless conduct is at once subjective and objective' . . . . It depends on what the defendant knew (subjective) and how a reasonable person would have acted (objective) knowing those facts"); *Commonwealth v. Godin*, 374 Mass. 120, 129, 371 N.E.2d 438, 444, cert. denied, 436 U.S. 917 (1977) (standard "is at once both a subjective and objective standard, and is based in part on the knowledge of facts which would cause a reasonable man to know that a danger of serious harm exists. Such knowledge has its roots in experience, logic, and common sense, as well as in formal legal standards"); *Commonwealth v. Welansky*, 316 Mass. 383, 399, 55 N.E.2d 902, 910 (1944) ("Wanton or reckless conduct amounts to what has been variously described as indifference to or disregard of probable consequences").

SUPPLEMENTAL INSTRUCTION

Victim injured while escaping. **The defendant may be convicted of assault and battery if the Commonwealth has proved beyond a reasonable doubt that the defendant caused *[the alleged victim]* reasonably to fear an immediate attack from the defendant, which then led him (her) to try to (escape) (*or*) (defend) himself (herself) from the defendant, and in doing so injured himself (herself).**

Commonwealth v. Parker, 25 Mass. App. Ct. 727, 522 N.E.2d 2 (1988).

[1] Note: Generally speaking, a subdural hematoma refers to bleeding on the brain.

NOTES:

1. **Verdict slip where there are alternate theories of guilt.** If the evidence would warrant a guilty verdict for the offense of assault and battery on more than one theory of culpability, the judge must provide the jury with a verdict slip to indicate the theory or theories on which the jury bases its verdict and, on request, instruct the jurors that they must agree unanimously on the theory of culpability. *Commonwealth v. Accetta*, 422 Mass. 642, 646- 647, 664 N.E.2d 830, 833 (1996); *Commonwealth v. Plunkett*, 422 Mass. 634, 640, 422 N.E.2d 833,

837 (1996); *Commonwealth v. Barry,* 420 Mass. 95, 112, 648 N.E.2d 732, 742 (1995). See the appendix for a sample verdict slip that may be used when an assault and battery charge is submitted to the jury under both the intentional and reckless branches of assault and battery, and without any lesser included offenses. The sample verdict slip must be adapted to include additional options if any lesser included offenses are submitted to the jury. W here only an assault is charged or the jury is presented with a lesser included offense of assault, and the Commonwealth proceeds upon the alternate theories of an attempted battery or an imminently threatened battery the jury need not be unanimous as to the theory and a special verdict slip requiring the jury to elect between the theories is not proper. *Commonwealth v. Arias*, 78 Mass. App. Ct. 429, 433, 939 N.E.2d 1169, 1173 (2010).

2. **Medical testimony**. In a prosecution for assault and battery, medical testimony about the victim's injuries is admissible to establish that the defendant's assault on the victim was intentional and not accidental. *Commonwealth v. Gill*, 37 Mass. App. Ct. 457, 463-464, 640 N.E.2d 798, 803 (1994).

3. **Transferred intent.** An instruction on transferred intent indicates that the Commonwealth need only prove intent as to one of the intended victims and does not have to prove intent specifically directed at each of the actual victims. *Commonwealth v. Melton*, 436 Mass. 291, 299 n.11, 763 N.E.2d 1092, 1099 n.11 (2002). "It is a familiar rule that one who shoots, intending to hit A., and accidentally hits and injures B., is liable for an assault and battery on B." *Commonwealth v. Hawkins*, 157 Mass. 551, 553, 32 N.E. 862, 863 (1893). Accord, *Commonwealth v. Drumgold,* 423 Mass. 230, 259, 668 N.E.2d 300, 319 (1996); *Commonwealth v. Pitts*, 403 Mass. 665, 668-669, 532 N.E.2d 34, 36 (1989); *Commonwealth v. Puleio*, 394 Mass. 101, 109-110, 474 N.E.2d 1078, 1083-1084 (1985); *Commonwealth v. Ely*, 388 Mass. 69, 76 n.13, 544 N.E.2d 1276, 1281 n.13 (1983).

4. **Statement of reasons required if imprisonment not imposed.** A jury session judge sentencing for this or one of the other crimes against persons found in G.L. c. 265 who does not impose a sentence of incarceration "shall include in the record of the case specific reasons for not imposing a sentence of imprisonment," which shall be a public record. G.L. c. 265, § 41.

6.230 WANTONLY OR RECKLESSLY PERMITTING BODILY INJURY TO A CHILD UNDER 14

G.L. c. 265, § 13J(b ¶ 3) (first part)
Issued May 2011

The defendant is charged under G.L. c. 265, § 13J, with being a person having the care and custody of a child under 14 years of age when the child received a bodily injury which the defendant wantonly or recklessly permitted to occur.

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

First: **That the defendant had the care and custody of *[the alleged victim]* ;**

Second: **That *[the alleged victim]* was a person under 14 years of age;**

Third: **That *[the alleged victim]* suffered bodily injury; and**

***Fourth*: That the defendant wantonly or recklessly permitted that injury to occur.**

To prove the first element, the Commonwealth must prove the defendant had care and custody of *[the alleged victim]*. Persons who have care and custody may include a parent, guardian, employee of a home or institution or any other person with equivalent supervision or care of a child, whether the supervision temporary or permanent.

To prove the second element, the Commonwealth must prove *[the alleged victim]* was a child who had not reached his (her) fourteenth birthday.

To prove the third element, (as I previously explained) the Commonwealth must prove that *[the alleged victim]* suffered a bodily injury. Under the law, a bodily injury is a substantial impairment of the physical condition. Included among such impairments:

(a burn)

(a fracture of any bone)

(a subdural hematoma)[1]

(any injury to any internal organ)

(any injury which occurs as the result of repeated harm to any bodily function or organ including human skin)

(any physical condition which substantially imperils a child's health or welfare).

To prove the fourth element, the Commonwealth must prove that the defendant acted wantonly or recklessly. It is not enough for the Commonwealth to prove that the defendant acted negligently — that is, in a manner that a reasonably careful person would not. It must be shown that the defendant's actions went beyond mere negligence and amounted to recklessness. The defendant acted recklessly if he (she) knew, or should have known, that his (her) [actions were] [failure to act was] very likely to result in bodily harm to *[the alleged victim]* but he (she) ran that risk and [went ahead anyway] [failed to act anyway].

It is not necessary that the defendant intended that *[the alleged victim]* be harmed or that he (she) foresaw the harm that resulted. If the defendant actually realized in advance that his (her) conduct was very likely to result in bodily injury to *[the alleged victim]* and decided to run that risk, such conduct would of course be reckless. But even if he (she) was not conscious of the serious danger that was inherent in such conduct, it is still reckless conduct if a reasonable person, under the circumstances as they were known to the defendant, would have recognized that such actions were so dangerous that it was very likely that they would result in bodily harm to *[the alleged victim]* .

G.L. c. 265, § 15A(b). *Commonwealth v. Ford*, 424 Mass. 709, 711, 677 N.E.2d 1149, 1151 (1997) (the recklessness branch of assault and battery with a dangerous weapon requires proof of an "intentional commission of a wanton or reckless act (something more than gross negligence) causing physical or bodily injury to another" by means of a dangerous weapon).

[1] Note: Generally speaking, a subdural hematoma refers to bleeding on the brain.

6.240 WANTONLY OR RECKLESSLY PERMITTING ANOTHER TO COMMIT AN ASSAULT AND BATTERY ON A CHILD UNDER 14 CAUSING BODILY INJURY

G.L. c. 265, § 13J(b ¶ 3) (second part)
Issued May 2011

The defendant is charged under G.L. c. 265, § 13J, with being a person who, while having care and custody of a child under 14 years of age, wantonly or recklessly permitted another to cause bodily injury to that child by touching the child without right to do so.

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

First: **That the defendant had the care and custody of *[the alleged victim]* ;**

Second: **That *[the alleged victim]* was a person under 14 years of age;**

Third: **That *[the alleged victim]* suffered bodily injury; and**

***Fourth*: That the defendant wantonly or recklessly permitted another to cause injury to *[the alleged victim]* by touching him (her) without right to do so.**

To prove the first element, the Commonwealth must prove the defendant had care and custody of *[the alleged victim]*. Persons who have care and custody may include a parent, guardian, employee of a home or institution or any other person with equivalent supervision or care of a child, whether the supervision temporary or permanent.

To prove the second element, the Commonwealth must prove *[the alleged victim]* was a child who had not reached his (her) fourteenth birthday.

To prove the third element, (as I previously explained) the Commonwealth must prove that *[the alleged victim]* suffered a bodily injury. Under the law, a bodily injury is a substantial impairment of the physical condition including:

(a burn)

(a fracture of any bone)

(a subdural hematoma)[1]

(any injury to any internal organ)

(any injury which occurs as the result of repeated harm to any bodily function or organ including human skin)

(any physical condition which substantially imperils a child's health or welfare).

To prove the fourth element, the Commonwealth must prove that the defendant acted wantonly or recklessly. It is not enough for the Commonwealth to prove that the defendant acted negligently — that is, in a manner that a reasonably careful person would not. It must be shown that the defendant's actions went beyond mere negligence and amounted to recklessness. The defendant acted recklessly if he (she) knew, or should have known, that his (her) [actions were] [failure to act was] very likely to result in bodily harm to *[the alleged victim]* but he (she) ran that risk and [went ahead anyway] [failed to act anyway].

It is not necessary that the defendant intended that *[the alleged victim]* be harmed or that he (she) foresaw the harm that resulted. If the defendant actually realized in advance that his (her) conduct was very likely to result in bodily injury to *[the alleged victim]* and decided to run that risk, such conduct would of course be reckless. But even if he (she) was not conscious of the serious danger that was inherent in such conduct, it is still reckless conduct if a reasonable person, under the circumstances as they were known to the defendant, would have recognized that such actions were so dangerous that it was very likely that they would result in bodily harm to *[the alleged victim]* .

G.L. c. 265, § 15A(b). *Commonwealth v. Ford*, 424 Mass. 709, 711, 677 N.E.2d 1149, 1151 (1997) (the recklessness branch of assault and battery with a dangerous weapon requires proof of an "intentional commission of a wanton or reckless act (something more than gross negligence) causing physical or bodily injury to another" by means of a dangerous weapon).

[1] Note: Generally speaking, a subdural hematoma refers to bleeding on the brain.

6.250 WANTONLY OR RECKLESSLY PERMITTING SUBSTANTIAL BODILY INJURY TO A CHILD UNDER 14

G.L. c. 265, § 13J(b ¶ 4) (first part)
Issued May 2011

The defendant is charged under G.L. c. 265, § 13J, with permitting a substantial bodily injury to a child under 14 years of age at a time when the defendant had the care and custody of that child.

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

First: **That the defendant had the care and custody of *[the alleged victim]* ;**

Second: **That *[the alleged victim]* was a person under 14 years of age;**

Third: **That *[the alleged victim]* suffered substantial bodily injury; and**

***Fourth*: That the defendant wantonly or recklessly permitted that injury to occur.**

To prove the first element, the Commonwealth must prove the defendant had care and custody of *[the alleged victim]* . Persons who have care and custody may include a parent, guardian, employee of a home or institution or any other person with equivalent supervision or care of a child, whether the supervision temporary or permanent.

To prove the second element, the Commonwealth must prove *[the alleged victim]* was a child who had not reached his (her) fourteenth birthday.

To prove the third element, (as I previously explained) the Commonwealth must prove that *[the alleged victim]* suffered substantial bodily injury. Under the law, substantial bodily injury is one which creates a permanent disfigurement, protracted loss or impairment of a function of a body member, limb or organ, or substantial risk of death.

To prove the fourth element, the Commonwealth must prove that the defendant acted wantonly or recklessly. It is not enough for the Commonwealth to prove that the defendant acted negligently — that is, in a manner that a reasonably careful person would not. It must be shown that the defendant's actions went beyond mere negligence and amounted to recklessness. The defendant acted recklessly if he (she) knew, or should have known, that his (her) [actions were] [failure to act was] very likely to result in substantial bodily harm to *[the alleged victim]* but he (she) ran that risk and [went ahead anyway] [failed to act anyway].

It is not necessary that the defendant intended that *[the alleged victim]* be harmed or that he (she) foresaw the harm that resulted. If the defendant actually realized in advance that his (her) conduct was very likely to result in bodily injury to *[the alleged victim]* and decided to run that risk, such conduct would of course be reckless. But even if he (she) was not conscious of the serious danger that was inherent in such conduct, it is still reckless conduct if a reasonable person, under the circumstances as they were known to the defendant, would have recognized that such actions were so dangerous that it was very likely that they would result in bodily harm to *[the alleged victim]* .

G.L. c. 265, § 15A(b). *Commonwealth v. Ford*, 424 Mass. 709, 711, 677 N.E.2d 1149, 1151 (1997) (the recklessness branch of assault and battery with a dangerous weapon requires proof of an "intentional commission of a wanton or reckless act (something more than gross negligence) causing physical or bodily injury to another" by means of a dangerous weapon).

6.260 WANTONLY OR RECKLESSLY PERMITTING ANOTHER TO COMMIT AN ASSAULT AND BATTERY ON A CHILD UNDER 14 CAUSING SUBSTANTIAL BODILY INJURY

G.L. c. 265, § 13J(b ¶ 4) (second part)
Issued May 2011

The defendant is charged under G.L. c. 265, § 13J, with being a person who, while having care and custody of a child under 14 years of age, wantonly or recklessly permitted another to cause substantial bodily injury to that child by touching the child without right to do so.

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

First: **That the defendant had the care and custody of *[the alleged victim]* ;**

Second: **That *[the alleged victim]* was a person under 14 years of age;**

Third: **That *[the alleged victim]* suffered substantial bodily injury; and**

***Fourth*: That the defendant wantonly or recklessly permitted another to cause that injury to *[the alleged victim]* by touching him (her) without right to do so.**

To prove the first element, the Commonwealth must prove the defendant had care and custody of *[the alleged victim]*. Persons who have care and custody may include a parent, guardian, employee of a home or institution or any other person with equivalent supervision or care of a child, whether the supervision temporary or permanent.

To prove the second element, the Commonwealth must prove *[the alleged victim]* was a child who had not reached his (her) fourteenth birthday.

To prove the third element, (as I previously explained) the Commonwealth must prove that *[the alleged victim]* suffered substantial bodily injury. Under the law, substantial bodily injury is one which creates a permanent disfigurement, protracted loss or impairment of a function of a body member, limb or organ, or substantial risk of death.

To prove the fourth element, the Commonwealth must prove that the defendant acted wantonly or recklessly. It is not enough for the Commonwealth to prove that the defendant acted negligently — that is, in a manner that a reasonably careful person would not. It must be shown that the defendant's actions went beyond mere negligence and amounted to recklessness. The defendant acted recklessly if he (she) knew, or should have known, that his (her) [actions were] [failure to act was] very likely to result in substantial bodily harm to *[the alleged victim]* but he (she) ran that risk and [went ahead anyway] [failed to act anyway].

It is not necessary that the defendant intended that *[the alleged victim]* be harmed or that he (she) foresaw the harm that resulted. If the defendant actually realized in advance that his (her) conduct was very likely to result in substantial bodily injury to *[the alleged victim]* and decided to run that risk, such conduct would of course be reckless. But even if he (she) was not conscious of the serious danger that was inherent in such conduct, it is still reckless conduct if a reasonable person, under the circumstances as they were known to the defendant, would have recognized that such actions were so dangerous that it was very likely that they would result in substantial bodily harm to *[the alleged victim]* .

G.L. c. 265, § 15A(b). *Commonwealth v. Ford*, 424 Mass. 709, 711, 677 N.E.2d 1149, 1151 (1997) (the recklessness branch of assault and battery with a dangerous weapon requires proof of an "intentional commission of a wanton or reckless act (something more than gross negligence) causing physical or bodily injury to another" by means of a dangerous weapon).

6.270 ASSAULT ON FAMILY OR HOUSEHOLD MEMBER

G.L. c.265 § 13M
March 2015

The defendant is charged with having committed an assault upon a family or household member, namely *[alleged victim]* . An assault may be committed in either of two ways. It is *either* an attempted battery *or* an immediately threatened battery. A battery is a harmful or an unpermittedtouching of another person. So an assault can be either an attempt to use some degree of physical force on another person — for example, by throwing a punch at someone — or it can be a demonstration of an apparent intent to use immediate force on another person — for example, by coming at someone with fists flying. The defendant may be convicted of assault if the Commonwealth proves *either* form of assault.

In order to establish the first form of assault — an attempted battery— the Commonwealth must prove beyond a reasonable doubt that the defendant intended to commit a battery — that is, a harmful or an unpermitted touching — upon *[alleged victim]* , took some overt step toward accomplishing that intent, and came reasonably close to doing so. With this form of assault, it is not necessary for the Commonwealth to show that *[alleged victim]* was put in fear or was even aware of the attempted battery.

In order to prove the second form of assault — an imminently threatened battery — the Commonwealth must prove beyond a reasonable doubt that the defendant intended to put *[alleged victim]* in fear of an imminent battery, and engaged in some conduct toward *[alleged victim]* which *[alleged victim]* reasonably perceived as imminently threatening a battery.

In either case, the Commonwealth must prove that the defendant and *[alleged victim]* were family or household members.

Under the law, two persons are "family or household members" if

(they are or were married to each other)

(they have a child in common)

(they are or have been in a "substantive dating relationship." To determine whether they were in a "substantive dating relationship," you should consider (1) the length of time of the relationship; (2) the type of relationship; (3) the frequency of interaction between the defendant and; [*alleged victim*] ; and [if applicable] (4) the length of time that has elapsed since the termination of the relationship. A relationship need not be exclusive or committed to be a substantive dating relationship.)

"The existence of a 'substantive dating relationship' is to be determined as a case-by-case basis." *C.O. v. M.M.*, 442 Mass. 648, 651 (2004). Especially where minors are involved, a "substantive dating relationship" may be conducted electronically. *E.C.O. v. Compton*, 464 Mass. 558, 564-565 (2013). Accordingly, three months of regular electronic communication between a minor and an adult that included intimate conversation and a mutual desire to engage in sexual relations could constitute a "substantive dating relationship." *Id.* at 564. By contrast, the statute does not "apply to acquaintance or stranger violence," and a single date at the cinema is insufficient to support a finding of a "substantive dating relationship." *C.O.*, 442 Mass. at 653-654. A relationship need not be exclusive or "committed" to be a "substantive dating relationship." *Brossard v. West Roxbury Div. of the Dist. Ct. Dep't*, 417 Mass. 183, 185 (1994). Ultimately, the courts "recognize[] the need for flexibility" in applying the definition. *C.O.*, 442 Mass. at 652.

Here instruct on Intent (Instruction 3.120), since both branches of assault are specific intent offenses.
If additional language on the first branch of assault is appropriate, see Instruction 4.120 (Attempt).

Commonwealth v. Barbosa, 399 Mass. 841, 845 n.7 (1987) (an assault is "any manifestation, by a person, of that person's present intention to do another immediate bodily harm"); *Commonwealth v. Delgado*, 367 Mass. 432, 435-437 & n.3 (1975) ("an act placing another in reasonable apprehension that force may be used is sufficient for the offense of criminal assault"; words threatening future harm are insufficient to constitute an assault unless "they put the other in reasonable apprehension of an imminent harmful or offensive contact with his person") (italics omitted); *Commonwealth v. Chambers*, 57 Mass. App. Ct. 47, 49 (2003) (threatened-battery branch "requires proof that the defendant has engaged in objectively menacing conduct with the intent of causing apprehension of immediate bodily harm on the part of the target"); *Commonwealth v. Musgrave*, 38 Mass. App. Ct. 519, 524 (1995) (threatened-battery branch of assault requires specific intent to put victim in fear or apprehension of immediate physical harm), *aff'd*, 421 Mass. 610 (1996); *Commonwealth v. Spencer*, 40 Mass. App. Ct. 919, 922 (1996) (same); *Commonwealth v. Enos*, 26 Mass. App. Ct. 1006, 1008 (1988) (necessary intent inferable from defendant's overt act putting another in reasonable fear, irrespective of whether defendant intended actual injury); *Commonwealth v. Domingue*, 18 Mass. App. Ct. 987, 990 (1984) (assault is "an overt act undertaken with the intention of putting another person in fear of bodily harm and reasonably calculated to do so, whether or not the defendant actually intended to harm the victim"). See *Commonwealth v. Hurley*, 99 Mass. 433, 434 (1868) (assault by joint venture by intentionally inciting assault by others); *Commonwealth v. Joyce*, 18 Mass. App. Ct. 417, 421-422, 426-430 (1984) (assault by joint venture).

NOTES:

1. **Certified batterer's intervention program.** Any sentence or continuance without a finding for strangulation or suffocation must include a condition that the defendant complete a certified batterer's intervention program unless "the court issues specific written findings describing the reasons that batterer's intervention should not be ordered or unless the batterer's intervention program determines that the defendant is not suitable for intervention." G.L. c. 265, § 13M(d).

2. **Multiple victims of single assault**. Where the defendant assaults multiple victims in a single act, the defendant may be convicted of multiple counts of assault and, in the judge's discretion, given consecutive sentences. *Commonwealth v. Dello Iacono*, 20 Mass. App. Ct. 83, 89-90 (1985) (firing gun into house with several residents).

3. **Simultaneous assault and property destruction**. A single act may support simultaneous convictions of assault by means of a dangerous weapon upon the victim who was assaulted and of malicious destruction of property (G.L. c. 266, § 127) with respect to the area where the victim was standing. *Domingue*, 18 Mass. App. Ct. 987, 990 (1984) (firing gun in order to damage bar and frighten bartender).

4. **Statement of reasons required if imprisonment not imposed.** A jury session judge sentencing for this or one of the other crimes against persons found in G.L. c. 265 who does not impose a sentence of incarceration "shall include in the record of the case specific reasons for not imposing a sentence of imprisonment," which shall be a public record. G.L. c. 265, § 41.

5. **Victim's apprehension or fear.** The first (attempted battery) branch of assault does not require that the victim was aware of or feared the attempted battery. *Commonwealth v. Gorassi*, 432 Mass. 244, 248 (2000)*; Commonwealth v. Richards*, 363 Mass. 299, 303 (1973)*; Commonwealth v. Slaney*, 345 Mass. 135, 138-139 (1962).

The second (threatened battery) branch of assault requires that the victim was aware of the defendant's objectively menacing conduct. *Chambers*, 57 Mass. App. Ct. at 48-52. Some older decisions seem to suggest that under the second branch of assault the victim must have feared as well as perceived the threatened battery. In *Chambers*, the Appeals Court determined that awareness of the threat was all that was required. *Id.* at 51-53. Other recent decisions appear to be in accord. See *Gorassi*, 432 Mass. at 248-249; *Commonwealth v. Gordon*, 407 Mass. 340, 349 (1990); *Slaney*, 345 Mass. at 139-141. See also the extended discussion of this issue in Richard G. Stearns, *Massachusetts Criminal Law: A Prosecutor's Guide* (28th ed. 2008). The model instruction requires perception, but not subjective fear, by the victim under the second branch of assault.

6. **Verdict slip.** W here the jury is presented with a lesser included offense of assault, and the Commonwealth proceeds upon the alternate theories of an attempted battery or an imminently threatened battery, the jury need not be unanimous as to the theory and a special verdict slip requiring the jury to elect between the theories is not proper. *Commonwealth v. Arias*, 78 Mass. App. Ct. 429, 433 (2010). A verdict slip need not distinguish between a conviction for an attempted battery and a threatened battery even when the Commonwealth proceeds upon both theories. The jury may return a unanimous verdict for assault even if they are split between the two theories. "Because attempted battery and threatened battery 'are closely related,' *Commonwealth* v. *Santos*, 440 Mass. 281, 289 (2003), we do not require that a jury be unanimous as to which theory of assault forms the basis for their verdict; a jury may find a defendant guilty of assault if some jurors find the defendant committed an attempted battery (because they are convinced the defendant intended to strike the victim and missed) and the remainder find that he committed a threatened battery (because they are convinced that the defendant intended to frighten the victim by threatening an assault). See *id.* at 284, 289 (jury were not required to be unanimous as to which form of assault was relied on to satisfy assault element of armed robbery)." *Commonwealth v. Porro*, 458 Mass. 526 (2010). Accord Arias, 78 Mass.App. Ct. at 432-433.

6.275 ASSAULT AND BATTERY ON FAMILY OR HOUSEHOLD MEMBER

G.L. c.265 § 13M
June 2016

I. INTENTIONAL ASSAULT AND BATTERY

The defendant is charged with having committed an assault and battery on a family or household member, namely ___*[alleged victim]*___. In order to prove that the defendant is guilty of having committed an intentional assault and battery on a family or household member, the Commonwealth must prove four things beyond a reasonable doubt:

First: **That the defendant touched the person of __*[alleged victim]*__, without having any right or excuse for doing so;**

Second: **That the defendant intended to touch __*[alleged victim]*__;**

Third: **That the touching was *either* likely to cause bodily harm to *[alleged victim]*__, *or* was offensive and was done without (his) (her) consent; and**

Fourth: **That the defendant and __*[alleged victim]*__ were family or household members.**

Under the law, two persons are "family or household members" if

(they are or were married to each other)

(they have a child in common)

(they are or have been in a "substantive dating or engagement relationship." To determine whether they were in a "substantive dating or engagement relationship," you should consider (1) the length of time of the relationship; (2) the type of relationship; (3) the frequency of interaction between the defendant and *[alleged victim]*; and [if applicable] (4) the length of time that has elapsed since the termination of the relationship. A relationship need not be exclusive or committed to be a substantive dating relationship.)

> "The existence of a 'substantive dating relationship' is to be determined as a case-by-case basis." *C.O. v. M.M.*, 442 Mass. 648, 651 (2004). Especially where minors are involved, a "substantive dating relationship" may be conducted electronically. *E.C.O. v. Compton*, 464 Mass. 558, 564-65 (2013). Accordingly, three months of regular electronic communication between a minor and an adult that included intimate conversation and a mutual desire to engage in sexual relations could constitute a "substantive dating relationship." *Id.* at 564. By contrast, the statute does not "apply to acquaintance or stranger violence," and a single date at the cinema is insufficient to support a finding of a "substantive dating relationship." *C.O.*, 442 Mass. at 653-54. A relationship need not be exclusive or "committed" to be a "substantive dating relationship." *Brossard v. West Roxbury Div. of the Dist. Ct. Dep't*, 417 Mass. 183, 185 (1994). Ultimately, the courts "recognize[] the need for flexibility" in applying the definition. *C.O.*, 442 Mass. at 652.

If additional language on intent is appropriate. **As I mentioned before, to prove an intentional assault and battery, the Commonwealth must prove beyond a reasonable doubt that the defendant *intended* to touch ___*[alleged victim]*___, in the sense that the defendant consciously and deliberately intended the touching to occur, and that the touching was not merely accidental or negligent. The Commonwealth is not required to prove that the defendant specifically intended to cause injury to ___*[alleged victim]*___.**

A touching is offensive and without consent when it amounts to an unprivileged and unjustified affront to the alleged victim's integrity.

If the touching was indirect. **A touching may be direct, as when a person strikes another, or it may be indirect as when a person sets in motion some force or instrumentality that strikes another.**

The model instruction does not separately define assault, since "[e]very battery includes an assault" as a lesser included offense. *Commonwealth v. Burke*, 390 Mass. 480, 482 (1983); *see* *Commonwealth v. Porro*, 458 Mass. 526, 533-535 (2010). If the evidence would also permit a jury finding of simple assault, the jury should be instructed on lesser included offenses (Instruction 2.280), followed by Instruction 6.120 (Assault), beginning with the second paragraph.

Commonwealth v. Ford, 424 Mass. 709, 711 (1997) (assault and battery is a general intent crime and does not require specific intent to injure the victim, but its intentional branch requires an intentional touching, and not merely an intentional act resulting in a touching); *Burke*, 390 Mass. at 482-83, 487 (any touching likely to cause bodily harm is a battery regardless of consent, but an offensive but nonharmful battery requires lack of consent or inability to consent); *Commonwealth v. McCan*, 277 Mass. 199, 203 (1931) ("An assault and battery is the intentional and unjustified use of force upon the person of another, however slight, or the intentional doing of a wanton or grossly negligent act causing personal injury to another"). Accord *Commonwealth v. Bianco*, 390 Mass. 254, 263 (1983) (same); *Commonwealth v. Campbell*, 352 Mass. 387, 397 (1967) (same); *Commonwealth v. Musgrave*, 38 Mass. App. Ct. 519, 521 (1995) (approving instruction for threatened-battery branch of assault that "when we say intentionally we mean that [defendant] did so consciously and voluntarily and not by accident, inadvertence or mistake"), *aff'd*, 421 Mass. 610 (1996); *Commonwealth v. Moore*, 36 Mass. App. Ct. 455, 457-60 (1994) (intentional branch of assault and battery requires proof "that the defendant intended that a touching occur" and not merely "proof that the defendant did some intentional act, the result of which was a touching of the victim"); *Commonwealth v. Ferguson*, 30 Mass. App. Ct. 580, 584 (1991) (intentional branch of assault and battery requires proof "that the defendant's conduct was intentional, in the sense that it did not happen accidentally"); *see* *Commonwealth v. Bianco*, 388 Mass. 358, 366-67 (1983) (assault and battery by joint venture); *Commonwealth v. Collberg*, 119 Mass. 350, 353 (1876) (mutual consent is no defense to cross-complaints of assault and battery; "such license is void, because it is against the law").

II RECKLESS ASSAULT AND BATTERY

A. If intentional assault and battery was already charged on. **There is a second way in which a person may be guilty of an assault and battery. Instead of intentional conduct, it involves reckless conduct that results in bodily**

B. If intentional assault and battery was not already charged on. **The defendant is charged with having committed an assault and battery upon on a family or household member, namely _____*[alleged victim]*_____, by reckless conduct.**

In order to prove that the defendant is guilty of having committed an assault and battery on a family or household member by reckless conduct, the Commonwealth must prove three things beyond a reasonable doubt:

First: **That the defendant intentionally engaged in actions which caused bodily injury to** *[alleged victim]*. **The injury must be sufficiently serious to interfere with the alleged victim's health or comfort. It need not be permanent, but it must be more than trifling. For example, an act that only shakes up a person or causes only momentary discomfort would not be sufficient.**

Second: **The Commonwealth must prove that the defendant's actions amounted to reckless conduct.**

And *third:* That the defendant and *[alleged victim]* **were family or household members.**

Under the law, two persons are "family or household members" if

(they are or were married to each other)

(they have a child in common)

(they are or have been in a "substantive dating or engagement relationship." To determine whether they were in a "substantive dating or engagement relationship," you should consider (1) the length of time of the relationship; (2) the type of relationship; (3) the frequency of interaction between the defendant and *[alleged victim]* **; and [if applicable] (4) the length of time that has elapsed since the termination of the relationship. A relationship need not be exclusive or committed to be a substantive dating relationship.)**

It is not enough for the Commonwealth to prove that the defendant acted negligently — that is, acted in a way that a reasonably careful person would not. It must be shown that the defendant's actions went beyond mere negligence and amounted to recklessness. The defendant acted recklessly if (he) (she) knew, or should have known, that such actions were very likely to cause substantial harm to someone, but (he) (she) ran that risk and went ahead anyway.

The defendant must have intended (his) (her) acts which resulted in the touching, in the sense that those acts did not happen accidentally.

> *If relevant to the evidence.* **If you find that the defendant's acts occurred by accident, then you must find the defendant not guilty.**

But it is not necessary that (he) (she) intended to injure or strike the alleged victim, or that (he) (she) foresaw the harm that resulted. If the defendant actually realized in advance that (his) (her) conduct was very likely to cause substantial harm and decided to run that risk, such conduct would of course be reckless. But even if (he) (she) was not conscious of the serious danger that was inherent in such conduct, it is still reckless conduct if a reasonable person, under the circumstances as they were known to the defendant, would have recognized that such actions were so dangerous that it was very likely that they would result in substantial injury.

Commonwealth v. Burno, 396 Mass. 622, 625-27 (1986) ("the intentional commission of a wanton or reckless act (something more than gross negligence) causing physical or bodily injury to another"; injury must have "interfered with the health or comfort of the victim. It need not have been permanent, but it must have been more than transient and trifling. For example, if an alleged victim were shaken up but by his own admission not injured, or if an alleged victim were to have a sore wrist for only a few minutes, the 'injury' in each instance would be transient and trifling at most.") (citation omitted); *Commonwealth v. Welch*, 16 Mass. App. Ct. 271, 273-77 ("The law recognizes . . . an alternative form of assault and battery in which proof of a wilful, wanton and reckless act which results in personal injury to another substitutes for . . . intentional conduct"; elements are [1] that the act involved a high degree of likelihood that substantial harm would result to another, and [2] that the victim suffered physical injury as a result of that act), *rev. denied*, 390 Mass. 1102 (1983); *see also* *Commonwealth v. Grey*, 399 Mass. 469, 472 n.4 (1987) (" 'The standard of wanton or reckless conduct is at once subjective and objective' . . . . It depends on what the defendant knew (subjective) and how a reasonable person would have acted (objective) knowing those facts.") (quoting *Commonwealth v. Welansky*, 316 Mass. 383, 398 (1944)); *Commonwealth v. Godin*, 374 Mass. 120, 129 (1977) (standard "is at once both a subjective and objective standard, and is based in part on the knowledge of facts which would cause a reasonable man to know that a danger of serious harm exists. Such knowledge has its roots in experience, logic, and common sense, as well as in formal legal standards."); *Commonwealth v. Welansky*, 316 Mass. 383, 399 (1944) ("Wanton or reckless conduct amounts to what has been variously described as indifference to or disregard of probable consequences").

SUPPLEMENTAL INSTRUCTION

Victim injured while escaping. **The defendant may be convicted of assault and battery if the Commonwealth has proved beyond a reasonable doubt that the defendant caused** *[alleged victim]* **reasonably to fear an immediate attack from the defendant, which then led (him) (her) to try to (escape) (*or*) (defend) (himself) (herself) from the defendant, and in doing so injured (himself) (herself).**

Commonwealth v. Parker, 25 Mass. App. Ct. 727, 731, 734, *rev. denied*, 402 Mass. 1104 (1988).

NOTES:

1. **Certified batterer's intervention program.** Any sentence or continuance without a finding for strangulation or suffocation must include a condition that the defendant complete a certified batterer's intervention program unless "the court issues specific written findings describing the reasons that batterer's intervention should not be ordered or unless the batterer's intervention program determines that the defendant is not suitable for intervention." G.L. c. 265, § 13M(d).

2. **No verdict slip or specific unanimity instruction required where both intentional and reckless assault and battery are alleged.** Where the evidence warrants instructing on both intentional assault and battery and reckless assault and battery, the jurors need not be unanimous on whether the assault and battery was intentional or reckless. The judge, therefore, need not give a specific unanimity instruction or provide verdict slips for the jury to indicate the basis of its verdict. *Commonwealth v. Mistretta*, 84 Mass. App. Ct. 906, 906-07, *rev. denied*, 466 Mass. 1108 (2013). This is because "the forms of assault and battery are . . . closely related subcategories of the same crime." *Id.* at 907. "Specific unanimity is not required, because they are not 'separate, distinct, and essentially unrelated ways in which the same crime can be committed.' " *Id.* (quoting *Commonwealth v. Santos*, 440 Mass. 281, 288 (2003)).

3. **Abuse prevention order admissible in evidence.** In a prosecution for assault and battery, a judge may admit evidence of prior circumstances under which the alleged victim had obtained an abuse prevention order under G.L. c. 209A against the defendant. While such evidence is not admissible to show bad character or propensity to commit the assault and battery, it is admissible to provide a full picture of the attack, which otherwise might have appeared as an essentially inexplicable act of violence. *Commonwealth v. Leonardi*, 413 Mass. 757, 762-64 (1992). Such an abuse prevention order must be redacted of statements that the court determined there was a substantial likelihood of immediate danger of abuse and that the defendant must surrender firearms. *Commonwealth v. Reddy*, 85 Mass. App. Ct. 104, 109-11, *rev. denied*, 468 Mass. 1104 (2014).

4. **Medical testimony.** In a prosecution for assault and battery, medical testimony about the victim's injuries is admissible to establish that the defendant's assault on the victim was intentional and not accidental. *Commonwealth v. Gill*, 37 Mass. App. Ct. 457, 463-64 (1994).

5. **Statement of reasons required if imprisonment not imposed.** A jury session judge sentencing for this or one of the other crimes against persons found in G.L. c. 265 who does not impose a sentence of incarceration "shall include in the record of the case specific reasons for not imposing a sentence of imprisonment," which shall be a public record. G.L. c. 265, § 41.

6.300 ASSAULT AND BATTERY BY MEANS OF A DANGEROUS WEAPON

G.L. c.265 § 15A
March 2017

I. INTENTIONAL ASSAULT AND BATTERY BY MEANS OF A DANGEROUS WEAPON

The defendant is charged with having committed an intentional assault and battery by means of a dangerous weapon.

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

First: **That the defendant touched the person of *[alleged victim]* , however slightly, without having any right or excuse for doing so;**

Second: **That the defendant intended to touch *[alleged victim]* ; and**

Third: **That the touching was done with a dangerous weapon.**

If additional language on intent is appropriate. **The Commonwealth must prove beyond a reasonable doubt that the defendant *intended* to touch *[alleged victim]* with the dangerous weapon, in the sense that the defendant consciously and deliberately intended the touching to occur, and that the touching was not merely accidental or negligent. The Commonwealth is *not* required to prove that the defendant specifically intended to cause injury to *[alleged victim]* .**

If no injury was sustained. **It is not necessary for the Commonwealth to prove that the defendant actually caused injury to *[alleged victim]* with a dangerous weapon. Any slight**

touching is sufficient, if it was done with a dangerous weapon.

A. If the alleged weapon is inherently dangerous. **A dangerous weapon is an item which is capable of causing serious injury or death. I instruct you, as a matter of law, that a _____ is a dangerous weapon.**

B. If the alleged weapon is not inherently dangerous. **An item that is normally used for innocent purposes can become a dangerous weapon if it is used as a weapon in a dangerous or potentially dangerous fashion. The law considers an item to be used in a dangerous fashion if it is used in a way that it reasonably appears to be capable of causing serious injury or death to another person.**

For example, a brick can be a dangerous weapon if it is thrust against someone's head or a pillow if it is used to suffocate someone. In deciding whether an item was used as a dangerous weapon, you may consider the circumstances surrounding the alleged crime, the nature, size and shape of the item, and the manner in which it was handled or controlled.

G.L. c. 265, § 15A(b). *Commonwealth v. Ford,* 424 Mass. 709, 711 (1997) (ABDW is a general intent crime and does not require specific intent to injure the victim, but its intentional branch requires an intentional touching, and not merely an intentional act resulting in a touching); *Commonwealth v. Waite,* 422 Mass. 792, 794 n.2 (1996) (ABDW does not require specific intent to do bodily harm with the dangerous weapon); *Quincy Mut. Fire Ins. Co. v. Abernathy*, 393 Mass. 81, 887 n.4 (1984) (ABDW "requires proof only that the defendant intentionally and unjustifiably used force, however slight, upon the person of another, by means of an instrumentality capable of causing bodily harm"); *Commonwealth v. Manning*, 6 Mass. App. Ct. 430, 436-438 (1978) (ABDW must be "by means of" dangerous weapon, that is, weapon must come into contact with victim); *Commonwealth v. Moffett*, 383 Mass. 201, 212 (1981) (same); *Commonwealth v. Liakos*, 12 Mass. App. Ct. 57, 60-61 (1981) (use of dangerous weapon, though not found or testified to, inferable from nature of victim's wounds).

The Appeals Court approved giving "helpful examples to guide the jury's analysis" in *Commonwealth v. Marrero*, 19 Mass. App. Ct. 921, 923 (1984), and much of the wording of the instruction regarding an item that is not inherently dangerous was reviewed in *Commonwealth v. Tevlin*, 433 Mass. 305, 310 (2001).

Where the dangerousness of the object is for the jury to decide, a lesser included instruction on assault and battery should always be given, and must be given on request. *Commonwealth v. Connolly, 49 Mass. App. Ct. 424, 426 (2000).*

II. RECKLESS ASSAULT AND BATTERY WITH A DANGEROUS WEAPON

A. If intentional ABDW was already charged on. **There is a second way in which a person may be guilty of an assault and battery by means of a dangerous weapon. Instead of intentional conduct, it involves a *reckless* touching with a dangerous weapon that results in bodily injury.**

B. If intentional ABDW was not already charged on. **The defendant is charged with having committed a reckless assault and battery by means of a dangerous weapon upon *[alleged victim]* .**

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

***First:* That the defendant engaged in actions which caused bodily injury to *[alleged victim]* .**

***Second:* That the bodily injury was done with a dangerous weapon; and**

***Third:* That the defendant's actions amounted to reckless conduct.**

With regard to the first element, the bodily injury must be sufficiently serious to interfere with the alleged victim's health or comfort. It need not be permanent, but it must be more than trifling. For example, an act that only shakes up a person or causes only momentary discomfort would not be sufficient.

A. *If the alleged weapon is inherently dangerous.* **A dangerous weapon is an item which is capable of causing serious injury or death. I instruct you, as a matter of law, that a _____ is a dangerous weapon.**

B. If the alleged weapon is not inherently dangerous. **An item that is normally used for innocent purposes can become a dangerous weapon if it is used as a weapon in a dangerous or potentially dangerous fashion. The law considers an item to be used in a dangerous fashion if it is used in a way that it reasonably appears to be capable of causing serious injury or death to another person.**

For example, a brick can be a dangerous weapon if it is thrust against someone's head or a pillow if it is used to suffocate someone. In deciding whether an item was used as a dangerous weapon, you may consider the circumstances surrounding the alleged crime, the nature, size and shape of the item, and the manner in which it was handled or controlled.

With regard to the third element, it is not enough for the Commonwealth to prove that the defendant acted negligently — that is, in a manner that a reasonably careful person would not. It must be shown that the defendant's actions went beyond mere negligence and amounted to recklessness. The defendant acted recklessly if he (she) knew, or should have known, that such actions were very likely to cause substantial harm to someone, but he (she) ran that risk and went ahead anyway.

But it is not necessary that he (she) intended to injure or strike the alleged victim, or that he (she) foresaw the harm that resulted. If the defendant actually realized in advance that his (her) conduct was very likely to cause substantial harm and decided to run that risk, such conduct would of course be reckless. But even if he (she) was not conscious of the serious danger that was inherent in such conduct, it is still reckless conduct if a reasonable person, under the circumstances as they were known to the defendant, would have recognized that such actions were so dangerous that it was very likely that they would result in substantial injury.

G.L. c. 265, § 15A(b). *Ford,* 424 Mass. at 711 (the recklessness branch of assault and battery with a dangerous weapon requires proof of an "intentional commission of a wanton or reckless act (something more than gross negligence) causing physical or bodily injury to another" by means of a dangerous weapon).

No verdict slip or specific unanimity instruction required where both intentional and reckless assault and battery by means of a dangerous weapon are alleged. Where the evidence warrants instructing on both intentional and reckless branches, the jurors need not be unanimous on whether the ABDW was intentional or reckless. The judge, therefore, need not give a specific unanimity instruction or provide verdict slips for the jury to indicate the basis of its verdict. See *Commonwealth v. Mistretta*, 84 Mass. App. Ct. 906, 906-07, rev. denied, 466 Mass. 1108 (2013). This is because "the forms of assault and battery are . . . closely related subcategories of the same crime." Id. at 907. "Specific unanimity is not required, because they are not 'separate, distinct, and essentially unrelated ways in which the same crime can be committed.' " *Id*., quoting *Commonwealth v. Santos*, 440 Mass. 281, 288 (2003).

NOTES:

1. **"Dangerous weapon."** A weapon is "an instrument of offensive or defensive combat; . . . anything used, or designed to be used, in destroying, defeating, or injuring an enemy." *Commonwealth v. Sampson*, 383 Mass. 750, 754 (1981). A dangerous weapon is "any instrument or instrumentality so constructed or so used as to be likely to produce death or great bodily harm." *Commonwealth v. Farrell*, 322 Mass. 606, 614-615 (1948).

If a weapon is inherently dangerous, it need not have been used in a dangerous fashion. *Appleby*, 380 Mass. at 307 n.6. For the list of weapons which are considered inherently dangerous, see G.L. c. 269, § 10(a) & (b) and *Commonwealth v. Appleby,* 380 Mass. 296, 303 (1980) (item is inherently dangerous "if designed for the purpose of bodily assault or defense"). See *Commonwealth v. Lord*, 55 Mass.App.Ct. 265, 267 (2002) (mace spraying device dangerous per se).

Usually-innocent items are also considered to be dangerous weapons if used in a dangerous or potentially dangerous fashion. *Id.* at 303-304, 307 (riding crop; and collecting cases on particular items). See also *Commonwealth v. Scott,* 408 Mass. 811, 822-823 (1990) (gag); *Commonwealth v. Gallison*, 383 Mass. 659, 667-668 (1981) (lit cigarette); *Commonwealth v. Barrett*, 386 Mass. 649, 654-656 (1980) (aerosol can sprayed in eyes of operator of moving vehicle); *Commonwealth v. Fettes,* 64 Mass. App. Ct. 917, 918 (2005) (dog). However, the fact that an appellate court previously held that the object was capable of being used as a dangerous weapon does not make it such in all future cases, regardless of circumstances. *Appleby, supra*. "The essential question, when an object which is not dangerous per se is alleged to be a dangerous weapon, is whether the object, as used by the defendant, is capable of producing serious bodily harm." *Marrero*, 19 Mass. App. Ct. at 922. This is determined by how the object's potential for harm would have appeared to a reasonable observer. *Commonwealth v. Tarrant*,

367 Mass. 411, 414 (1975). This determination is normally for the jury, to be decided on the basis of the circumstances surrounding the crime, the nature, size and shape of the object, and the manner in which it was handled or controlled. *Appleby*, 380 Mass. at 307 n.5; *Marrero, supra;* *Commonwealth v. Davis*, 10 Mass. App. Ct. 190, 193 (1980). "That a dangerous weapon was used can be inferred from the victim's injuries." *Commonwealth v. Roman*, 43 Mass. App. Ct. 733, 736, S.C., 427 Mass. 1006 (1998). W hether an item is a dangerous weapon turns on how it is used, and not the subjective intent of the actor. *Commonwealth v. Lefebvre*, 60 Mass. App. Ct. 912, 913 (2004); *Commonwealth v. Connolly* 49 Mass. App. Ct. 424, 425 (2000).

To qualify as a dangerous weapon, an item need not be capable of being wielded, possessed or controlled, and may be stationary. *Commonwealth v. Sexton,* 425 Mass. 146, 152 (1997) (concrete pavement against which victim's head was repeatedly struck; and collecting cases). See also *Commonwealth v. McIntosh,* 56 Mass. App. Ct. 827, 829 (2002) (windowpane). It may not, however, be a human body part. *Davis*, 10 Mass. App. Ct. at 192-193 (teeth and other body parts). The ocean is not a dangerous weapon for purposes of § 15A where the victim is abandoned far from shore, *Commonwealth v. Shea,* 38 Mass. App. Ct. 7, 15-16, (1995), but perhaps it would be if the victim's head were held underwater, see *Sexton,* 425 Mass. at 150 & n.1.

2. **Knives.** Not all knives are dangerous per se. *Commonwealth v. Miller*, 22 Mass. App. Ct. 694, 694 n.1 (1986) (noting Legislature has not designated all knives as dangerous per se, and discussing the definition of "dirk knife"). By statute, "any stiletto, dagger or a device or case which enables a knife with a locking blade to be drawn at a locked position, any ballistic knife, or any knife with a detachable blade capable of being propelled by any mechanism, dirk knife, any knife having a double-edged blade, or a switch knife, or any knife having an automatic spring release device by which the blade is released from the handle, having a blade of over one and one-half inches" is a dangerous weapon per se. G.L. c. 269, § 10(b). See *Commonwealth v. Smith,* 40 Mass. App. Ct. 770, 776-78 (1996) (a "knife having a double-edged blade" need not be double-edged for its entire length); *Miller, supra* (discussing the difficulties in defining a "dirk knife"). Straight knives typically are regarded as dangerous per se while folding knives, at least those without a locking device, typically are not. *Commonwealth v. Turner,* 59 Mass. App. Ct. 825, 828 (2003). See *Commonwealth v. Young*, 461 Mass. 198, 211-12 (2012) (affirming instruction that a nine-inch knife with a five-inch double-edge blade was dangerous per se). Possession of a closed folding knife is a dangerous weapon for purposes of G.L. c. 269, § 10(b) only if used or handled in a manner that made it a dangerous weapon. *Turner,* 59 Mass. App. Ct. at 828-29.

3. **Shod foot.** "Footwear, such as a shoe, when used to kick, can be a dangerous weapon." *Commonwealth v. Tevlin*, 433 Mass. 305, 311 (2001); *Commonwealth v. Fernandez*, 43 Mass. App. Ct. 313, 315 (1997) (sneakers); *Commonwealth v. Marrero*, 19 Mass. App. Ct. 921, 922 (1984) (boots or sneakers); *Commonwealth v. Zawatsky,* 41 Mass. App. Ct. 392, 398-399 (1996) (unnecessary for prosecutor to prove exactly what type of shoes defendant wore where there was evidence that defendant was wearing shoes and gave victim a vicious kick to the head resulting in injury). Compare *Commonwealth v. Charles,* 57 Mass. App. Ct. 595, 599 (2003) (kicking was "not so minimal as to foreclose an inference" that shod feet were being used as dangerous weapons capable of causing serious injury) with *Commonwealth v. Mercado*, 24 Mass. App. Ct. 391, 397 (1987) (jury may infer that foot was shod, but no more than a nudge was insufficient).

4. **Unseen weapon**. A defendant who claimed to have a weapon may be taken at his word, if it is possible that he did have such a weapon. *Commonwealth v. Hastings,* 22 Mass. App. Ct. 930, 930 (1986) (where victim felt sharp object against her, defendant claiming to have unseen knife may be convicted of ABDW).

5. **Specification of dangerous weapon**. The particular type of dangerous weapon with which the offense was committed is not an essential element of ABDW. *Commonwealth v. Salone*, 26 Mass. App. Ct. 926, 929 (1988). It is therefore surplusage in a complaint and, if the defendant is not surprised, its specification in the complaint may be amended at any time to conform to the evidence. See G.L. c. 277, § 21.

6. **Automobile as extension of occupants**. As to whether a battery of an automobile is also a battery of its occupants, see *Commonwealth v. Burno*, 396 Mass. 622, 627-628 (1986) (agreeing that "a battery could occur although no force was applied to a person directly," but reserving decision on whether "a battery could occur even if no force at all, direct or indirect, was applied to a person").

7. **Victim injured while escaping.** A defendant may be convicted of ABDW where the victim was cut with the defendant's knife while trying to grab the knife away from the pursuing defendant. *Commonwealth v. Rajotte*, 23 Mass. App. Ct. 93, 96 (1986). See the supplemental instruction to Assault and Battery (Instruction 6.140).

8. **Consent not a defense.** *Commonwealth v. Appleby*, 380 Mass. 296, 310 (1980) (consent is not a defense to ABDW). *Commonwealth* v. *Burke,* 390 Mass. 480, 482-483 (1983); *Commonwealth* v. *Leonard,* 90 Mass. App. Ct. 187 (2016).

9. **Transferred intent**. An instruction on transferred intent indicates that the Commonwealth need only prove an intent to touch one of the intended victims and does not have to prove intent specifically directed at each of the actual victims.

Commonwealth v. Melton, 436 Mass. 291, 299 n.11 (2002). "It is a familiar rule that one who shoots, intending to hit A., and accidentally hits and injures B., is liable for an assault and battery on B." *Commonwealth v. Hawkins*, 157 Mass. 551, 553 (1893). Accord, *Commonwealth v. Dung Van Tran*, 463 Mass. 8, 25 & n.19 (2012); *Commonwealth v. Drumgold,* 423 Mass. 230, 259, (1996); *Commonwealth v. Pitts*, 403 Mass. 665, 668-669 & n. 6 (1989); *Commonwealth v. Puleio*, 394 Mass. 101, 109-110, (1985); *Commonwealth v. Ely*, 388 Mass. 69, 76 n.13 (1983).

10. **Joint venture.** A conviction of ABDW by joint venture requires knowledge that the co-venturer had a dangerous weapon, but this may be inferred from the circumstances. *Commonwealth v. Ferguson*, 365 Mass. 1, 8-9 (1974); *Commonwealth v. Meadows*, 12 Mass. App. Ct. 639, 644 (1981). See *Commonwealth v. Britt*, 465 Mass. 87, 100 (2013) (where conviction is based on joint venture theory of crime that has as element use or possession of weapon, Commonwealth bears "the burden of proving that [the defendant] had knowledge that a member of the joint venture had a weapon"). However, "there is no need to prove an anticipatory compact between the parties to establish joint venture, if, at the climactic moment the parties consciously acted together in carrying out the criminal endeavor." *Commonwealth v. Sexton*, 425 Mass. 146, 152 (1997) (joint venture liability for ABDW upheld where defendant continuously kicked and punched the victim while his coventurer repeatedly slammed the victim's head into the pavement, and at no time during this conflict did the defendant seek to withdraw).

11. **Aggravated forms of offense**. Assault and battery on a person 60 years or older by means of a dangerous weapon (G.L. c. 265, § 15A[a]) is an aggravated form of ABDW (§ 15A[b]). The Commonwealth must charge and prove that the victim was 60 years of age or older. The jury may consider the victim's physical appearance as one factor in determining age, but appearance alone is not sufficient evidence of age unless the victim is of "a marked extreme" age, since "[e]xcept at the poles, judging age on physical appearance is a guess . . . ." *Commonwealth v. Pittman*, 25 Mass. App. Ct. 25, 28 (1987). A further-aggravated sentence is provided for subsequent offenses.

An ABDW is also aggravated if it causes serious bodily injury, or if the defendant knows or has reason to know that the victim is pregnant, or if the defendant knows that the victim has an outstanding abuse restraining order against the defendant, or if the defendant is 18 years of age or older and the victim is under the age of 14. (G.L. c. 265, § 15A(c)).

12. **Lesser included offenses**. ABDW has as lesser included offenses assault with a dangerous weapon, and assault and battery (Instruction 6.140). *Commonwealth v. Beal*, 474 Mass. 341, 347 (2016) (ADW lesser included offense of ABDW); *Commonwealth v. Connolly*, 49 Mass. App. Ct. 424, 426 (2000) (assault and battery lesser included offense of ABDW). Both theories of assault (Instruction 6.120) are lesser included offenses of *intentional* ABDW; there is still an open question about whether both theories are lesser included offenses of reckless ABDW). See *Commonwealth v. Porro*, 458 Mass. 526, 534 & n.8 (2010). If the evidence would also permit a jury finding of a lesser included offense, the jury should be instructed on lesser included offenses (Instruction 2.280).

13. **Statement of reasons required if imprisonment not imposed.** A jury session judge sentencing for this or one of the other crimes against persons found in G.L. c. 265 who does not impose a sentence of incarceration "shall include in the record of the case specific reasons for not imposing a sentence of imprisonment," which shall be a public record. G.L. c. 265, § 41.

6.301 SAMPLE JURY VERDICT FORM

2009 Edition

COMMONWEALTH OF MASSACHUSETTS
DISTRICT COURT DEPARTMENT OF THE TRIAL COURT
_____ Division
Complaint No. _____
)
COMMONWEALTH)
)
vs.)
)
JURY VERDICT
_____)

We, the jury, unanimously return the following verdict:

(Check only one of the following three choices:)

___ 1. We find the defendant **NOT GUILTY** of the offense of intentional or reckless assault and battery by means of a dangerous weapon *(General Laws chapter 265, section 15A).*

___ 2. We find the defendant **GUILTY** as charged of the offense of **INTENTIONAL** assault and battery by means of a dangerous weapon *(General Laws chapter 265, section 15A).*

___ 3. We find the defendant **GUILTY** as charged of the offense of **RECKLESS** assault and battery by means of a dangerous weapon *(General Laws chapter 265, section 15A).*

Date: _____
Signature: _____
Foreperson of the Jury

6.320 ASSAULT AND BATTERY BY MEANS OF A DANGEROUS WEAPON CAUSING SERIOUS INJURY

G.L. c. 265 § 15A[c][i]
2009 Edition

The defendant is charged with having committed (an intentional) (or) (a reckless) assault and battery with a dangerous weapon upon, and thereby caused serious bodily injury to, *[the alleged victim]* .

G.L. c. 265, §15A(c)(i).

If the Commonwealth relies solely upon a theory of intentional assault and battery, continue with "I" below. If the Commonwealth relies on both theories, continue with both "I" and "II.A" below. If the Commonwealth relies solely upon a theory of reckless assault and battery, skip to "II.B" below.

I. INTENTIONAL ASSAULT AND BATTERY WITH A DANGEROUS WEAPON CAUSING SERIOUS INJURY

In order to prove the defendant guilty of an intentional assault and battery by means of a dangerous weapon causing serious bodily injury, the Commonwealth must prove four things beyond a reasonable doubt:

First: **That the defendant touched the person of *[the alleged victim]* , however slightly, without having any right or excuse for doing so;**

Second: **That the defendant intended to touch *[the alleged victim]* ;**

Third: **That the touching was done with a dangerous weapon; and**

Fourth: **That the defendant's actions caused serious bodily injury to *[the alleged victim]* .**

A bodily injury is "serious" if it results in (permanent disfigurement) (a loss or impairment of a bodily function, limb or organ) (or) (a substantial risk of death).

Here the jury must be instructed on the definition of dangerous weapon from Instruction 5.401[sic] (*Assault and Battery by Means of a Dangerous Weapon*).

If additional language on intent is appropriate. **The Commonwealth must prove beyond a reasonable doubt that the defendant *intended* to touch *[the alleged victim]* with the dangerous weapon, in the sense that the defendant consciously and deliberately intended the touching to occur, and that the touching was not merely accidental or negligent. The Commonwealth is *not* required to prove that the defendant specifically intended to cause injury to *[the alleged victim]* , although the Commonwealth must prove beyond a reasonable doubt that serious bodily harm resulted.**

II. RECKLESS ASSAULT AND BATTERY WITH A DANGEROUS WEAPON CAUSING SERIOUS INJURY

A. Continue here if the jury is charged on both intentional and reckless conduct.

There is a second way in which a person may commit the crime of assault and battery by means of a dangerous weapon causing serious physical injury. Instead of intentional conduct, it involves a reckless touching with a dangerous weapon that results in serious bodily injury.

B. Begin here if the jury is charged solely on reckless conduct. **The defendant is (also) charged with having committed an assault and battery by reckless conduct, with a dangerous weapon, upon *[the alleged victim]* , thereby causing serious bodily injury to *[the alleged victim]* .**

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

First: **That the defendant acted recklessly;**

Second: **That the defendant's reckless conduct included an intentional act which resulted in serious bodily injury to *[the alleged victim]* ;**

and *Third:* That the injury was inflicted by a dangerous weapon.

It is not enough for the Commonwealth to prove that the defendant acted negligently — that is, in a manner that a reasonably careful person would not. It must be shown that the defendant's actions went beyond mere negligence and amounted to recklessness. The defendant acted recklessly if (he) (she) knew, or should have known, that such actions were very likely to cause substantial harm to someone, but (he) (she) ran that risk and went ahead anyway.

The defendant must have intended (his) (her) acts which resulted in the touching, in the sense that those acts did not happen accidentally. But it is not necessary that (he) (she) intended to injure or strike the alleged victim, or that (he) (she) foresaw the harm that resulted. If the defendant actually realized in advance that (his) (her) conduct was very likely to cause substantial harm and decided to run that risk, such conduct would of course be reckless. But even if (he) (she) was not conscious of the serious danger that was inherent in such conduct, it is still reckless conduct if a reasonable person, under the circumstances as they were known to the defendant, would have recognized that such actions were so dangerous that it was very likely that they would result in substantial injury.

G.L. c. 265, § 15A(b). Ford, 424 Mass. at 711, 677 N.E.2d at 1151 (the recklessness branch of assault and battery with a dangerous weapon requires proof of an "intentional commission of a wanton or reckless act (something more than gross negligence) causing physical or bodily injury to another" by means of a dangerous weapon).

A serious bodily injury is one that involves (permanent disfigurement) (a loss or impairment of a bodily function, limb or organ) (or) (a substantial risk of death).

Here, if not previously done, the jury must be instructed on the definition of dangerous weapon from Instruction 6.300 (Assault and Battery by Means of a Dangerous Weapon).

In a prosecution for reckless assault and battery by means of a dangerous weapon, the Commonwealth need prove only "a bodily injury . . . sufficiently serious to interfere with the alleged victim's health or comfort." *Commonwealth v. Burno*, 396 Mass. 622, 625-627, 487 N.E.2d 1366, 1368-1370 (1986). But in a prosecution for intentional or reckless assault and battery by means of a dangerous weapon with serious injury, the statute requires proof of a permanent disfigurement, loss or impairment of a bodily function, limb or organ, or a substantial risk of death. Therefore, this instruction differs from that for the crime of reckless assault and battery by means of a dangerous weapon causing injury found in *Instruction 6.300* (Assault and Battery by Means of a Dangerous Weapon).

SUPPLEMENTAL INSTRUCTION

Victim injured while escaping. **As I mentioned earlier, the defendant's touching must have directly caused the** *[alleged victim's]* **injury or must have directly and substantially set in motion a chain of events that produced the injury in a natural and continuous sequence. Here you have heard some evidence suggesting that** *[alleged victim]* **was injured while escaping from** *[place]* **. To establish that element of the offense — that the defendant caused the injury which occurred as a result of the escape, the Commonwealth must prove beyond a reasonable doubt: (1) that the defendant caused** ***[the alleged victim]*** **reasonably to fear an immediate attack from the defendant; (2) that this fear led (him) (her) to try to (escape) (*or*) (defend) (himself) (herself) from the defendant; and (3) that** ***[the alleged victim]*** **received a serious bodily injury from or during that attempt to (escape) (or) (defend).**

Commonwealth v. Parker, 25 Mass. App. Ct. 727, 522 N.E.2d 2 (1988).

Here the jury must be instructed on "Accident" (Instruction 9.100) if the issue of accident is supported by the evidence.

See Instruction 6.300 (Assault and Battery by means of a Dangerous Weapon) for additional notes.

6.340 ASSAULT AND BATTERY WITH A DANGEROUS WEAPON ON A CHILD UNDER 14

G.L. c. 265 § 15A[c][iv]
2009 Edition

The defendant is charged with having committed (an intentional) (or) (a reckless) assault and battery with a dangerous weapon upon *[the alleged victim]* at the time when *[the alleged victim]* was a child under the age of 14 years.

G.L. c. 265, § 15A(c)(iv).

If the Commonwealth relies solely upon a theory of intentional assault and battery, continue with "I" below. If the Commonwealth relies on both theories, continue with both "I" and "II.A" below. If the Commonwealth relies solely upon a theory of reckless assault and battery, skip to "II.B." below.

I. INTENTIONAL ASSAULT AND BATTERY WITH A DANGEROUS WEAPON ON A CHILD UNDER 14

In order to prove an intentional assault and battery by means of a dangerous weapon on a child under age 14, the Commonwealth must prove four things beyond a reasonable doubt:

First: **That the defendant touched the person of *[the alleged victim]* , however slightly, without having any right or excuse for doing so;**

Second: **That the defendant intended to touch *[the alleged victim]* ;**

Third: **That the touching was done with a dangerous weapon; and**

Fourth: **That *[the alleged victim]* was a child under the age of 14 years.**

Here the jury must be instructed on the definition of dangerous weapon from Instruction 6.300 (Assault and Battery by Means of a Dangerous Weapon).

If additional language on intent is appropriate. **The Commonwealth must prove beyond a reasonable doubt that the defendant *intended* to touch** *[the alleged victim]* **with the dangerous weapon, in the sense that the defendant consciously and deliberately intended the touching to occur, and that the touching was not merely accidental or negligent. The Commonwealth is *not* required to prove that the defendant specifically intended to cause injury to** *[the alleged victim]* **.**

If no injury was sustained. **It is not necessary for the Commonwealth to prove that the defendant actually caused injury to** *[the alleged victim]* **with a dangerous weapon. Any slight touching is sufficient, if it was done with a dangerous weapon.**

II. RECKLESS ASSAULT AND BATTERY WITH A DANGEROUS WEAPON ON A CHILD UNDER 14

A. Continue here if the jury is charged on both intentional and reckless conduct.

There is a second way in which a person may commit an assault and battery by means of a dangerous weapon on a child under 14. Instead of intentional conduct, it requires that there be reckless conduct by the defendant causing injury.

B. Begin here if jury is charged solely on reckless conduct. **This defendant is (also) charged with having recklessly committed an assault and battery by means of a dangerous weapon upon *[the alleged victim]* when *[the alleged victim]* was under 14 years of age.**

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

First: **That the defendant acted recklessly;**

Second: **That the defendant's reckless conduct included an intentional act which resulted in bodily injury to *[the alleged victim]* ;**

Third: **That the injury was inflicted by a dangerous weapon; and**

***Fourth*: That the *[the alleged victim]* was under 14 years of age at the time.**

It is not enough for the Commonwealth to prove that the defendant acted negligently — that is, in a manner that a reasonably careful person would not. It must be shown that the defendant's actions went beyond mere negligence and amounted to recklessness. The defendant acted recklessly if (he) (she) knew, or should have known, that such actions were very likely to cause substantial harm to someone, but (he) (she) ran that risk and went ahead anyway.

The defendant must have intended (his) (her) acts which resulted in the touching, in the sense that those acts did not happen accidentally. But it is not necessary that (he) (she) intended to injure or strike the alleged victim, or that (he) (she) foresaw the harm that resulted. If the defendant actually realized in advance that (his) (her) conduct was very likely to cause substantial harm and decided to run that risk, such conduct would of course be reckless. But even if (he) (she) was not conscious of the serious danger that was inherent in such conduct, it is still reckless conduct if a reasonable person, under the circumstances as they were known to the defendant, would have recognized that such actions were so dangerous that it was very likely that they would result in substantial injury.

G.L. c. 265, § 15A(b). *Ford*, 424 Mass. at 711, 677 N.E.2d at 1151 (the recklessness branch of assault and battery with a dangerous weapon requires proof of an "intentional commission of a wanton or reckless act (something more than gross negligence) causing physical or bodily injury to another" by means of a dangerous weapon)

The injury must be sufficiently serious to interfere with the alleged victim's health or comfort. It need not be permanent, but it must be more than trifling. For example, an act that only shakes up a person or causes only momentary discomfort would not be sufficient.

Here, if not previously done, the jury must be instructed on the definition of dangerous weapon from Instruction 6.300 (Assault and Battery by Means of a Dangerous Weapon).

SUPPLEMENTAL INSTRUCTION

Victim injured while escaping. **As I mentioned earlier, the defendant's touching must have directly caused the *[alleged victim's]* injury or must have directly and substantially set in motion a chain of events that produced the injury in a natural and continuous sequence. Here you have heard some evidence suggesting that *[alleged victim]* was injured while escaping from *[place].* To establish that element of the offense — that the defendant caused the injury which occurred as a result of the escape, the Commonwealth must prove beyond a reasonable doubt: (1) that *[the alleged victim]* was a child under the age of 14; (2) that the defendant, armed with a dangerous weapon, caused *[the alleged victim]* reasonably to fear an immediate attack from the defendant; (3) that this fear led *[the alleged victim]* to try to (escape) (*or*) defend (himself) (herself) from the defendant; and (4) that *[the alleged victim]* received more than a trifling bodily injury from that dangerous weapon from or during that attempt to (escape) (or) (defend).**

Commonwealth v. Parker, 25 Mass. App. Ct. 727, 522 N.E.2d 2 (1988).

Here the jury must be instructed on "Accident" (Instruction 9.100) if the issue of accident is rasied by the evidence.

See Instruction 6.300 (Assault and Battery by Means of a Dangerous Weapon) for additional notes.

6.360 ASSAULT AND BATTERY WITH A DANGEROUS WEAPON ON A PERSON PROTECTED BY AN ABUSE PREVENTION ORDER

G.L. c. 265 § 15A[c][iii]

The defendant is charged with having committed (an intentional) (or) (a reckless) assault and battery with a dangerous weapon upon *[the alleged victim]* when the defendant knew at the time that a court had issued an order protecting *[the alleged victim]* from (him) (her).

G.L. c. 265, § 15A(c)(iii).

If the Commonwealth relies solely upon a theory of intentional assault and battery, continue with "I" below. If the Commonwealth relies on both theories, continue with both "I" and "II.A" below. If the Commonwealth relies solely upon a theory of reckless assault and battery, skip to "II.B." below.

I. INTENTIONAL ASSAULT AND BATTERY WITH A DANGEROUS WEAPON ON A PERSON PROTECTED BY AN ABUSE PREVENTION ORDER

In order to prove an intentional assault and battery with a dangerous weapon upon a person protected by a court order, the Commonwealth must prove six things beyond a reasonable doubt:

First: **That the defendant touched the person of *[the alleged victim]* , however slightly, without having any right or excuse for doing so;**

Second: **That the defendant intended to touch *[the alleged victim]* ;**

Third: **That the touching was done with a dangerous weapon;**

Fourth: **That a court had issued (an order) (or) (a judgment) against the defendant ordering (him) (her):**

(to vacate) (and) (stay away from) particular premises);

(or) (to stay a certain distance away from *[the alleged victim]*);

(or) (not to contact *[the alleged victim]*);

(or) (not to abuse *[the alleged victim]*).

Fifth: **That the order was in effect at the time of the alleged assault and battery; and**

Sixth: **That the defendant knew that the pertinent term(s) of the order (was) (were) in effect.**

To prove the defendant had knowledge of the order's terms, there must be proof that the defendant received a copy of the order or learned of it in some other way.

Commonwealth v. Welch, 58 Mass. App. Ct. 408, 790 N.E.2d 718, 58 (2003).

Here the jury must be instructed on the definition of dangerous weapon from Instruction 6.300 (Assault and Battery by Means of a Dangerous Weapon).

If additional language on intent is appropriate. **As I just mentioned, to prove an intentional assault and battery, the Commonwealth must prove beyond a reasonable doubt that the defendant *intended* to touch *[the alleged victim]* , in the sense that the defendant consciously and deliberately intended the touching to occur, and that the touching was not merely accidental or negligent. The Commonwealth is not required to prove that the defendant specifically intended to cause injury to *[the alleged victim]* .**

II. RECKLESS ASSAULT AND BATTERY WITH A DANGEROUS WEAPON ON A PERSON PROTECTED BY AN ABUSE PREVENTION ORDER

A. Continue here If the jury is charged on both intentional and reckless conduct.

There is a second way in which a person may commit the crime of assault and battery with a dangerous weapon on a protected person. Instead of intentional conduct, it involves a reckless touching that results in bodily injury.

B. Begin here if the jury is charged solely on reckless conduct. **The defendant is (also) charged with having committed an assault and battery with a dangerous weapon by reckless conduct on a person protected by an abuse prevention order.**

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

First: **That the defendant acted recklessly;**

Second: **That the defendant's reckless conduct included an intentional act which resulted in bodily injury to** ***[the alleged victim]*** **;**

Third: **That the injury was inflicted by a dangerous weapon;**

Fourth: **That a court had issued (an order) (or) (a judgment) against the defendant ordering (him) (her):**

(to [vacate] [and] [stay away from] particular premises);

(or) (to stay a certain distance away from ***[the alleged victim]*** **);**

(or) (not to contact *[the alleged victim]*);

(or) (not to abuse *[the alleged victim]*).

Fifth: **That the order was in effect at the time of the alleged reckless conduct; and**

Sixth: **That the defendant knew that the pertinent term(s) of the order (was) (were) in effect.**

It is not enough for the Commonwealth to prove that the defendant acted negligently — that is, acted in a way that a reasonably careful person would not. It must be shown that the defendant's actions went beyond mere negligence and amounted to recklessness. The defendant acted recklessly if (he) (she) knew, or should have known, that such actions were very likely to cause substantial harm to someone, but (he) (she) ran that risk and went ahead anyway.

The defendant must have intended (his) (her) acts which resulted in the touching, in the sense that those acts did not happen accidentally. But it is not necessary that (he) (she) intended to injure or strike the alleged victim, or that (he) (she) foresaw the harm that resulted. If the defendant actually realized in advance that (his) (her) conduct was very likely to cause substantial injury and decided to run that risk, such conduct would of course be reckless. But even if (he) (she) was not conscious of the serious danger that was inherent in such conduct, it is still reckless conduct if a reasonable person, under the circumstances as they were known to the defendant, would have recognized that such actions were so dangerous that it was very likely that they would result in substantial injury.

Commonwealth v. Burno, 396 Mass. 622, 487 N.E.2d 1366 (1986).

The injury must be sufficiently serious to interfere with the alleged victim's health or comfort. It need not be permanent, but it must be more than trifling. For example, an act that only shakes up a person or causes only momentary discomfort would not be sufficient.

Here, if not previously done, the jury must be instructed on the definition of dangerous weapon from Instruction 5.401[sic] (*Assault and Battery by Means of a Dangerous Weapon*).

SUPPLEMENTAL INSTRUCTION

Victim injured while escaping. **As I mentioned earlier, the defendant's touching must have directly caused *[alleged victim's]* injury or must have directly and substantially set in motion a chain of events that produced the injury in a natural and continuous sequence. You have heard some evidence suggesting that *[alleged victim]* was injured while escaping from *[place]*. To establish that element of the offense — that the defendant caused the injury which occurred as a result of the escape — the Commonwealth must prove beyond a reasonable doubt: (1) that a court had issued (an order) (or) (a judgment) against the defendant as I explained earlier; (2) the order was in effect; (3) the defendant knew that the pertinent term(s) of the order (was) (were) in effect; (4) the defendant caused *[the alleged victim]* reasonably to fear an immediate attack from the defendant; (5) this fear led *[the alleged victim]* to try to (escape) (or) (defend himself) (defend herself) from the defendant; and (6) *[the alleged victim]* received more than a trifling bodily injury from or during that attempt to (escape) (or) (defend).**

Commonwealth v. Parker, 25 Mass. App. Ct. 727, 522 N.E.2d 2 (1988).

Here the jury must be instructed on "Accident" (Instruction 9.100) if the issue of accident is supported by the evidence.

NOTES:

1. **Violations of other types of restraining orders.** This instruction is for assault and battery with dangerous weapon on a person protected by orders issued pursuant to G.L. c. 209A, §§ 3, 4 and 5. Violations of other restraining orders, specifically G.L. c. 208, §§ 18, 34B, 34C; G. L. c. 209, § 32 and G. L. c. 209C, §§ 15 or 20 are also criminally punishable under G.L. 265 §13A(b)(iii), and the elements of the offense are the same for each type of order. The instruction should be modified by inserting the proper statutory reference.

2. See instruction 6.300 (Assault and Battery by Means of a Dangerous Weapon) for additional notes.

6.380 ASSAULT AND BATTERY BY MEANS OF A DANGEROUS WEAPON ON A PREGNANT WOMAN

G.L. c. 265 § 15A[c][ii]
2009 Edition

The defendant is charged with having committed (an intentional) (or) (a reckless) assault and battery with a dangerous weapon upon *[the alleged victim]* when *[the alleged victim]* was pregnant and the defendant knew, or had reason to know, that she was pregnant.

G.L. c. 265, § 15A(c)(ii).

If the Commonwealth relies solely upon a theory of intentional assault and battery, continue with "I" below. If the Commonwealth relies on both theories, continue with both "I" and "II.A" below. If the Commonwealth relies solely upon a theory of reckless assault and battery, skip to "II.B." below.

I. INTENTIONAL ASSAULT AND BATTERY WITH A DANGEROUS WEAPON ON A PREGNANT WOMAN

In order to prove the defendant guilty of an intentional assault and battery by means of a dangerous weapon on a pregnant woman, the Commonwealth must prove five things beyond a reasonable doubt:

First: **That the defendant touched the person of *[the alleged victim]* , however slightly, without having any right or excuse for doing so;**

Second: **That the defendant intended to touch *[the alleged victim]* ;**

Third: **That the touching was done with a dangerous weapon;**

***Fourth*: That *[the alleged victim]* was pregnant at the time of the alleged assault and battery; and**

***Fifth*: That the defendant knew, or had reason to know, that *[the alleged victim]* was pregnant.**

You should consider all the circumstances and any reasonable inferences which you draw from the evidence to determine whether the Commonwealth has proved beyond a reasonable doubt that the defendant knew or had reason to know that *[the alleged victim]* was pregnant.

Here the jury must be instructed on the definition of dangerous weapon from Instruction 6.300 (Assault and Battery by Means of a Dangerous Weapon).

***If additional language on intent is appropriate.* As I just mentioned, to prove an intentional assault and battery, the Commonwealth must prove beyond a reasonable doubt that the defendant *intended* to touch *[the alleged victim]* , in the sense that the defendant consciously and deliberately intended the touching to occur, and that the touching was not merely accidental or negligent. The Commonwealth is not required to prove that the defendant specifically intended to cause injury to *[the alleged victim]* .**

II. RECKLESS ASSAULT AND BATTERY WITH A DANGEROUS WEAPON ON A PREGNANT WOMAN

A. Continue here if the jury is charged on both intentional and reckless conduct.

There is a second way in which a person may commit the crime of assault and battery with a dangerous weapon on a pregnant woman. Instead of intentional conduct, it involves a reckless touching that results in bodily injury.

B. Begin here if the jury is charged solely on reckless conduct. **The defendant is (also) charged with having committed an assault and battery with a dangerous weapon upon a pregnant woman,** ***[the alleged victim]*** **, by reckless conduct, thereby causing bodily injury.**

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

First: **That the defendant acted recklessly;**

Second: **That the defendant's reckless conduct included an intentional act which resulted in bodily injury to** ***[the alleged victim]*** **;**

Third: **That the injury was inflicted by a dangerous weapon;**

Fourth: **That** ***[the alleged victim]*** **was pregnant at the time of the alleged assault and battery; and**

Fifth: **That the defendant knew, or had reason to know, that she was pregnant.**

It is not enough for the Commonwealth to prove that the defendant acted negligently — that is, acted in a way that a reasonably careful person would not. It must be shown that the defendant's actions went beyond mere negligence and amounted to recklessness. The defendant acted recklessly if (he) (she) knew, or should have known, that such actions were very likely to cause substantial harm to someone, but (he) (she) ran that risk and went ahead anyway.

The defendant must have intended (his) (her) acts which resulted in the touching, in the sense that those acts did not happen accidentally. But it is not necessary that (he) (she) intended to injure or strike the alleged victim, or that (he) (she) foresaw the harm that resulted. If the defendant actually realized in advance that (his) (her) conduct was very likely to cause substantial injury and decided to run that risk, such conduct would of course be reckless. But even if (he) (she) was not conscious of the serious danger that was inherent in such conduct, it is still reckless conduct if a reasonable person, under the circumstances as they were known to the defendant, would have recognized that such actions were so dangerous that it was very likely that they would result in substantial injury.

Here the jury must be instructed on "Accident" (Instruction 9.100) if the issue of accident is raised by the evidence.

The Commonwealth must prove the injury was sufficiently serious to interfere with the alleged victim's health or comfort. It need not be permanent, but it must be more than trifling. For example, an act that only shakes up a person or causes only momentary discomfort would not be sufficient.

Here, if not previously done, the jury must be instructed on the definition of dangerous weapon from Instruction 6.300 (Assault and Battery by Means of a Dangerous Weapon).

SUPPLEMENTAL INSTRUCTION

Victim injured while escaping. **As I mentioned earlier, the defendant's touching must have directly caused *[alleged victim's]* injury or must have directly and substantially set in motion a chain of events that produced the injury in a natural and continuous sequence. You have heard some evidence suggesting that *[alleged victim]* was injured while escaping from *[place]*. To establish that element of the offense — that the defendant caused the injury which occurred as a result of the escape — the Commonwealth must prove beyond a reasonable doubt: (1) that *[the alleged victim]* was pregnant at the time; (2) that the defendant knew, or had reason to know, that *[the alleged victim]* was pregnant; (3) that the defendant caused *[the alleged victim]* reasonably to fear an immediate attack from the defendant; (4) that this fear led her to try to (escape) (or) (defend herself) from the defendant; and (5) that a dangerous weapon caused more than a trifling bodily injury to *[the alleged victim]* from or during that attempt to (escape) (or) (defend).**

Commonwealth v. Parker, 25 Mass. App. Ct. 727, 522 N.E.2d 2 (1988).

Here the jury must be instructed on "Accident" (Instruction 9.100) if the issue of accident is supported by the evidence.

See Instruction 6.300 (Assault and Battery by Means of a Dangerous Weapon) for additional notes.

6.390 SUFFOCATION

G.L. c. 265, § 15D
March 2015

The defendant is charged with suffocation. In order to prove that the defendant is guilty of suffocation, the Commonwealth must prove three things beyond a reasonable doubt:

First, that the defendant blocked the nose or mouth of *[alleged victim]* ;

Second, that (he) (she) interfered with the (normal breathing) (circulation

of blood) of *[alleged victim]* , without having any right or excuse for doing so; and

Third. that (he) (she) did so intentionally.

NOTES:

1**. Aggravated versions.** Strangulation or suffocation may be aggravated by (I) causing serious bodily injury; (ii) knowing or having reason to know that the victim is pregnant; (iii) knowing that there is an abuse prevention or restraining order in effect against the defendant; or (iv) having a prior conviction for strangulation or suffocation. G.L. c. 265, § 15D(c). Although the maximum penalty for the aggravated crime is ten years in state prison, the aggravated crime remains within the final jurisdiction of the District Court. G.L. c. 218, § 26. Applicable jury instructions for the aggravating factors can be found in Instruction 6.160 (assault and battery causing serious injury), Instruction 6.180 (assault and battery on a person protected by an abuse prevention order), Instruction 6.200 (assault and battery on a pregnant woman).

2**. Certified batterer's intervention program.** Any sentence or continuance without a finding for strangulation or suffocation must include a condition that the defendant complete a certified batterer's intervention program unless "the court issues specific written findings describing the reasons that batterer's intervention should not be ordered or unless the batterer's intervention program determines that the defendant is not suitable for intervention." G.L. c. 265, § 15D(d).

6.395 STRANGULATION

G.L. c. 265, § 15D
March 2015

The defendant is charged with strangulation. In order to prove that the defendant is guilty of strangulation, the Commonwealth must prove three things beyond a reasonable doubt:

First, that the defendant applied substantial pressure on the throat or neck of *[alleged victim]* ;

Second, that (he) (she) interfered with the (normal breathing) (circulation of blood) of *[alleged victim]* , without having any right or excuse for doing so; and

Third. that (he) (she) did so intentionally.

NOTES:

1**. Aggravated versions.** Strangulation or suffocation may be aggravated by (I) causing serious bodily injury; (ii) knowing or having reason to know that the victim is pregnant; (iii) knowing that there is an abuse prevention or restraining order in effect against the defendant; or (iv) having a prior conviction for strangulation or suffocation. G.L. c. 265, § 15D(c). Although the maximum penalty for the aggravated crime is ten years in state prison, the aggravated crime remains within the final jurisdiction of the District Court. G.L. c. 218, § 26. Applicable jury instructions for the aggravating factors can be found in Instruction 6.160 (assault and battery causing serious injury), Instruction 6.180 (assault and battery on a person protected by an abuse prevention order), Instruction 6.200 (assault and battery on a pregnant woman).

2. Certified batterer's intervention program. Any sentence or continuance without a finding for strangulation or suffocation must include a condition that the defendant complete a certified batterer's intervention program unless "the court issues specific written findings describing the reasons that batterer's intervention should not be ordered or unless the batterer's intervention program determines that the defendant is not suitable for intervention." G.L. c. 265, § 15D(d).

6.400 CUSTODIAL INTERFERENCE BY RELATIVE

G.L. c. 265 § 26A
2009 Edition

This instruction is drafted under the felony branch of G.L. c. 265, § 26A. It may be adapted for the misdemeanor branch of the same offense by eliminating the fifth element and the corresponding statutory language.

The defendant is charged with having violated section 26A of chapter 265 of our General Laws, which provides as follows:

"Whoever, being a relative of a child less than eighteen years old, without lawful authority,

holds or intends to hold such a child permanently or for a protracted period,

or takes or entices such a child from his lawful custodian . . . .

[and does so] by taking or holding [the] child (outside the Commonwealth)

(or) (under circumstances which expose the [*child*] taken or enticed from lawful custody to a risk which endangers his safety)

shall be punished . . . ."

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

***First:* That the defendant is a relative of the child involved;**

***Second:* That the child was less than 18 years of age at the time;**

Third: **The Commonwealth must prove *either* that the defendant held or intended to hold the child permanently or for a protracted period, *or* that the defendant took or enticed the child from his (her) lawful custodian;**

Fourth: **The Commonwealth must prove that the defendant did so without lawful authority; and**

Fifth: **The Commonwealth must prove that the defendant *either* took or held the child outside Massachusetts *or* did so in a way which exposed him (her) to a risk which endangered his (her) safety.**

NOTES:

1. **Custody of child born in wedlock**. "In making an order or judgment relative to the custody of children pending a controversy between their parents, or relative to their final possession, the rights of the parents shall, in the absence of misconduct, be held to be equal, and the happiness and welfare of the children shall determine their custody or possession." G.L. c. 208, § 31. A parent who takes minor children from the other spouse and removes them from the Commonwealth at a time when there were no pending proceedings concerning the marriage or their custody cannot be convicted under G.L. c. 265, § 26A. *Commonwealth v. Beals*, 405 Mass. 550, 541 N.E.2d 1011 (1989).

2. **Custody of child born out of wedlock**. "Prior to or in the absence of an adjudication or voluntary acknowledgment of paternity, the mother shall have custody of a child born out of wedlock." G.L. c. 209C, § 10(b).

3. **Defendants with legal custody**. A commentator has suggested that the "takes or entices" branch of § 26A may be applied even to a parent with legal custody or joint legal custody who interferes with the visitation or joint custody rights of the other parent. Green, "The Crime of Parental Kidnapping in Massachusetts," 70 Mass. L. Rev. 115 (1985).

4. **Related offenses**. General Laws c. 265, § 26A also punishes anyone, whether or not a relative, who "takes or entices from lawful custody any incompetent person or other person entrusted by authority of law to the custody of another person or institution." This branch of the statute would apparently apply to a non-relative's interference with child custody if a kidnapping charge (G.L. c. 265, § 26) is unavailable because the interference was consensual.

5. **Removal of child from Commonwealth after divorce**. "A minor child of divorced parents who is a native of or has resided five years within this commonwealth and over whose custody and maintenance a probate court has jurisdiction shall not, if of suitable age to signify his consent, be removed out of this commonwealth without such consent, or, if under that age, without the consent of both parents, unless the court upon cause shown otherwise orders." G.L. c. 208, § 30.

6. **Statement of reasons required if imprisonment not imposed.** A jury session judge sentencing for this or one of the other crimes against persons found in G.L. c. 265 who does not impose a sentence of incarceration "shall include in the record of the case specific reasons for not imposing a sentence of imprisonment," which shall be a public record. G.L. c. 265, § 41.

6.500 INDECENT ASSAULT AND BATTERY

G.L. c. 265 § 13H
2009 Edition

The defendant is charged with indecent assault and battery. Section 13H of chapter 265 of our General Laws provides as follows:

"Whoever commits an indecent assault and battery on a person who has attained age fourteen shall be punished . . . ."

To prove the defendant guilty of this offense, the Commonwealth must prove four things beyond a reasonable doubt:

First: **That the alleged victim was at least fourteen years of age at the time of the alleged offense;**

Second: **That the defendant committed an assault and battery on the alleged victim. Assault and battery is essentially the intentional touching of another person, without legal justification or excuse.**

Third: **The Commonwealth must prove beyond a reasonable doubt that the assault and battery was "indecent" as that word is commonly understood, measured by common understanding and practices.**

An indecent act is one that is fundamentally offensive to contemporary standards of decency. An assault and battery may be "indecent" if it involves touching portions of the anatomy commonly thought private, such as a person's genital area or buttocks, or the breasts of a female.

and *Fourth:* The Commonwealth must prove beyond a reasonable doubt that the alleged victim did not consent.

See Instruction 6.140 (Assault and Battery) for additional language defining assault and battery. If the alleged victim was under the age of 14, see Instruction 6.520 (Indecent Assault and Battery on a Child under 14).

"A touching is indecent when, judged by the normative standard of societal mores, it is violative of social and behavioral expectations in a manner which [is] fundamentally offensive to contemporary moral values . . . [and] which the common sense of society would regard as immodest, immoral and improper." *Commonwealth v. Vasquez*, 65 Mass. App. Ct. 305, 306, 839 N.E.2d 343, 346 (2005) (internal quotations omitted). See *Commonwealth v. Bishop*, 296 Mass. 459, 462, 6 N.E.2d 369, 370 (1937); *Commonwealth v. Mosby*, 30 Mass. App. Ct. 181, 184-185, 567 N.E.2d 939, 941-942 (1991); *Commonwealth v. Cardoza*, 29 Mass. App. Ct. 645, 648, 563 N.E.2d 1384, 1386-1387 (1990); *Commonwealth v. Gilmore*, 22 Mass. App. Ct. 977, 978, 496 N.E.2d 171, 172 (1986); *Commonwealth v. Thayer*, 20 Mass. App. Ct. 234, 238, 479 N.E.2d 213, 216 (1985); *Commonwealth v. Perretti*, 20 Mass. App. Ct. 36, 43, 477 N.E.2d 1061, 1066 (1985); *Commonwealth v. De La Cruz*, 15 Mass. App. Ct. 52, 59, 443 N.E.2d 427, 432 (1982).

The above list of private anatomical parts and areas "has never been declared to be exhaustive . . . . [and may] include other parts of the body — whether clothed or unclothed — that, if intentionally and unjustifiably touched, would violate our contemporary views of personal integrity and privacy." *Commonwealth v. Castillo*, 55 Mass. App. Ct. 563, 566, 772 N.E.2d 1093, 1096 (2002) (internal quotations omitted).

SUPPLEMENTAL INSTRUCTION

Where capacity of victim over 14 to consent is at issue. **I have instructed you that when the alleged victim is 14 years of age or older, one element of this offense is that he (she) did not consent to the touching.**

In some cases, you may also have to consider a related question: whether the alleged victim was *able* to consent. If a person is so impaired because of the consumption of drugs or alcohol or for some other reason (for example, sleep, unconsciousness, mental retardation, or helplessness) that he (she) is incapable of consenting, then it automatically follows that he (she) did not consent.

In such cases, the Commonwealth may prove that *[alleged victim]* did not consent by proving beyond a reasonable doubt:

***First,* that *[alleged victim]* was so impaired because of (consumption of alcohol or drugs) (mental retardation) (injury) (physical helplessness) (sleep) (*[other reason]*) that he (she) was incapable of freely giving consent; and**

***Second,* that the defendant knew, or reasonably should have known, that *[alleged victim's]* condition rendered him (her) incapable of consenting.**

It is a question of fact in each case as to whether a particular person was or was not able to consent on a particular occasion. How do you determine this?

Where drugs or alcohol were involved: **(Consumption or intoxication with alcohol or drugs, by itself, does not necessarily mean that an individual is incapable of deciding whether to consent. It is a matter of common knowledge that there are many levels of intoxication. The question is whether, as a result of a person's consumption of drugs, alcohol, or both, that person was unable to give or to refuse consent.)**

If intoxication is not involved: **(The crucial factors are often the person's intelligence or physical condition, but you may also consider other factors, such as the person's maturity and experience. The question comes down to whether the person was intelligent and aware enough to understand and evaluate what was happening, and to make a decision whether or not to consent based on that understanding.)**

If the Commonwealth has proved beyond a reasonable doubt that *[alleged victim]* did not have enough understanding and awareness on that occasion to be able to consent, and that the defendant knew or reasonably should have known this, then the Commonwealth has proved that he (she) did not consent.

If the Commonwealth has failed to prove beyond a reasonable doubt that *[alleged victim]* was incapable of consenting and that the defendant knew or reasonably should have known this, then the Commonwealth must prove beyond a reasonable doubt that *[alleged victim]* did not in fact give consent.

In a rape case where the complainant's capacity to consent is at issue, the judge should instruct that if "because of the consumption of drugs or alcohol or for some other reason (for example, sleep, unconsciousness, mental retardation, or helplessness), a person is so impaired as to be incapable of consenting to sexual intercourse, then intercourse occurring during such incapacity is without that person's consent . . . . This formulation . . . is intended to communicate to the jury that intoxication must be extreme before it can render a complainant incapable of consenting." However, the judge should not suggest that the alleged victim must be "wholly insensible" or "unconscious or nearly so . . . . The issue is whether, as a result of such intoxication, the complainant was unable to give or refuse consent." *Commonwealth v. Blache*, 450 Mass. 583, 592 & n.14, 595 n.19, 880 N.E.2d 736, 744, 743 n.14 & 745 n.19 (2008).

Blache also held that a defendant's reasonable mistake as to the complainant's ability to consent is a defense to a rape charge that is premised on the complainant's inability to consent. When a complainant is able to give or refuse consent, mistake about consent is not a defense because the need to prove the use or threat of force should negate any such mistake. But where the complainant is incapable of consenting, the Commonwealth need only prove the force necessary for penetration, and this increases the possibility of a reasonable mistake about consent. In rape cases tried after the *Blache* rescript (February 21, 2008) that are premised on inability to consent, the Commonwealth must prove that the defendant knew or reasonably should have known that the complainant was incapable of consenting. Id., 450 Mass. at 592-597, 880 N.E.2d at 744-747.

This supplemental instruction assumes that Blache is to be applied also in indecent assault and battery cases, and incorporates the contents of the suggested model instruction set out in *Blache*, 450 Mass. at 595 n.19, 880 N.E2d at 745 n.19.

NOTES:

1. **Accidental touching**. If there is evidence, no matter how incredible, that the touching may have been accidental, the judge must charge on request that the Commonwealth has the burden of proving beyond a reasonable doubt that the touching was not accidental. *Commonwealth v. Maloney*, 23 Mass. App. Ct. 1016, 1016-1017, 505 N.E.2d 552, 553 (1987). See Instruction 9.100 (Accident).

2. **Aggravated forms of offense if victim 60 or older or disabled, or after prior sex offense.** General Laws c. 265, § 13H provides for an aggravated form of this offense if the victim is 60 or older or disabled. The District Court lacks final jurisdiction over that aggravated offense. General Laws c. 265, § 45 provides that a conviction under § 13H requires imposition of lifetime community parole supervision if the defendant was previously convicted of indecent assault and battery, rape, assault with intent to commit rape, unnatural and lascivious acts, drugging for sex, or kidnapping.

3. **Consent**. It appears that absence of consent may not be an element of an indecent assault and battery upon a victim who is 14 or older if the touching was "physically harmful" or "potentially physically harmful." See *Commonwealth v. Burke*, 390 Mass. 480, 487, 457 N.E.2d 622, 627 (1983).

4. **First complaint**. Testimony concerning "first complaint" (See Instruction 3.660) is not limited to rape prosecutions, but may be received in other cases of sexual assault. *Commonwealth v. King,* 445 Mass. 217, 237-248, 834 N.E.2d 1175, 1193-1201 (2005) (replacing fresh complaint doctrine with first complaint rule for "sexual assaults"); *Commonwealth v. Brenner,* 18 Mass. App. Ct. 930, 931-932, 465 N.E.2d 1229, 1231 (1984) (fresh complaint doctrine applicable to indecent assault and battery).

5. **Intent**. Indecent assault and battery does not require a specific intent, but only "the general criminal intent to do that which the law prohibits." *Commonwealth v. Egerton,* 396 Mass. 499, 504, 487 N.E.2d 481, 485 (1986). See *Commonwealth v. Fuller,* 22 Mass. App. Ct. 152, 158-159, 491 N.E.2d 1083, 1087 (1986). See also *Commonwealth v. Conefrey,* 37 Mass. App. Ct. 290, 299-301, 640 N.E.2d 116, 122-123 (1994) (indecent assault and battery on a child under G.L. c. 265, § 13B is not a specific intent crime, and therefore need not have been done for the purpose of sexual gratification or arousal).

6. **Kissing.** The mouth and its interior are an intimate part of the body. *Commonwealth v. Rosa*, 62 Mass. App. Ct. 622, 625, 818 N.E.2d 621, 624 (2004) (insertion of thumb into mouth, coupled with other suggestive circumstances, found indecent). "[A]n unwanted kiss on the mouth has been held to constitute indecent conduct, at least in circumstances involving the forced insertion of the tongue, when coupled with surreptitiousness and a considerable disparity in age and authority between the perpetrator and the victim. We do not read our cases, however, as requiring that there always be tongue involvement for an act that might be characterized as a kiss to be found indecent, as other facts and circumstances may allow the trier of fact rationally to determine that the kiss was an indecent act . . . . [I]n most situations it would not be appropriate to criminalize a brief kiss on the mouth that did not involve the insertion or attempted insertion of the tongue [except where] the kiss could be viewed as having improper, sexual overtones, violative of social and behavioral expectations." *Commonwealth v. Vasquez,* 65 Mass. App. Ct. 305, 307, 839 N.E.2d 343, 346 (2005) (internal quotations omitted). See *Commonwealth v. Castillo,* 55 Mass. App. Ct. 563, 566-567, 772 N.E.2d 1093 (2002) (kiss with forced insertion of tongue). See also *Commonwealth v. Alan M. Goguen,* 72 Mass. App. Ct. 1113, 891 N.E.2d 1164, 2008 WL 3540024 (No. 07-P-149, Aug. 15, 2008) (unpublished opinion under Appeals Court Rule 1:28) (even absent use of tongue, jury could infer indecency from defendant's nakedness and manipulation of penis before victim); *Commonwealth v. Luther Boyd,* 55 Mass. App. Ct. 1114, 774 N.E.2d 685, 2002 WL 2021264 (No. 00-P-928, Sept. 4, 2002) (unpublished opinion under Appeals Court Rule 1:28) (kiss with attempted tongue involvement on girlfriend's 12-year-old niece found indecent).

7. **Lesser included offenses**. Indecent assault and battery is a lesser included offense of forcible rape (G.L. c. 265, § 22). *Commonwealth v. Thomas,* 401 Mass. 109, 119-120, 514 N.E.2d 1309, 1315-1316 (1987); *Egerton,* 396 Mass. at 503 n.3, 487 N.E.2d at 485 n.3. Assault and battery is a lesser included offense of indecent assault and battery; there is no lesser included offense of "indecent assault." *Commonwealth v. Eaton,* 2 Mass. App. Ct. 113, 116-118, 309 N.E.2d 504, 506-508 (1974). See *Commonwealth v. Darin J. Lourenco*, 54 Mass. App. Ct. 1115, 767 N.E.2d 1134, 2002 WL 971403 (No. 00-P-1054, May 10, 2002) (unpublished opinion under Appeals Ct. Rule 1:28) (assault and battery not a lesser included offense of indecent assault and battery on a child).

8. **Parental Activity.** There is no risk that a jury could consider "normal parental activity" indecent where the judge instructed that an indecent act is to be "measured by common understanding and practices." *Commonwealth v. Trowbridge*, 419 Mass. 750, 758, 647 N.E.2d 413, 419 (1995).

9. **Prior uncharged sexual contacts with same victim.** Evidence of the defendant's prior illicit sexual acts with the same victim, not charged in the complaint, may be admissible to show inclination to commit the acts charged in the complaint if sufficiently similar and not too remote in time. *Commonwealth v. Sosnowski*, 43 Mass. App. Ct. 367, 682 N.E.2d 944, 947 (1997) (two months not too remote); *Commonwealth v. Arthur,* 31 Mass. App. Ct. 178, 181, 575 N.E.2d 1147, 1149 (1991); *Commonwealth v. Calcagno,* 31 Mass. App. Ct. 25, 26-27, 574 N.E.2d 420, 421- 422 (1991); *Commonwealth v. King,* 387 Mass. 464, 469-470, 441 N.E.2d 248, 251-252 (1982).

10. **Privileged records.** In a prosecution for a sexual offense, the defense may seek pretrial access to statutorily privileged records of the alleged victim (e.g., psychological records) by a motion under Mass. R. Crim. 17(a)(2). The prosecutor must notify the subject and the record holder that they may, but are not required to, appear and be heard. After hearing, the judge must determine (1) whether the records are presumptively privileged, i.e., prepared in circumstances suggesting that some or all are likely to be privileged, and (2) whether the four requirements of *Commonwealth v. Lampron,* 441 Mass. 265, 806 N.E.2d 72 (2004), have been satisfied: that the documents are evidentiary and relevant, that they are not otherwise procurable by due diligence, that the defense cannot properly prepare for trial without them, and that the application is made in good faith and is not a general fishing expedition. If so, the judge is to order the clerk-magistrate to issue a summons for the records along with written instructions to the record keeper, who is then to deliver them under seal to the clerk-magistrate. Defense counsel is to be permitted to inspect them after signing a protective order with "stringent provisions" against disclosure (including to the defendant). Defense counsel must seek court authorization to disclose the privileged records to others, and must file a motion in limine no later than the final pretrial conference in order to use privileged content at trial. *Commonwealth v. Dwyer,* 448 Mass. 122, 859 N.E.2d 400 (2006).

11. **Rape shield law.** The admission of evidence concerning the prior sexual conduct of the victim is limited by the rape shield law, G.L. c. 233, § 21B. *Commonwealth v. Ruffen,* 399 Mass. 811, 816, 507 N.E.2d 684, 688 (1987). In some circumstances, the statute may have to yield to the defendant's right to demonstrate bias on the part of the victim, but only if evidence of bias cannot otherwise be elicited. *Commonwealth v. Elder,* 389 Mass. 743, 750-751, 452 N.E.2d 1104, 1109-1110 (1983); *Commonwealth v. Joyce,* 382 Mass. 222, 224-232, 415 N.E.2d 181, 183-188 (1981). See *Jury Trial Manual for Criminal Offenses Tried in the District Court* § 4.13.

12. **Rape trauma syndrome.** It is within a judge's discretion to permit expert testimony on rape trauma syndrome to explain the post-assault behavior and symptoms of adult or child victims of sexual abuse. Such testimony is for the limited purpose of helping the jury to assess the alleged victim's credibility, and is not admissible as affirmative evidence that sexual abuse did occur. *Commonwealth v. Hudson,* 417 Mass. 536, 540-543, 631 N.E.2d 50, 52-53 (1994) (child victims); *Commonwealth v. Dockham,* 405 Mass. 618, 629, 542 N.E.2d 591, 598 (1989) (adult victims); *Commonwealth v. Mamay,* 407 Mass. 412, 421-422, 553 N.E.2d 945, 951 (1990) (same).

However, it is reversible error to permit such an expert witness to offer an opinion that the alleged victim was in fact sexually assaulted. *Commonwealth v. Colin C.,* 419 Mass. 54, 59-61, 643 N.E.2d 19, 22 (1994). If the expert witness has interviewed or evaluated the alleged victim in the case, particular care must be taken to prevent the expert from implicitly rendering an opinion as to the alleged victim's truthfulness. *Trowbridge,* 419 Mass. at 759, 647 N.E.2d at 420 (expert testimony that child's behavior was consistent with that of sexually abused children, and that child's physical condition was consistent with type of abuse alleged in the case, was impermissible endorsement of child's credibility). In such cases, the judge should conduct a voir dire at which the expert answers the proposed questions. If the judge allows the testimony, the witness should be cautioned in advance not to opine on the credibility of the particular victim or that of sexual abuse victims in general. The judge should charge the jury after the expert's testimony and again during final instructions on the role of experts, and also charge on request that expert testimony is not affirmative evidence of sexual abuse and that the expert did not assess the credibility of the particular alleged victim. Counsel too should be very careful in closing argument not to imply that the expert vouched for the credibility of the particular alleged victim. *Commonwealth v. Rather,* 37 Mass. App. Ct. 140, 638 N.E.2d 915 (1984).

13. **Self-defense claim.** In a prosecution for indecent assault and battery involving a scuffle between the complainant and the defendant, the defendant is not entitled to a self-defense charge if the evidence would only permit the jury to find that the defendant initiated an indecent touching of the complainant, which triggered her physical response. The defendant is entitled to a self-defense charge if the evidence would permit the jury to find that the complainant initiated the scuffle and that any contact between the defendant and a sexually private area of the complainant occurred only when he

tried to push her away in justifiable self-defense. *Commonwealth v. Lyons*, 71 Mass. App. Ct. 671, 885 N.E.2d 848 (2008).

14. **Statement of reasons required if imprisonment not imposed.** A jury session judge sentencing for this or one of the other crimes against persons found in G.L. c. 265 who does not impose a sentence of incarceration "shall include in the record of the case specific reasons for not imposing a sentence of imprisonment," which shall be a public record. G.L. c. 265, § 41.

6.520 INDECENT ASSAULT AND BATTERY ON A CHILD UNDER FOURTEEN

G.L. c. 265, § 13B
Revised May 2014

The defendant is charged with indecent assault and battery on a child less than 14 years of age.

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

First: **That the alleged victim was not yet 14 years of age at the time of the alleged offense;**

Second: **That the defendant committed an assault and battery on that child. Assault and battery is essentially the intentional touching of another person without legal justification or excuse.**

and *Third:* The Commonwealth must prove beyond a reasonable doubt that the assault and battery was "indecent" as that word is commonly understood, measured by common understanding and practices.

An indecent act is one that is fundamentally offensive to contemporary standards of decency. An assault and battery may be "indecent" if it involves touching portions of the anatomy commonly thought private, such as a person's genital area or buttocks, or the breasts of a female.

If the victim is under 14 years of age, it is irrelevant whether or not (he) (she) consented to any touching.

Commonwealth v. Dunton, 84 Mass. App. Ct. 1128 (2014) (No. 12-P-1577, Jan. 13, 2014) (unpublished opinion under Appeals Ct. Rule 1:28).

The model instruction reflects the law on the issue of consent applicable to such offenses committed on and after October 6, 1986, when St. 1986, c. 187 amended G.L. c. 265, § 13B to provide that "[i]n a prosecution under this section, a child under the age of fourteen years shall be deemed incapable of consenting to any conduct of the defendant for which said defendant is being prosecuted."

For such an offense committed before October 6, 1986, the judge must charge that absence of consent is a fourth required element of the crime; the judge should also give the supplemental instruction to Instruction 6.500 (Indecent Assault and Battery), appropriately modified to discuss "maturity," concerning the child-victim's ability to consent. See *Commonwealth v. Reid*, 400 Mass. 534, 541 (1987); *Commonwealth v. Burke*, 390 Mass. 480, 487 (1983); *Commonwealth v. Maloney*, 23 Mass. App. Ct. 1016, 1016 (1987) (lack of consent inferable from age and verbal reluctance of witness); *Matter of Moe*, 12 Mass. App. Ct. 298, 299 n.1 (1981).

See also the citations and notes under Instruction 6.500.

NOTES:

1. **Age of victim.** The age of the victim is an essential element of this offense. *Commonwealth v. Rockwood*, 27 Mass. App. Ct. 1137, 1139 (1989).

2. **Aggravated forms of offense.** Statute 2008, c. 205 (effective October 22, 2008), created two new aggravated forms of this offense:

Aggravated indecent assault and battery on a child under 14 (G.L. c. 265, § 13B½) provides for enhanced punishment if the offense was committed (1) by a person who was a mandated reporter of child abuse or neglect, or (2) if it was committed during the commission or attempted commission of 12 specified offenses: armed burglary (G.L. c. 266, § 14), unarmed burglary (§ 15), breaking and entering (§ 16), entering without breaking (§ 17), breaking and entering in a dwelling (§ 18), kidnapping (G.L. c. 265, § 26), armed robbery (§ 17), unarmed robbery (§ 19), assault and battery with a dangerous weapon (§ 15A), assault with a dangerous weapon (§ 15B), home invasion (§ 18C), or exhibiting a child in a state of nudity or sexual conduct (G.L. c. 272, § 29A).

Indecent assault and battery on a child under 14 after prior sex offense (G.L. c. 265, § 13B¾) provides for enhanced punishment if the offense was committed after a prior conviction or juvenile adjudication for any of 10 sex offenses: indecent assault and battery on a child under 14 (§ 13B), aggravated indecent assault and battery on a child under 14 (§ 13B½), indecent assault and battery on a person 14 or older (§ 13H), assault to rape a child (§ 24B), rape of a child (§ 22A), aggravated rape of a child (§ 22B), statutory rape (§ 23), aggravated statutory rape (§ 23A), rape (§ 22), or "a like violation of the laws of another state, the United States or a military, territorial or Indian tribal authority."

Under G.L. c. 218, § 26, the District Court has jurisdiction over violations of G.L. c. 265, § 13B but does not have final jurisdiction over these aggravated forms (§§ 13B½ and 13B¾) of the offense.

The same statute also repealed the prior enhanced penalty for a subsequent conviction of § 13B. However, a prosecutor is still able to bring a charge of subsequent-offense indecent assault and battery on a child under 14 that is within the District Court's final jurisdiction by basing the charge both on G.L. c. 265, §§ 13B and 45, which does not increase the maximum 2½ year sentence that the District Court may impose, but makes available the additional option of lifetime community parole supervision.

3. **Hearsay statement by child victim.** General Laws c. 233, § 81 permits, under certain limited circumstances, the admission of hearsay statements by sexual abuse victims under 10 years of age. The Supreme Judicial Court has assumed without deciding that § 81 is facially constitutional. However, the judge "must strictly adhere" to the requirements of § 81 and in addition: (1) the Commonwealth must give the defense advance notice that it will seek to use such hearsay statements; (2) the Commonwealth must show its compelling need to do so "by more than a mere preponderance of evidence"; (3) any separate hearing regarding the reliability of the statement must be on the record, and the defendant and defense counsel must be permitted to attend "[w]here possible without causing severe emotional trauma to the child witness"; (4) the judge's finding of reliability must be supported by specific findings on the record; (5) if the child is presently unavailable because incompetent to testify, that incompetence must not call into question the reliability of the hearsay statement; and (6) there must be other, independently-admissible evidence that corroborates the child's hearsay statement. *Commonwealth v. Colin C.*, 419 Mass. 54, 61-66 & n.8 (1994).

4. **Individual voir dire required on request.** For the trial of any sexual offense against a minor, the judge must, on request, question prospective jurors individually as to whether they are the victim of a childhood sexual offense. *Commonwealth v. Flebotte*, 417 Mass. 348, 353-356 (1994).

5. **Inflammatory evidence.** In a trial based on the defendant having touched the breast of a 12 year old girl, the judge correctly admitted in evidence items taken from the defendant's car which included photographs of fully clothed young girls in outdoors play, small-sized underwear, and pornographic magazines showing pictures of teenage girls and of sexual activity between adults. As evidence of the defendant's voyeuristic interest in sexual matters and young females, they were probative as to whether the defendant had intentionally or accidentally touched the victim's breast. The Appeals Court assumed that a second group of items from the car (consisting of a knife, rope, duct tape, and personal lubricant) should have been excluded as irrelevant and perhaps suggestive that the defendant intended to kidnap and rape the victim. *Commonwealth v. Wallace*, 70 Mass. App. Ct. 757, 764-766 (2007).

6. **Lesser included offenses.** Since simple assault and battery (G.L. c. 265, § 13A) requires *either* an actually or potentially physically harmful touching *or* an unconsented touching, it is not a lesser included offense of indecent assault and battery on a child under 14 because lack of consent is no longer an element of the latter offense. *Commonwealth v. Farrell*, 31 Mass. App. Ct. 267 (1991). Indecent assault and battery on a child under 14 is a lesser included offense of forcible rape of a child (G.L. c. 265, § 22A). *Commonwealth v. Cobb*, 26 Mass. App. Ct. 283, 284 (1988). For offenses committed prior to October 6, 1986, indecent assault and battery on a child under 14 is not a lesser included offense of statutory rape (G.L. c. 265, § 23). *Reid*, 400 Mass. at 541*; Commonwealth v. Rowe*, 18 Mass. App. Ct. 926 (1984).

6.540 RECKLESS ENDANGERMENT OF A CHILD UNDER 18

G.L. c. 265 § 13L
Issued May 2011

A person may violate G.L. c. 265, § 13L either (I.) by wanton or reckless conduct creating a substantial risk to a child or (II.) by wantonly and recklessly failing to take reasonable steps to alleviate such a risk.

I. RECKLESS ENDANGERMENT BY CREATING A RISKOF SERIOUS BODILY INJURY OR SEXUAL ABUSE

The defendant is charged with wanton or reckless conduct creating a substantial risk of (serious bodily injury) (sexual abuse) to a child under the age of eighteen.

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

First: **That the defendant engaged in conduct which created a substantial and unjustifiable risk of (serious bodily injury) (sexual abuse) to *[alleged victim]* ;**

Second: **That the defendant's conduct was wanton or reckless; and**

Third: **That *[alleged victim]* was under the age of eighteen years.**

To prove the first element, it is not enough for the Commonwealth to prove that there was a possibility of risk to *[alleged victim]* . The Commonwealth must prove that the defendant's conduct created a substantial and unjustifiable risk of (serious bodily injury) (sexual abuse).

Serious bodily injury. **A serious bodily injury is one which results in a permanent disfigurement, a protracted loss or impairment of a bodily function, limb or organ, or a substantial risk of death.**

Sexual abuse. **Sexual abuse includes conduct amounting to (an indecent assault and battery on a child under the age of 14) (an indecent assault and battery on a person 14 or older) (rape) (rape of a child under age 16 with force) (rape and abuse of a child) (assault with intent to commit rape) (assault of a child with intent to commit rape).**

[*The trial judge should instruct on the elements of the applicable sexual abuse charge as illustrated below.*]

For Indecent Assault and Battery on a Child Under Fourteen (G.L. c. 265, § 13B), see *Instruction 6.520*. For Indecent Assault and Battery on a Person 14 or Older (G.L. c. 265, § 13H), see *Instruction 6.500*. For the remaining underlying offenses, the following definitions may be of guidance:

"Rape" (G.L. c. 265, § 22) is natural or unnatural sexual intercourse with another person by force and against that person's will, or that compels such person to submit to such act by threat of bodily force or violence. The first element is that the defendant engaged in either natural or unnatural sexual intercourse with the complainant. The second element is that the sexual intercourse was accomplished by compelling the complainant to submit by force or threat of bodily injury and against his/her will. Natural intercourse is normal intercourse - that is, it consists of inserting the penis into the female sex organ. Unnatural sexual intercourse includes oral and anal intercourse, including fellatio and cunnilingus, and other intrusions of a part of a person's body or other object into the genital or anal opening of another's body. Either natural or unnatural sexual intercourse is complete on penetration, no matter how slight, of a person's genital or anal opening. In addition to the vagina, the female genital opening includes the anterior parts known as the vulva and labia. Penetration into the vagina itself is not required.

"Rape of a child by use of force" (G.L. c. 265, § 22A) is natural or unnatural sexual intercourse with a child under the age of 16 years by force and against that child's will, or that compels such child to submit to such act by threat of bodily force or violence. The first element is that the defendant engaged in either natural or unnatural sexual intercourse with the complainant. The second element is that the natural or unnatural sexual intercourse was accomplished by force or by threat of bodily injury and against the complainant's will. The force needed for rape may, depending on the circumstances, be constructive force as well as physical force, violence or threat of bodily harm. The third element is that the defendant engaged in sexual intercourse with a child who was under 16 years of age at the time of the alleged offense.

"Rape and abuse of a child" (G.L. c. 265, § 23) is natural or unnatural sexual intercourse with a child under the age of 16 years that is unlawful. The first element is that the defendant engaged in either natural or unnatural sexual intercourse with the complainant. The second element is that the defendant engaged in sexual intercourse with a child who was under 16 years of age at the time of the alleged offense. The third element is that the sexual intercourse was unlawful. Unlawful sexual intercourse is intercourse outside of a marital relationship. The defendant's honest belief that the victim was 16 years of age or older is not a defense to this charge. In the case of rape of a child under the age of 16 years committed without the use of force or threat, lack of consent is conclusively presumed by law.

"Assault with intent to commit rape" (G.L. c. 265, § 24) has two elements. First, that the defendant assaulted the alleged victim. An assault is defined as an attempt or offer by one person to do bodily injury to another by force and violence. Alternatively, an assault may consist of putting a person in fear of immediate bodily injury. An assault may be committed in one of two ways. The first type of assault consists of an offer or attempt to commit a battery. The second type of assault occurs when the defendant, with the intent to cause apprehension of immediate bodily harm, does some act that causes such apprehension. The second element is that the defendant possessed a specific intent to rape the complainant. See *Instruction 3.120* (Specific Intent).

"Assault of child with intent to commit rape" (G.L. c. 265, § 24B) consists of the same two elements of assault with intent to commit rape, plus that the victim was under 16 years of age.

To prove the second element of the offense, the Commonwealth must prove that the defendant's conduct was wanton or reckless. It is not enough for the Commonwealth to prove that the defendant acted negligently – that is, in a way that a reasonably careful person would not act. The Commonwealth must prove that the defendant was aware of and consciously disregarded a substantial and unjustifiable risk that his (her) act would result in (serious bodily injury) (sexual abuse).

The Commonwealth is not required to prove that the defendant intended that *[alleged victim]* be (injured) (sexually abused), but it must prove that he (she) was consciously aware of and disregarded a substantial and unjustifiable risk (of serious bodily injury) (of sexual abuse). The risk must have been of such a nature and degree that to disregard it would constitute a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

To prove the third element of the offense, the Commonwealth must prove that *[alleged victim]* was under the age of eighteen years.

If the Commonwealth has proven all three elements beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth has failed to prove one or more of the elements beyond a reasonable doubt, you must find the defendant not guilty.

I. RECKLESS ENDANGERMENT BY FAILING TO ALLEVIATE

The defendant is charged with wantonly or recklessly failing, where he (she) had a duty to act, to take reasonable steps to alleviate a substantial risk that a child under the age of eighteen years would suffer (serious bodily injury) (sexual abuse).

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

First: **That *[alleged victim]* was a child under the age of eighteen years;**

Second: **That there was a substantial and justifiable risk that *[alleged victim]* would suffer (serious bodily injury) (sexual abuse);**

Third: **That the defendant was under a duty to take reasonable steps to alleviate that risk to the child; and**

Fourth: **That the defendant wantonly or recklessly failed to take such steps.**

To prove the first element, the Commonwealth must prove that *[alleged victim]* was under the age of eighteen years.

To prove the second element, it is not enough for the Commonwealth to prove that there was only a possibility of risk to *[alleged victim]* . The Commonwealth must prove that the defendant's failure to act created a substantial and unjustifiable risk of (serious bodily injury) (sexual abuse).

Serious bodily injury. **A serious bodily injury is one which results in a permanent disfigurement, protracted loss or impairment of a bodily function, limb or organ, or substantial risk of death.**

Sexual abuse. **Sexual abuse includes conduct amounting to (an indecent assault and battery on a child under the age of 14) (an indecent assault and battery on a person 14 or older) (rape) (rape of a child under age 16 with force) (rape and abuse of a child) (assault with intent to commit rape) (assault of a child with intent to commit rape).**

[*The trial judge should instruct on the elements of the applicable sexual abuse charge as illustrated below.*]

For Indecent Assault and Battery on a Child Under Fourteen (G.L. c. 265, § 13B), see *Instruction 6.520*. For Indecent Assault and Battery on a Person 14 or Older (G.L. c. 265, § 13H), see *Instruction 6.500*. For the remaining underlying offenses, the following definitions may be of guidance:

"Rape" (G.L. c. 265, § 22) is natural or unnatural sexual intercourse with another person by force and against that person's will, or that compels such person to submit to such act by threat of bodily force or violence. The first element is that the defendant engaged in either natural or unnatural sexual intercourse with the complainant. The second element is that the sexual intercourse was accomplished by compelling the complainant to submit by force or threat of bodily injury and against his/her will. Natural intercourse is normal intercourse - that is, it consists of inserting the penis into the female sex organ. Unnatural sexual intercourse includes oral and anal intercourse, including fellatio and cunnilingus, and other intrusions of a part of a person's body or other object into the genital or anal opening of another's body. Either natural or unnatural sexual intercourse is complete on penetration, no matter how slight, of a person's genital or anal opening. In addition to the vagina, the female genital opening includes the anterior parts known as the vulva and labia. Penetration into the vagina itself is not required.

"Rape of a child by use of force" (G.L. c. 265, § 22A) is natural or unnatural sexual intercourse with a child under the age of 16 years by force and against that child's will, or that compels such child to submit to such act by threat of bodily force or violence. The first element is that the defendant engaged in either natural or unnatural sexual intercourse with the complainant. The second element is that the natural or unnatural sexual intercourse was accomplished by force or by threat of bodily injury and against the complainant's will. The force needed for rape may, depending on the circumstances, be constructive force as well as physical force, violence or threat of bodily harm. The third element is that the defendant engaged in sexual intercourse with a child who was under 16 years of age at the time of the alleged offense.

"Rape and abuse of a child" (G.L. c. 265, § 23) is natural or unnatural sexual intercourse with a child under the age of 16 years that is unlawful. The first element is that the defendant engaged in either natural or unnatural sexual intercourse with the complainant. The second element is that the defendant engaged in sexual intercourse with a child who was under 16 years of age at the time of the alleged offense. The third element is that the sexual intercourse was unlawful. Unlawful sexual intercourse is intercourse outside of a marital relationship. The defendant's honest belief that the victim was 16 years of age or older is not a defense to this charge. In the case of rape of a child under the age of 16 years committed without the use of force or threat, lack of consent is conclusively presumed by law.

"Assault with intent to commit rape" (G.L. c. 265, § 24) has two elements. First, that the defendant assaulted the alleged victim. An assault is defined as an attempt or offer by one person to do bodily injury to another by force and violence. Alternatively, an assault may consist of putting a person in fear of immediate bodily injury. An assault may be committed in one of two ways. The first type of assault consists of an offer or attempt to commit a battery. The second type of assault occurs when the defendant, with the intent to cause apprehension of immediate bodily harm, does some act that causes such apprehension. The second element is that the defendant possessed a specific intent to rape the complainant. See *Instruction 3.120* (Specific Intent).

"Assault of child with intent to commit rape" (G.L. c. 265, § 24B) consists of the same two elements of assault with intent to commit rape, plus that the victim was under 16 years of age.

To prove the third element, the Commonwealth must prove that the defendant had a duty to alleviate the risk of (serious bodily injury) (sexual abuse).

Parents and legal guardians have a legal duty to take reasonable steps to prevent harm to a child in their care. Those who accept responsibility as caretakers also have a duty to take reasonable steps to prevent harm to a child who is in their care. Other persons may also have a duty to alleviate a risk of harm to a child. You should look to the facts of this case to determine whether the Commonwealth has proven that the defendant had this duty to act.

To prove the fourth element of the offense, the Commonwealth must prove that the defendant wantonly and recklessly failed to take reasonable steps to alleviate the risk.

It is not enough for the Commonwealth to prove that the defendant was negligent — that is, failed to act in a way that a reasonably careful person would act. It must prove that the defendant's failure to act went substantially beyond negligence and amounted to wanton or reckless behavior.

The defendant was wanton or reckless if he (she) was aware that a failure to act created a substantial and unjustifiable risk of (serious bodily injury to) (sexual abuse of) *[alleged victim]* , but he (she) consciously disregarded that risk. The risk must have been of such nature and degree that disregarding the risk was a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

> ***If appropriate*: *capacity and means to alleviate risk.*** **The defendant may be found guilty only if he (she) had the capacity and means to alleviate the risk and failed to do so. You may consider any evidence about the ability of the defendant to take steps to alleviate the risk and about any risk the defendant might incur if he (she) sought to aid *[alleged victim]* . You may take into account that in a dangerous situation, a person may have to make decisions quickly and while under emotional strain.**

If the Commonwealth has proven all four elements beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth has failed to prove one or more of the elements beyond a reasonable doubt, you must find the defendant not guilty.

NOTES:

1. **Statutory history**. The statute was added by St. 2002, c. 322.

2. **Consciousness of risk.** A defendant may be found guilty only if he (she) was aware of the risk and consciously disregarded the risk.

3. **Persons who have a "duty to act"**. The statute does not define who has a "duty to act". A parent has a common law duty to provide for the care and welfare of his (her) children. See *Commonwealth v. Hall*, 322 Mass. 523, 78 N.E.2d 644 (1948). Other persons, such as a caretaker, may also be considered to have a "duty to act". The Department of Children and Families, in 110 Code Mass. Regs. § 2.00, gives a broad definition of "caretaker": child's parent, stepparent, guardian, "any other household member entrusted with the responsibility for a child's health and welfare", any other person entrusted with responsibility for a child, including a babysitter, and those in a child's school, day care center. Appellate courts have employed that definition in various cases. See, e.g., *Adoption of Fran,* 54 Mass. App. Ct. 455, 766 N.E.2d 91 (2002), where the court said that a non-parent could be considered responsible for the death of a child because he was a "caretaker." Appellate courts have allowed fresh complaint testimony to be admitted despite long delays where the alleged perpetrator "is an authority figure in the child's life" such as a parent, teacher or babysitter. *Commonwealth v. Traynor,* 40 Mass. App. Ct. 527, 666 N.E.2d 527 (1996). Note, however, that a child born alive cannot maintain a cause of action in tort against her mother for personal injuries incurred before birth because of the mother's negligence. *Remy v. MacDonald,* 440 Mass. 675, 801 N.E.2d 260 (2004).

Other persons may also be found to have a "duty to act." The Child Trespasser Statute (G.L. c. 231, § 85Q) imposes liability on property owners a duty of reasonable care. It might be found that a property owner who wantonly or recklessly fails to take steps to alleviate a risk of serious bodily injury to a child trespasser has violated this statute. Schools may also owe a duty of care to students. See *Alter v. Newton,* 35 Mass. App. Ct. 142, 617 N.E.2d 656 (1993) ("Because of the relationship between a school and its students, the city had a duty of care to the plaintiff to provide her with reasonably safe school premises").

4. **Means and capacity to alleviate the risk**. A parent or other may not be liable for failure to alleviate a risk if he (she) did not have the means and capacity of performing this duty. See *Commonwealth v. Hall, supra.*

5. **Acts covered by the statute**. While the preamble to the statute speaks to the need to protect children from physical and sexual abuse, the plain language of the statute proscribes all wanton and reckless conduct that creates a substantial (and unjustifiable) risk of serious bodily injury to a child. *Commonwealth v. Hendricks*, 452 Mass. 97, 101, 891 N.E.2d 209, 214 (2008).

6.560 ENTICING A CHILD UNDER 16

G.L. c. 265 § 26C
Issued May 2011

The defendant is charged with violating the child enticement statute.

G.L. c. 265, § 26C.

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

First: **that the alleged victim was a child under the age of 16 or a person whom the defendant believed to be under the age of 16;**

Second: **that the defendant enticed the alleged victim to**

(enter) (exit) (or) (remain within)

a (vehicle) (dwelling) (building) (or) (outdoor space);

Third: **that the defendant did so with the intent that he (she) or another person would commit the offense of:**

• Indecent assault and battery (on a child under the age of 14) (on a person with an intellectual disability) (on a person 14 years or older) ***[G.L. c. 265, §§ 13B, 13F or 13H]***

• Rape (of a child under 16 with force) (and abuse of a child under the age of 16) ***[G.L. c. 265, §§ 22, 22A or 23]***

• Assault (on a child under 16) with intent to commit rape ***[G.L. c. 265, §§ 24 or 24B]***

- **Inducing a minor to become a prostitute** ***[G.L. c. 272, § 4A]***
- **Open and gross lewdness** ***[G.L. c. 272, § 16]***
- **Disseminating matter harmful to a minor** ***[G.L. c. 272, § 28]***
- **Disseminating or possessing to disseminate obscene matter** ***[G.L. c. 272, § 29]***
- **Posing or exhibiting a child under 18 in a state of nudity or sexual conduct** ***[G.L. c. 272, § 29A]***
- **Knowingly purchasing or possessing visual material of a child under 18 in sexual conduct** ***[G.L. c. 272, § 29C]***
- **Unnatural and lascivious acts with a child under 16** ***[G.L. c. 272, § 35A]***
- **Accosting or annoying a person of the opposite sex** ***[G.L. c. 272, § 53]***
- **Common nightwalker or streetwalker** ***[G.L. c. 272, § 53]***
- **Disorderly conduct** ***[G.L. c. 272, § 53]***
- **Disturbing the peace** ***[G.L. c. 272, § 53]***
- **Indecent exposure** ***[G.L. c. 272, § 53]***
- **Keeping a noisy and disorderly house** ***[G.L. c. 272, § 53]***
- **Lewd, wanton and lascivious conduct** ***[G.L. c. 272, § 53]***
- **Engaging in sexual conduct for a fee** ***[G.L. c. 272, § 53A]***
- **(Paying) (procuring for) sexual conduct (with a child under 14)** ***[G.L. c. 272, § 53A]***

• [Identify crime which has as an element the use of or attempted use of force].

To prove the first element of the offense, the Commonwealth must prove beyond a reasonable doubt that the alleged victim was a child who was under the age of 16 years, or a person who the defendant believed was a child under the age of 16 years.

If there is evidence that the alleged victim was not actually under 16. **You have heard evidence that there never was a child under 16 years of age involved in this case. The Commonwealth is not required to prove that the defendant enticed a child who was actually under 16 years of age. It is sufficient if the Commonwealth proves beyond a reasonable doubt that the object of the defendant's enticement was a person whom he (she) believed to be a child under the age of 16.**

To prove the second element of the offense, the Commonwealth must prove beyond a reasonable doubt that the defendant enticed someone to (enter) (exit) (or) (remain within) a (vehicle) (dwelling) (building) (or) (some outdoor space). To "entice" means "to lure, induce, persuade, tempt, incite, solicit, coax or invite" someone. A person may entice someone with words, gestures or in other ways.

To prove the third element of the offense, the Commonwealth must prove beyond a reasonable doubt that, by this enticement, the defendant intended to commit the offense of _____ or intended that someone else commit the offense of _____.

The Commonwealth must prove each element of the offense beyond a reasonable doubt.

Here instruct on the elements of the offense which the defendant is alleged to have intended. Below is the list of the intended offenses covered by G.L. c. 265, § 26C, with statutory references and, where available, the corresponding model jury instruction.

If the intended offense is a strict liability offense, see note 1 below with regard to the defendant's knowledge that the alleged victim was underage.

Statute Offense Model Jury Instruction
G.L. c. 265, § 13B Indecent assault and battery on a child under 14 6.520
G.L. c. 265, § 13F Indecent assault and battery on a person with an intellectual disability
G.L. c. 265, § 13H Indecent assault and battery on a person 14 or older 6.500
G.L. c. 265, § 22 Rape; Aggravated rape
G.L. c. 265, § 22A Rape of a child under 16 with force
G.L. c. 265, § 23 Rape and abuse of a child under 16 (statutory rape)
G.L. c. 265, § 24 Assault with intent to rape
G.L. c. 265, § 24B Assault on a child under 16 with intent to rape
G.L. c. 272, § 4A Inducing a minor to prostitution
G.L. c. 272, § 16 Open and gross lewdness 7.400
G.L. c. 272, § 28 Disseminating matter harmful to a minor
G.L. c. 272, § 29 Disseminating or possessing to disseminate obscene matter 7.180
G.L. c. 272, § 29A Posing or exhibiting child under 18 in a state of nudity or sexual conduct
G.L. c. 272, § 29C Possessing child pornography
G.L. c. 272, § 35A Unnatural act with child under 16
G.L. c. 272, § 53 Accost or annoy person of opposite sex 6.600
---Common nightwalker 7.120
---Common streetwalker
---Disorderly conduct 7.160
---Disturbing the peace 7.200
---Indecent exposure 7.340
---Keeping a noisy and disorderly house
---Lewd, wanton and lascivious conduct 7.380
G.L. c. 272, § 53A Sexual conduct for a fee 7.480
---Paying or procuring for sexual conduct 7.480
---Paying or procuring for sexual conduct with a child under 14
[Various statutes] "Any offense that has as an element the use or attempted use of force"

NOTES:

1. **Age of child**. To satisfy the first element of the offense, the Commonwealth must prove that the defendant enticed a victim who was under the age of sixteen, or a victim who the defendant believed was under the age of sixteen. In addition, the third element of the offense requires a specific intent to commit one of the enumerated crimes. W here the intended crime is a strict liability offense such as rape or indecent assault of a child, to satisfy the third element the Commonwealth must prove that the defendant specifically intended to have sexual relations with (or commit indecent assault on) an underage victim. The Commonwealth need not prove that the defendant knew the exact age of the victim, but must prove that the defendant intended to direct his sexual advances to an underage victim,

i.e., to do a criminal act. Intending to have consensual sexual relations with another adult would not provide the requisite criminal specific intent for the third element, even if it turned out that the object of the defendant's advances was in fact a child. *Commonwealth v. Filopoulos,* 451 Mass. 234, 884 N.E.2d 514 (2008); *Commonwealth v. Disler,* 451 Mass. 216, 884 N.E.2d 500 (2008).

2. **Consent not a defense**. A child under the statutory age is incapable of consenting to any of the enumerated offenses that are strict liability offenses.

3. **Speech alone.** The statute does not require an overt act but does require proof of specific intent to commit one or more of the enumerated crimes. It does not criminalize the mere sending of sexually explicit messages or indecent language, even to minors; in fact, the statute can be violated by enticing a child without making any verbal reference to sexual matters at all. *Commonwealth v. Disler,* 451 Mass. 216, 884 N.E.2d 500 (2008). In a prosecution for enticing a child with intent to kidnap, merely offering the victim a ride and then saying in a “more demanding” and “sort of loud” voice “Get in the truck” were insufficient to prove that the defendant intended to forcibly confine the victim . *Commonwealth v. LaPlante,* 73 Mass. App. Ct. 199, 897 N.E.2d 78 (2008).

ABUSE-RELATED OFFENSES

6.600 ANNOYING AND ACCOSTING PERSONS OF THE OPPOSITE SEX

G.L. c. 272, § 53
Revised June 2016

The defendant is charged with accosting and annoying a person.

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

First: **That the defendant knowingly engaged in an offensive and disorderly act (or acts), or offensive and disorderly language;**

Second: **That the defendant intended to direct that conduct to** *[alleged victim]* **;**

Third: **That** *[alleged victim]* **was aware of the defendant’s conduct; and**

Fourth: **That this conduct would be offensive and disorderly to a reasonable person.**

To prove the first element of the offense, the Commonwealth must prove beyond a reasonable doubt *either* that the defendant committed a disorderly act (or acts) *or* that (he) (she) used disorderly language.

To be disorderly, the defendant's act (or acts) or language must involve one of the following four things without a legitimate reason:

- **it must involve fighting or violent or tumultuous behavior; *or***
- **it must create a hazardous condition; *or***
- **it must create a physically offensive condition that amounts to an invasion of personal privacy; *or***
- **it must be threatening.**

A threat may take many forms. It may be a comment, or an act that would make a reasonable person fearful, not just uncomfortable. The Commonwealth is not required to prove that the defendant intended a threat to be immediately followed by actual violence or physical force.

SUPPLEMENTAL INSTRUCTION

If sexually explicit language is involved. **Sexually explicit language may be inherently threatening when it is directed at particular individuals in settings in which such communications are inappropriate and likely to cause severe distress.**

"The term 'true threat' has been adopted to help distinguish between words that literally threaten but have an expressive purpose such as political hyperbole, and words that are intended to place the target of the threat in fear, whether the threat is veiled or explicit."

Commonwealth v. Chou, 433 Mass. 229, 236 (2001); *see Commonwealth v. Ramirez*, 69 Mass. App. Ct. 9, 10, 21-22 (2007) (defendant staring at complainant at swimming pool and singing that he "fell in love with a little girl" insufficient to infer that he intended her to fear that harm would befall her).

To prove the second element, the Commonwealth must prove that the conduct was directed at and received by the *[alleged victim]* **.**

To prove the third element, the Commonwealth must prove that *[alleged victim]* **was aware of the defendant's offensive and disorderly conduct.**

To prove the fourth element of the offense, the Commonwealth must prove that the disorderly act(s) or language (was) (were) sexual in nature and would be offensive to a reasonable person in the complainant's position. An act or language is offensive when it is repugnant or offensive to contemporary standards of decency and causes real displeasure, anger, or resentment. An act or language is offensive when it is contrary to the prevailing sense of what is decent or moral.

To prove the fourth element of the offense, the Commonwealth must prove that the offensive and disorderly act(s) or language would be offensive to a reasonable person.

Commonwealth v. Cahill, 446 Mass. 778, 781, 783 (2006) (Commonwealth must prove that defendant's behavior was offensive and disorderly to a reasonable person).

NOTES:

1. **Offensive and disorderly are distinct elements.** The Commonwealth must prove both that the conduct was offensive and disorderly. *Commonwealth v. Lombard*, 321 Mass. 294 (1947).

2. **A single act sufficient.** The statute originally penalized "persons who with offensive and disorderly act or language accost or annoy persons of the opposite sex." In 1983, the word "act" was changed to "acts." St. 1983, c. 66, § 1. Nevertheless, "the change had no impact on the statute's meaning," *Commonwealth v. Moran*, 80 Mass. App. Ct. 8, 13 (2011), and proof of a single disorderly and offensive act is sufficient.

3. **Opposite sex not required.** In 2014, the Legislature removed the requirement that the victim be of the opposite sex of the defendant. St. 2014, c. 417 (effective March 24, 2015).

4. **Invasion of privacy need not be extreme.** The word "extreme" was deleted from this instruction after the decision in *Commonwealth v. Cahill*, 446 Mass. 778, 782 (2006) (statute not limited to extreme invasions of personal privacy), rev'g *Commonwealth v. Cahill*, 64 Mass. App. Ct. 911 (2005).

5. **"Physically offensive condition."** If the act was physically offensive, it need not also be threatening, *Commonwealth v. Cahill*, 446 Mass. 778, 783 (2006), and vice versa, *Commonwealth v. Chou*, 433 Mass. 229, 234 (2001) (distribution of sexually derogatory flyers concerning victim was not physically offensive but was threatening).

"Offensive acts are those that cause 'displeasure, anger or resentment; esp., repugnant to the prevailing sense of what is decent or moral.' " *Cahill*, 446 Mass. at 781 (quoting Black's Law Dictionary 1113 (8th ed. 2004)). Conduct is physical when it is " 'of or relating to the body.' " *Commonwealth v. Ramirez*, 69 Mass. App. Ct. 9, 17 (2007) (quoting Merriam-Webster's Collegiate Dictionary 935 (11th ed. 2005)). Physical contact with a victim's person is not necessary to render one's actions physically offensive, however. *Cahill*, 446 Mass. at 782 (citing *Commonwealth v. LePore*, 40 Mass. App. Ct. 543, 549(physically offensive conduct where defendant removed screen from bedroom window of ground floor apartment wherein woman lay sleeping and stood there smoking cigarettes), *rev. denied*, 423 Mass. 1104 (1996)); *cf. Ramirez*, 69 Mass. App. Ct. at 16 (no physically offensive conduct where defendant merely stared at complainant at swimming pool and sang that he"fell in love with a little girl").

6. **Public or private.** The offense may be committed in public or in private. *Commonwealth v. Cahill*, 446 Mass. 778, 782 n.6 (2006); *Commonwealth v. Chou*, 433 Mass. 229, 233 (2001).

7. **"Offensive" conduct must have sexual context.** "Offensive acts are those that cause 'displeasure, anger or resentment; esp., repugnant to the prevailing sense of what is decent or moral.' " *Commonwealth v. Cahill*, 446 Mass. 778, 781 (2006) (quoting from Black's Law Dictionary 1113 (8th ed. 2004)). "We interpret the 'offensive' acts or language element of G. L. c. 272, § 53, as requiring proof of sexual conduct or language, either explicit or implicit." *Commonwealth v. Sullivan*, 469 Mass. 621, 625-26 (2014). "By implicit sexual conduct or language, we mean that which a reasonable person would construe as having sexual connotations." *Id.* at 626

6.620 CIVIL RIGHTS VIOLATIONS

G.L. c. 265 § 37
2009 Edition

The defendant is charged with having violated the Massachusetts Civil Rights Act, which is found as section 37 of chapter 265 of our General Laws. It provides that:

"No person . . . shall by force or threat of force,

willfully injure, intimidate or interfere with,

***or* attempt to injure, intimidate or interfere with,**

***or* oppress or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him [or her] by the constitution or laws of the commonwealth *or* by the constitution or laws of the United States."**

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

***First:* That *[alleged victim]* was exercising a right or privilege protected by the Constitution or laws of the Commonwealth of Massachusetts or of the United States;**

***Second:* That the defendant either injured, intimidated, interfered with, oppressed or threatened the exercise or enjoyment of that legally protected right by *[alleged victim]* , or attempted to do so;**

Third: **That the defendant did so by using force or by threatening to use force; and**

Fourth: **That the defendant did so wilfully.**

The foregoing instruction, and the notes below, are based upon a model instruction developed by the Department of the Attorney General. See also A. Sager, "Rights Protected by the Massachusetts Civil Rights Act Against Interference on Account of Race or Color," 17 Suffolk U. L. Rev. 53 (1983); Sherman & Goldman, "The Development of the Massachusetts Civil Rights Act," 29 Boston Bar. J. 10 (No. 4 Sept./Oct. 1985).

General Laws c. 265, § 37 offers a scope of protection that is similar in many respects to 42 U.S.C. § 242 (the Federal criminal statute governing civil rights violations), and to 42 U.S.C. § 1983 (the Federal civil statute governing civil rights violations). General Laws c. 265, § 37 differs from both Federal statutes in two significant ways: (1) It applies whether or not a defendant was acting under color of law, and therefore encompasses not only private rights secured against the government but also relations between private parties. *O'Connell v. Chasdi*, 400 Mass. 686, 692, 511 N.E.2d 349, 352 (1987); *Bell v. Mazza*, 394 Mass. 176, 182, 474 N.E.2d 1111, 1115 (1985) (statutory phrase "whether or not acting under color of law" is superfluous); *Batchelder v. Allied Stores Corp*., 393 Mass. 819, 822-823, 473 N.E.2d 1128, 1131 (1985); *United States Jaycees v. Massachusetts Comm'n Against Discrimination*, 391 Mass. 594, 609 n.9, 463 N.E.2d 1151, 1160 n.9 (1984). (2) It requires proof of force or threat of force, and is limited to certain specific prohibited acts (e.g., "injure," "intimidate," etc.). *Commonwealth v. Stephens*, 25 Mass. App. Ct. 117, 122 n.5, 515 N.E.2d 606, 609 n.5 (1987). In addition, the Massachusetts statute, unlike 42 U.S.C. § 1983, requires that the violation have been "willful," *Redgrave v. Boston Symphony Orchestra*, Inc., 399 Mass. 93, 99-100, 502 N.E.2d 1375, 1379, S.C., 831 F.2d 339 (1st Cir. 1987), 855 F.2d 888 (1st Cir. 1988) (en banc).

The Massachusetts Civil Rights Act (St. 1979, c. 801) also contains civil provisions, which are codified at G.L. c. 12, §§ 11H-11I.

SUPPLEMENTAL INSTRUCTIONS

1. "Exercise or enjoyment" of rights. **A person is exercising or enjoying a right or privilege secured by the Constitution or laws of the Commonwealth or of the United States whenever that person's behavior or interest is protected by any provision of the Massachusetts or the Federal Constitution, or any Federal or state statute. I instruct you that *[constitutional or statutory provision]* guarantees to *[specify persons protected]* the right to *[specify right]* . Such a person exercises or enjoys that legal right whether or not he knows that the law guarantees him that right.**

Bell, supra ("secured" means "created by, arising under or dependent upon" rather than "fully protected"; right can be "secured" against private party although Constitution or statute only prohibits governmental interference).

See G.L. c. 233, §§ 70 (judicial notice of Federal law) and 75 (proof of Massachusetts and Federal statutes by printed copy).

2. "Injure, intimidate or interfere with . . . or oppress or threaten". **To injure, intimidate, interfere with, oppress or threaten another person in the free exercise or enjoyment of a right or privilege means in general to impede or prevent the full and free benefit of that right. The alleged victim need not be completely prevented from exercising the right, just hampered in exercising it. To "intimidate" means to put in fear. To "interfere" means to hinder or meddle in the affairs of another. To "oppress" means to use authority or power abusively or excessively. To "threaten" means to express an intention to harm another's person or property. This element is satisfied if it is proven beyond a reasonable doubt that the defendant negatively affected the alleged victim's rights in any one of these ways.**

Delaney v. Chief of Police of Wareham, 27 Mass. App. Ct. 398, 409, 539 N.E.2d 65, 72 (1989) ("threat" is "acts or language by which another is placed in fear of injury or damage").

3. "Attempt to injure, intimidate or interfere with." **To prove that the defendant attempted to injure, intimidate or interfere with another person's rights, the Commonwealth must prove two things: that the defendant took a step toward interfering with the alleged victim's rights, and that he (she) did so with the specific intention of interfering with those rights. Neither intent alone nor making preparations is enough by itself to constitute an attempt. You must also find that the defendant took an overt act designed to interfere with the alleged victim's right and came reasonably close to doing so.**

See Instruction 4.120 (Attempt).

Commonwealth v. Ware, 375 Mass. 118, 120, 375 N.E.2d 1183, 1184 (1978); *Commonwealth v. Gosselin*, 365 Mass. 116, 121, 309 N.E.2d 884, 888 (1974); *Commonwealth v. Peaslee*, 177 Mass. 267, 271-274, 69 N.E. 55, 56 (1901); *Commonwealth v. Burns*, 8 Mass. App. Ct. 194, 196, 392 N.E.2d 865, 867-868 (1979).

4. "Force." **"Force" means physical force, directed either against a person or against property. But the amount of physical force used does not matter. Even a minimal amount of force is sufficient.**

Commonwealth v. Richards, 363 Mass. 299, 302, 293 N.E.2d 854, 857 (1973) (force against person); *Commonwealth v. Jones*, 362 Mass. 83, 87-90, 283 N.E.2d 840, 843 (1972) (even swift purse snatching involves use of "force").

5. "Threat of force." **A threat of force is an expression of an intention to use force which is communicated to the person threatened. It must also seem to any reasonable person standing in the place of the threatened person that the person making the threat actually had the ability to carry it out.**

Commonwealth v. Chalifoux, 362 Mass. 811, 816, 291 N.E.2d 635, 638 (1973) (definition of threat); *Commonwealth v. Corcoran*, 252 Mass. 465, 483-484, 148 N.E. 123, 127 (1925) (apprehension to be determined objectively).

6. "Wilfully." **The defendant's act must have been done wilfully. The defendant's act was wilful if it was done either with the specific purpose of interfering with the alleged victim's enjoyment of the interests protected by the right to *[specify right]* , or it was done because the alleged victim had exercised that right.**

It is *not* necessary for the Commonwealth to prove that the defendant knew that he (she) was violating the law, or that he (she) knew that the right to *[specify right]* is specifically protected by the Constitution or laws of Massachusetts or the United States. The Commonwealth is only required to prove that the defendant acted with the particular purpose of interfering with the alleged victim's enjoyment of the interests that are protected by that right. If he (she) did so, then he (she) acted wilfully.

See *Instruction 3.120* (Intent).

This is a specific intent crime, which involves two determinations:
"The first is a purely legal determination. Is the . . . right at issue clearly delineated and plainly applicable under the circumstances of the case? If the trial judge concludes that it is, then the jury must make the second, factual, determination. Did the defendant commit the act in question with the particular purpose of depriving the victim of his enjoyment of the interests protected by that . . . right?

"If both requirements are met, even if the defendant did not in fact recognize the [unlawfulness] of his act, he will be adjudged as a matter of law to have acted 'willfully'—i.e. 'in reckless disregard of constitutional [or statutory] prohibitions or guarantees.'" *Stephens*, 25 Mass. App. Ct. at 121 n.4, 515 N.E.2d at 609 n.4, quoting from and adopting the rule of *United States v. Ehrlichman*, 546 F.2d 910, 921 (D.C. Cir. 1976), cert. denied, 429 U.S. 1120 (1977).

It is not necessary to prove that the victim knew that he or she was exercising a right protected by § 37, that the defendant knew that he or she was depriving the victim of a specific right protected by § 37, or that the defendant had "a particularly evil or wicked purpose." It is only necessary to prove that the defendant "'engaged in activity which interferes with rights which as . . . matter of law are clearly and specifically protected.'" *Stephens*, 25 Mass. App. Ct. at 124-125, 515 N.E.2d at 610- 611, quoting from Ehrlichman, 546 F.2d at 928. See *United States v. Guest*, 383 U.S. 745, 760, 86 S.Ct. 1170 (1966) (private purpose—e.g. robbery—unrelated to deprivation of legal right insufficient); *Screws v. United States*, 325 U.S. 91, 101-107, 65 S.Ct. 1031, 1035-1038 (1945) ("wilfully" means acting with purpose of depriving victim of enjoyment of protected interest or in reckless disregard of legal guarantee). Generally, negligent acts will not rise to level of coercion required to convict under this statute. See *Deas v. Dempsey*, 403 Mass. 468, 470-472, 530 N.E.2d 1239, 1241 (1988).

NOTES ON SELECTED SECURED RIGHTS:

1. **Fourteenth Amendment**. " . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. **Art. 1 of Massachusetts Declaration of Rights**. "All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin." Massachusetts Declaration of Rights, art. 1, as amended by art. 106 of the Amendments.

3. **Education rights.** Under Federal and state law, public school students have a right to attend school and to be educated without discrimination or segregation on account of race. U.S. Const., Amend. 14. *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686 (1954). Mass. Const., Pt. 1, art. 1. G.L. c. 76, § 5.

4. **Employment rights**. All persons are guaranteed the same right to make and perform employment contracts as is enjoyed by white citizens. 42 U.S.C. § 1981. *Johnson v. Railway Express Agency,* 421 U.S. 454, 95 S.Ct. 1716 (1975). The right to work without discrimination because of race, color, religious creed, national origin or ancestry is a right and privilege of all inhabitants of the Commonwealth. St. 1946, c. 368. It is an unlawful discriminatory practice for any employer or his agent to discriminate against an applicant or employee in compensation, terms, conditions or privileges of employment because of race, color, religious creed, national origin, sex, age or ancestry, or for any person to aid, abet, incite, compel or coerce such discrimination. G.L. c. 151B, § 4. See *Radvilas v.*

Stop & Shop, Inc., 18 Mass. App. Ct. 431, 466 N.E.2d 832 (1984) (employment discrimination because of sex and age).

Sexual harassment in the workplace violates both art. 1 of the Massachusetts Declaration of Rights, *O'Connell,* 400 Mass. at 693, 511 N.E.2d at 353, and G.L. c. 151B, § 4(1), *College-Town, Div. of Interco, Inc. v. Massachusetts Comm'n Against Discrimination,* 400 Mass. 156, 162, 508 N.E.2d 587, 591 (1987).

5. **Housing rights**. The right to own, rent and occupy housing without discrimination because of race, color, religion, sex, or national origin is guaranteed by the federal Fair Housing Act of 1968. 42 U.S.C. § 3601 et seq. *Trafficante v. Metropolitan Life Ins. Co.,* 409 U.S. 205, 93 S.Ct. 364 (1972). The right to occupy and enjoy housing is protected against racially motivated interference, whether by the property owners or by third persons unconnected to the property owner. *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights,* 558 F.2d 1283, 1294 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978). Black citizens have the same right to inherit, purchase, lease, sell, hold and convey residential property that white citizens have. 42 U.S.C. § 1982. This means that black persons have the right to live wherever white persons have the right to live, and cannot lawfully be prevented from exercising this right on the grounds of race. *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 88 S.Ct. 2186 (1968). White persons have the right to associate with black persons and have black guests in their homes without discrimination or interference. *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.,* 410 U.S. 431, 93 S.Ct. 1090 (1973).

6. **Mental patients' rights**. A mental patient has a constitutional right to basically safe and humane living conditions, which includes protection from assaults. *Harper v. Cserr,* 544 F.2d 1121, 1123 (1st Cir. 1976). See *Goodman v. Parwatikar,* 570 F.2d 801, 804 (8th Cir. 1978).

7. **Personal security rights**. All persons have the same right to the full and equal benefit of all laws and proceedings for the security of persons and property that is enjoyed by white citizens. 42 U.S.C. § 1981. This right is violated by racially motivated violence. *Mahone v. Waddle,* 564 F.2d 1018 (3d Cir. 1977), cert. denied, 438 U.S. 904 (1978).

8. **Prisoners' rights**. While officials such as police or corrections officers may use reasonable force to overcome resistance by a person whom they are taking into custody or holding in custody, the constitutional right to due process includes the right not to be subjected to unreasonable, unnecessary or unprovoked force by such officers. Arresting officers may use only such force as is reasonably necessary to effect an arrest or to defend themselves. It is a violation of the Fourteenth Amendment to hold and physically punish a person and thereby deprive him of liberty without due process of law. *Ingraham v. Wright,* 430 U.S. 651, 674, 97 S.Ct. 1401, 1414 (1977); *Screws,* 325 U.S. at 106, 111, 65 S.Ct. at 1038, 1040; *United States v. McQueeney,* 674 F.2d 109, 113 (1st Cir. 1982); *Landrigan v. Warwick,* 628 F.2d 736, 741-742 (1st Cir. 1980); *United States v. Villarin Gerena,* 553 F.2d 723, 724 (1st Cir. 1977); *Human Rights Comm'n of Worcester v. Assad,* 370 Mass. 482, 487, 349 N.E.2d 341, 344-345 (1976). G.L. c. 111B, § 8, sixth par. (protective custody statute); G.L. c. 124, § 1(b), (g). 103 Code Mass. Regs. §§ 505.05(5), 505.06. Reasonable force is that which an ordinary prudent person would deem necessary under the circumstances. *Powers v. Sturtevant,* 199 Mass. 265, 266, 85 N.E. 84, 84 (1908). This is a jury question. *Commonwealth v. Young,* 326 Mass. 597, 603, 96 N.E.2d 133, 136 (1950).

The right to inform authorities of a violation of Federal law is a "right or privilege" secured by the Federal Constitution. *Motes v. United States,* 178 U.S. 458, 462-463, 20 S.Ct. 993, 995 (1900).

9. **Private establishments open to the public**. Privately-owned facilities (such as stores, restaurants, taverns, gas stations, theaters and arcades) which are open to the public and which solicit or accept the patronage of the general public are also places of public accommodation covered by the Massachusetts Public Accommodations Law, *supra.* See also 804 Code Mass. Regs. § 5.01.

10. **Public accommodations rights**. The Massachusetts Public Accommodations Law guarantees to all persons the full and equal use of all places of public accommodation free from any distinction, discrimination or restriction on account of race, color, religious creed, national origin, sex, deafness, blindness, ancestry, or any physical or mental disability. Public facilities such as parks, playgrounds, government buildings, public beaches, highways, streets and sidewalks are all places of public accommodation covered by the law. G.L. c. 272, §§ 92A, 98.

11. **Religious exercise rights**. The right to free exercise of religion is guaranteed by Articles 2 and 3 of the Declaration of Rights of the Massachusetts Constitution and by the First Amendment to the United States Constitution. This right protects religious worship, religious practices, meetings for those purposes, and ownership and use of buildings and other property for religious purposes. It protects the religious activities of individuals, congregations, and their spiritual leaders. Mass. Const., Pt. 1, arts. 2, 3; U.S. Const., Amends. 1, 14.

12. **Travel rights**. Under the United States Constitution, all persons have a right to travel freely between the states, and to use the highways and other avenues of interstate commerce in doing so. *Griffin v. Breckenridge,* 403 U.S. 88, 91 S.Ct. 1790 (1971); *Guest, supra.* Public transportation vehicles (such as MBTA buses, subway cars, and streetcars), bus stops, and subway stations and platforms are all places of public accommodation under the Massachusetts Public Accommodations Law, *supra.*

13. **Voting rights**. The right to elect public officials and to be elected to public office is guaranteed by the Federal Constitution, *United States v. Classic,* 313 U.S. 299, 314, 61 S.Ct. 1031, 1035 (1941), and by Article 9 of the Massachusetts Declaration of Rights, *Batchelder v. Allied Stores Int'l,* 388 Mass. 83, 445 N.E.2d 590 (1983).

6.640 CRIMINAL HARASSMENT

G.L. c. 265 § 43A
January 2013

The defendant is charged with criminal harassment in violation of section 43A of chapter 265 of the General Laws.

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

First: **That the defendant engaged in a knowing pattern of conduct or speech, or series of acts, on at least three separate occasions;**

Second: **That the defendant intended to target *[the alleged victim]* with the harassing conduct or speech, or series of acts, on each occasion;**

Third: **That the conduct or speech, or series of acts, were of such a nature that they seriously alarmed *[the alleged victim]*;**

Fourth: **That the conduct or speech, or series of acts, were of such a nature that they would cause a reasonable person to suffer substantial emotional distress; and**

Fifth: **That the defendant committed the conduct or speech, or series of acts, willfully and maliciously.**

Commonwealth v. McDonald, 462 Mass. 236, 240, 967 N.E.2d 1101 (2012) (listing elements).

To satisfy the first element of the offense, the Commonwealth must prove a pattern of conduct which includes a minimum of three incidents of harassment.

To satisfy the second element, the Commonwealth must prove that each incident was directed at ___*[the alleged victim]*___, and that the defendant intended that ___*[the alleged victim]*___ know that each incident was directed at (him) (her).

To satisfy the third element, the Commonwealth must prove that ___*[the alleged victim]*___ was seriously alarmed by this conduct.

To satisfy the fourth element, the Commonwealth must prove that a reasonable person would suffer substantial emotional distress if confronted with those acts, conduct or speech. By substantial emotional distress, I mean distress that is considerable, of importance, solid and real. The offending conduct must be such as would produce a considerable or significant amount of emotional distress in a reasonable person; something markedly greater than the level of uneasiness, nervousness, unhappiness or the like which is commonly experienced in day to day living.

To satisfy the fifth element, the Commonwealth must prove that the defendant acted willfully and maliciously. An act is "willful" if it is done intentionally and by design, and not out of mistake or accident. The defendant acted willfully if the defendant intended the conduct.

An act is done with "malice" if the defendant's conduct was intentional and without justification or mitigation, and any reasonably prudent person would have foreseen the actual harm that resulted to ***[the alleged victim]*** **.**

If you find that the Commonwealth has proved each of these elements beyond a reasonable doubt, you should return a verdict of guilty on this charge. If you find that the Commonwealth has not proved one or more of these five elements beyond a reasonable doubt, you must return a verdict of not guilty on this charge.

SUPPLEMENTAL INSTRUCTION

Communications covered by statute. **The conduct, acts or threats may be communicated by any means including, but not limited to, (mail) (telephone) (facsimile transmission) (e-mail) (internet communications) (telecommunications device) (electronic instant messages) (any electronic communication device including any device that transfers [signs] [signals] [writing] [images] [sounds] [data] or [intelligence of any nature] transmitted in whole or in part by a [wire] [radio] [electromagnetic system] [photo-electronic system] [photo-optical system])**

NOTES:

1. **Wilful conduct.** Wilful conduct must be intentional (as opposed to negligent), but does not require that the defendant intend its harmful consequences as well. *Commonwealth v. O'Neil,* 67 Mass. App. Ct. 284, 290-293, 853 N.E.2d 576, 582-584 (2006).

2. **Malicious conduct**. The requirement of malice does not require a showing of cruelty, hostility or revenge, nor does it require an actual intent to cause the required harm, but merely that the conduct be "intentional and without justification or mitigation, and any reasonable prudent person would have foreseen the actual harm that resulted." *O'Neil, supra.* Accord, *Commonwealth v. Paton,* 63 Mass. App. Ct. 215, 219, 824 N.E.2d 887, 891 (2005); *Commonwealth v. Giavazzi,* 60 Mass. App. Ct. 374, 375-376, 802 N.E.2d 589 (2004). Prior to the *O'Neil* decision, the instruction included language that: "An act is 'wilful' if it is done intentionally and by design, in contrast to an act which is done thoughtlessly or accidentally. The defendant acted wilfully if the defendant intended both the conduct and its harmful consequences. An act is done with 'malice' if it is done out of cruelty, hostility or revenge. To act with malice, one must act not only deliberately, but out of hostility toward *[the alleged victim].*"

3 **Three or more harassing incidents required.** "The phrase 'pattern of conduct or series of acts' requires the Commonwealth to prove three or more incidents of harassment." *Commonwealth* v. *Welch,* 444 Mass. 80, 825 N.E.2d 1005 (2005).

4**.** **Substantial emotional distress.** The term "substantial emotional distress" is defined as considerable in amount, or of real worth and importance. *Commonwealth* v.

Robinson, 444 Mass. 102, 825 N.E.2d 1021 (2005); *Commonwealth* v. *Paton*, 63 Mass. App. Ct. 215, 824 N.E.2d 887 (2005).

5. **Harassing conduct does not encompass protected speech.** Although the statute reaches harassing speech, it does not reach protected speech. Specifically, it reaches only "fighting words." *Commonwealth* v. *Welch*, 444 Mass. 80, 825 N.E.2d 1005 (2005).

6.660 HARASSING OR OBSCENE TELEPHONE CALLS OR ELECTRONIC COMMUNICATIONS

G.L. c. 269 § 14A
Revised May 2011

I. HARASSING TELEPHONE CALLS OR ELECTRONIC COMMUNICATIONS

The defendant is charged with making harassing (telephone calls) (or) (electronic communications). Section 14A of chapter 269 of our General Laws provides as follows:

"Whoever (telephones another person . . .

or causes a person to be telephoned,) (contacts another person by electronic communication, or causes a person to be contacted by electronic communication) repeatedly, for the sole purpose of harassing, annoying, or molesting the person or the person's family, whether or not conversation ensues . . .

shall be punished."

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

First: **That the defendant (made telephone calls to) (caused telephone calls to be made to) (contacted by electronic communication) (caused to be contacted by electronic communication)** ***[name of person]*** **repeatedly, which means three or more times; and**

Second: **That the defendant's sole purpose in (making the telephone calls) (having the telephone calls made) (making the contacts by electronic communication) (causing the contacts by electronic communication to be made) was either to harass, annoy or molest** ***[name of person]*** **or his (her) family.**

The Commonwealth is not required to show that the defendant had a conversation or actual contact with ***[name of person]*** **, but only that he (she) (made the telephone calls) (had the telephone calls made) (made the contacts by electronic communication) (had the contacts made by electronic communication).**

As I indicated, the Commonwealth must prove that the defendant's *only* purpose was to annoy, harass or molest *[name of person]* or his (her) family. For example, your favorite charity might call you repeatedly to ask for donations and that might annoy or even harass you, but it would not violate the law if the intent was not to annoy, harass or molest. If the defendant called repeatedly but not for the *sole* purpose of harassment, he (she) is entitled to be acquitted.

The defendant's intent or purpose cannot be proved directly because there is no way to look into the human mind. But you may determine the defendant's purpose from the surrounding circumstances. You may consider any of the defendant's statements and acts, and any other facts and circumstances shown by the evidence, which help to indicate his (her) state of mind. You may infer that a person ordinarily intends the natural and probable consequences of acts that he (she) does knowingly. For example, if a person makes repeated telephone calls in a short period of time, or in the middle of the night, and hangs up when someone answers the phone, it might be reasonable to infer that the calls were made for the purpose of harassment. However, you should consider all the circumstances in evidence that you deem relevant in determining whether the Commonwealth has proved beyond a reasonable doubt that the defendant acted with the required intent.

Commonwealth v. Roberts, 442 Mass. 1034, 816 N.E.2d 112, 113 (2004) ("The jury could infer the requisite intent from the number of calls, the tenor of the calls, their sequence and timing, and the defendant's persistence in placing the calls despite repeatedly being asked to cease . . . ."); *Commonwealth v. Wotan*, 37 Mass. App. Ct. 727, 728-730, 643 N.E.2d 62, 63-64 (1994), rev'd on other grounds, 422 Mass. 740 (1996) (hundreds of calls are "so obviously vexatious to the receiver that the requisite sole purpose of harassing, annoying and molesting may be inferred, even if getting the receiver's goat is at bottom stimulated by an obsessive desire to get the receiver's attention"). Compare *Commonwealth v. Strahan*, 30 Mass. App. Ct. 947, 949, 570 N.E.2d 1041, 1043 (1991) (calling 11 times in 7 minutes, while perhaps partially motivated by a desire to harass, does not support conviction of § 14A where evidence suggests at least a partial motive was to reestablish a prior relationship with victim), with Roberts, supra (holding that "certain statements made during some of the calls were, at least superficially, phrased as concern for the [victim] did not make it impermissible for the jury to infer that the actual and sole purpose of the calls was to annoy or harass). See *Commonwealth v. Voight*, 28 Mass. App. Ct. 769, 556 N.E.2d 115 (1990) (government unit cannot be a harassed "person," but calls "could take on a tone so directed at the recipient [employee] as an individual as to constitute harassment under the statute").

SUPPLEMENTAL INSTRUCTIONS

1. *"Electronic communications."* The term "electronic communications" includes but is not limited to any transfer of (signs) (signals) (writing) (images) (sounds) (data) (or) (intelligence of any nature), transmitted in whole or in part by a (wire) (radio) (electromagnetic) (photo-electronic) (or) (photo-optical) system.

2. When there was no conversation or the communication was not read.

The Commonwealth is not required to show that (the defendant had a telephone conversation with) (the defendant's electronic communication was received by) *[name]* , but only that the defendant (made the telephone calls or had them made) (sent the electronic communications or had them sent) and that they could have been received by *[name]* .

Commonwealth v. Roberts, 426 Mass. 689 (1998) ("to telephone is to place a telephone call that might result in an oral communication").

II. OBSCENE TELEPHONE CALLS OR ELECTRONIC COMMUNICATIONS

The defendant is (also) charged with making repeated and obscene (telephone calls) (or) (electronic communications). Section 14A of chapter 269 of our General Laws (also) provides as follows:

> **"[W]hoever (telephones . . . a person repeatedly)**
>
> **(or) (contacts a person repeatedly by electronic communication) and uses indecent or obscene language to the person, shall be punished . . . ."**

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

First: **That the defendant (made telephone calls to) (or) (contacted by electronic communication) *[name]* repeatedly, which means three or more times; and**

Second: **That in making those (calls) (electronic communications), the defendant used indecent or obscene language.**

It is not necessary that the defendant specifically knew or believed that his (her) language was legally indecent or obscene. It is only necessary that such language was in fact indecent and obscene, and the defendant knew the general character of what he (she) was saying.

For a definition of "obscene," see Instruction 7.180 (Disseminating Obscene Matter). For a definition of "indecent," see Instruction 6.500 (Indecent Assault and Battery). See also *F.C.C. v. Pacifica Found*., 438 U.S. 726, 740, 98 S.Ct. 3026, 3035 (1978) (in statute banning "obscene, indecent or profane language" over the radio, the word "indecent" should be given its normal dictionary meaning of "nonconformance with accepted standards of morality").

NOTES:

1. **"Repeatedly."** The statutory term "repeatedly" in the first element of each of the above offenses requires three or more such telephone calls. *Commonwealth v. Wotan*, 422 Mass. 740, 665 N.E.2d 976 (1996).

2. **Anonymous telephone calls.** "[A]nonymous telephone calls and acts . . . are, by their nature, not perceptibly linked to a particular individual. They are anonymous. Yet connections may be inferred through timing, mode of communication, content of the communication, similarity to identified conduct, and interpersonal relationships, particularly those involving grievances against the recipient of the unwanted communication." Where, in addition to evidence of specific calls traced to the defendant, there is evidence of other, anonymous telephone calls, the judge has discretion to permit the jury to consider such evidence as probative of the defendant's intent to harass, annoy or molest if such evidence would permit (even if it would not compel) an inference that the defendant was the source of such anonymous calls. The judge should instruct the jury that they must first consider whether the anonymous calls were in fact made by the defendant and, if so, they are to consider that evidence only on the issue of whether the defendant's sole purpose in making the calls traced to him was to harass, annoy or molest. *Wotan,* 37 Mass. App. Ct. at 730-734, 643 N.E.2d at 64-66.

6.680 STALKING

G.L. c. 265 § 43
Revised May 2011

The defendant is charged with stalking *[alleged victim]* . Section 43 of chapter 265 of our General Laws provides as follows:

"Whoever . . . willfully and maliciously engages in a knowing pattern of conduct or series of acts over a period of time directed at a specific person which seriously alarms or annoys that person and would cause a reasonable person to suffer substantial emotional distress, *and* makes a threat with the intent to place the person in imminent fear of death or bodily injury, shall be guilty of the crime of stalking . . . ."

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

***First:* That over a period of time the defendant knowingly engaged in a pattern of conduct or series of acts, involving at least three incidents, directed at *[alleged victim]* ;**

***Second:* That those acts were of a kind that would cause a reasonable person to suffer substantial emotional distress;**

Third: **That those acts did cause *[alleged victim]* to become seriously alarmed or annoyed;**

Fourth: **That the defendant took those actions wilfully and maliciously.**

An act is "willful" if it is done intentionally and by design, and not out of mistake or accident.

An act is done with "malice" if the defendant's conduct was intentional and without justification or mitigation, and any reasonable prudent person would have foreseen the actual effect on *[the alleged victim]* .

And *Fifth:* The Commonwealth must prove beyond a reasonable doubt that the defendant also made a threat with the intention of placing *[alleged victim]* in imminent fear of death or bodily injury.

See Instructions 3.120 (Intent) and 2.240 (Direct and Circumstantial Evidence).

The model instruction uses the definition of stalking found in G.L. c. 265, § 43, as amended by St. 1996, c. 298, § 11 (effective November 7, 1996), which eliminated the two-pronged definition (stalking by harassing or stalking by following) found in the earlier version of § 43, as enacted by St. 1992, c. 31 (effective May 18, 1992). The "threat" element "closely approximates the common law definition of the crime of assault" and should be so interpreted. *Commonwealth v. Matsos*, 421 Mass. 391, 394, 657 N.E.2d 467, 470 (1995).

The statutory phrase "pattern of conduct or series of acts" appears to require three or more incidents. See Kwiatkowski, 418 Mass. at 548 n.6, 637 N.E.2d at 858 n.6 (identical phrase in definition of "harasses" in prior version of § 43, coupled with phrase "repeatedly harasses," requires proof of three or more incidents); *Commonwealth v. Martinez*, 43 Mass. App. Ct. 408, 410-411, 683 N.E.2d 699, 701-702 (1997) (phrase "repeatedly follows" in prior version of § 43 requires proof of three or more incidents). See also *Commonwealth v. Wotan*, 422 Mass. 740, 742, 665 N.E.2d 976, 978 (1996) ("repeatedly" in G.L. c. 269, § 14A requires three rather than two harassing telephone calls because defendant entitled to benefit of plausible ambiguity in statute)

SUPPLEMENTAL INSTRUCTION.

Communications covered by statute. **The conduct, acts or threats may be communicated by any means including, but not limited to (mail) (telephone) (facsimile transmission) (e-mail) (internet communications) (telecommunications device) (electronic instant messages) (any electronic communication device including any device that transfers [signs] [signals] [writing] [images] [sounds] [data] or [intelligence of any nature] transmitted in whole or in part by a [wire] [radio] [electromagnetic system] [photo-electronic system] [photo-optical system]).**

NOTES:

1. **Stalking in violation of a court order.** General Laws c. 265, § 43(b) creates an aggravated form of this offense with a mandatory minimum penalty if it is committed in violation of a temporary or permanent vacate, restraining or no-contact order or judgment issued pursuant to G.L. c. 208, §§ 18, 34B or 34C, G.L. c. 209, § 32, G.L. c. 209A, §§ 3-5, or G.L. c. 209C, §§ 15 or 20, or a protection order issued by another jurisdiction, or a temporary restraining order or preliminary or permanent injunction issued by the Superior Court. The model instruction may be modified by adding as additional elements the existence and violation of such a court order.

2. **Subsequent offenses not within District Court jurisdiction.** General Laws c. 265, § 43(c) establishes a mandatory minimum penalty for repeat offenders. Subsequent offenses are not within the final jurisdiction of the District Court.

3. **Violation of c. 209A order is lesser included offense**. Violation of a 209A order (G.L. c. 209A, § 7) is a lesser included offense of stalking (G.L. c. 265, § 43), and therefore a defendant who has been convicted of violating a c. 209A order may not be convicted of stalking based upon the same conduct. *Edge v. Commonwealth*, 451 Mass. 74, 76-77, 883 N.E.2d 928, 931 (2008).

4. **Harassing letters.** In a prosecution under § 43, a judge should not exclude otherwise-admissible harassing letters sent by the defendant to the complainant, because they are repetitive or unduly prejudicial. The Commonwealth is entitled to present to the jury the totality of the defendant's conduct, since it must prove the victim 's alarm or annoyance, and the likelihood that a reasonable person in the victim's position would suffer substantial emotional distress. *Matsos,* 421 Mass. at 392 n.3, 657 N.E.2d at 469 n.3.

5. **Willful and malicious conduct**. Willful conduct must be intentional (as opposed to negligent) but does not require that the defendant intend its harmful consequences as well. *Commonwealth v. O'Neil,* 67 Mass. App. Ct. 284, 290-293, 853 N.E.2d 576, 582-584 (2006) (criminal harassment). The modern definition of "malice" does not require any showing of "cruelty, hostility or revenge, nor does it require an actual intent to cause the required harm, but merely that the conduct be "intentional and without justification or mitigation, and any reasonable prudent person would have foreseen the actual harm that resulted." *Id.* Prior to the *O'Neil* decision, this instruction included language that: "An act is done maliciously if it is done out of cruelty or hostility or revenge, or other wrongful motive."

6. **Pre-1996 incidents.** The model instruction's description of the elements of the offense may also be used for incidents between August 3, 1994 and November 6, 1996 prosecuted under the "harassing" prong of the prior version of § 43. See *Commonwealth v. Kwiatkowski,* 418 Mass. 543, 637 N.E.2d 854 (1994). *Kwiatkowski*'s invalidation of pre-August 3, 1994 "harassing" convictions is to be applied retroactively in cases that were on direct appeal when it was decided if the defendant raised the constitutional validity of the statute at trial; if not, the defendant is entitled to have the conviction set aside only if there is a substantial risk of a miscarriage of justice. *Matsos,* 421 Mass. at 396-399, 657 N.E.2d at 471-472.

7. **Statement of reasons required if imprisonment not imposed.** A jury session judge sentencing for this or one of the other crimes against persons found in G.L. c. 265 who does not impose a sentence of incarceration "shall include in the record of the case specific reasons for not imposing a sentence of imprisonment," which shall be a public record. G.L. c. 265, § 41.

8. **Venue.** Violations of § 43 may be prosecuted wherever "an act constituting an element of the crime was committed." G.L. c. 277, § 62B.

6.700 THREAT TO COMMIT CRIME

G.L. c. 275 §§ 2-4
January 2013

The defendant is charged with having threatened to commit a crime against the person or property of another. Threatening [a person with a crime against his or her person or property] [a person by threatening a crime against someone else or their property] is itself a crime.

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

First: **That the defendant expressed an intent to injure a person, or property of another, now or in the future;**

Second: **That the defendant intended that his (her) threat be conveyed to a particular person;**

Third: **That the injury that was threatened, if carried out, would constitute a crime; and**

Fourth**: That the defendant made the threat under circumstances which could reasonably have caused the person to whom it was conveyed to fear that the defendant had both the intention and the ability to carry out the threat.**

G.L. c. 275, §§ 2-4. *Commonwealth v. Chalifoux*, 362 Mass. 811, 816-817, 291 N.E.2d 635, 639 (1973) (victim's testimony of prior assault relevant to issue of apprehension); *Commonwealth v. DeVincent*, 358 Mass. 592, 594-595, 266 N.E.2d 314, 315-316 (1971); *Commonwealth v. Maiden*, 61 Mass. App. Ct. 433, 436 , 810 N.E.2d 1279, 1281 (2004) (actual receipt by victim of threat not a necessary element; intent that threat be conveyed to target is sufficient, whether or not it was successfully communicated); *Commonwealth v. Hughes*, 59 Mass. App. Ct. 280, 283, 795 N.E.2d 594, 596 (2003); *Commonwealth v. Ditsch*, 19 Mass. App. Ct. 1005, 475 N.E.2d 1235 (1985) (immediate or personal ability to carry out threat unnecessary, only "intention and ability in circumstances which would justify apprehension on the part of the recipient"); *Commonwealth v. Daly*, 12 Mass. App. Ct. 338, 424 N.E.2d 1138 (1981) (under Mass. R. Crim. P. 4[b], others beside victim may bring complaint). See also *Wagenmann v. Adams*, 829 F.2d 196, 207 (1st Cir. 1987); *Robinson v. Bradley*, 300 F.Supp. 665, 668 (D. Mass. 1969) (3-judge court); *Commonwealth v. Kerns*, 449 Mass. 641, 871 N.E.2d 433 (2007).

SUPPLEMENTAL INSTRUCTIONS

1. Victim's apprehension **It is not required that** ***[alleged victim]*** **actually became apprehensive because of any threat that was made. But you may consider whether or not he (she)** ***was*** **apprehensive in determining whether the Commonwealth has proved the fourth thing that it must prove — namely, that the defendant made the threat under circumstances which** ***could*** **reasonably have caused** ***[alleged victim]*** **to fear that the defendant had both the intention and the ability to carry out the threat.**

Chalifoux, supra; *Commonwealth v. Winter*, 9 Mass. App. Ct. 512, 528, 402 N.E.2d 1372, 1381 (1980). The test for victim apprehension is objective: "Whether the threat by its contents in the circumstances was such as would cause the target of the threat to fear that the threatened crime and injury might be inflicted." *Maiden*, 61 Mass. App. Ct. at 436, 810 N.E.2d at 1282.

2. Threat made indirectly**. The Commonwealth is not required to prove that the threat was communicated directly to *[alleged victim]*. This element is satisfied if it is proved beyond a reasonable doubt that the defendant *intended* the threat to be conveyed to *[alleged victim]*. This can be done directly or indirectly through a third party or by some other means. The proof may be by direct or circumstantial evidence.**

See Instruction 2.240 (Direct and Circumstantial Evidence). *Commonwealth v. Hughes*, 59 Mass. App. Ct. 280, 283; 795 N.E.2d 594, 596 (2003); *Maiden*, 61 Mass. App. Ct. at 435, 810 N.E.2d at 1281 ("the legal definition of threat requires 'communication' of the threat in the sense that it must be uttered, not idly, but to the target, to one who the defendant intends to pass it on to the target, or to one who the defendant should know will probably pass it on to the target"); *Commonwealth v. Furst*, 56 Mass. App. Ct. 283, 776 N.E.2d 1032 (2002); *Commonwealth v. Meier*, 56 Mass. App. Ct. 278, 776 N.E.2d 1034 (2002).

3. Unsuccessful communication. **The Commonwealth is not required to prove that the threat was successfully communicated to *[alleged victim]*. It must prove beyond a reasonable doubt that the defendant made a communication that he (she) intended would reach the *[alleged victim]*, even if he (she) was unsuccessful in doing so. That proof may be by direct or circumstantial evidence.**

See Instruction 2.240 (Direct and Circumstantial Evidence). *Commonwealth v. Kerns*, 449 Mass. 641, 871 N.E.2d 433 (2007); *Commonwealth v. Maiden*, 61 Mass. App. Ct. 433, 436 , 810 N.E.2d 1279, 1281 (2004); *Commonwealth v. Hughes*, 59 Mass. App. Ct. 280, 283; 795 N.E.2d 594, 596 (2003); *Commonwealth v. Furst*, 56 Mass. App. Ct. 283, 776 N.E.2d 1032 (2002); *Commonwealth v. Meier*, 56 Mass. App. Ct. 278, 776 N.E.2d 1034 (2002).

NOTES:

1. **Warrantless arrest.** General Laws c. 275, §§ 2-6 does not authorize warrantless arrest for threats. *Commonwealth v. Jacobsen,* 419 Mass. 269, 644 N.E.2d 213 (1995).

2. **First Amendment**. The offense of threatening to commit a crime only reaches cases of "true threats," which do not qualify as protected speech. *Commonwealth v. Sholley*, 432 Mass. 721, 727, 739 N.E.2d 236, 241 (2000). The term "true threat" distinguishes between words that literally threaten but have an expressive purpose such as political hyperbole, and words that are intended to place the target of the threat in fear. *Commonwealth v. Chou*, 433 Mass. 229, 236, 741 N.E.2d 17, 23 (2001). Compare *Watts v. United States*, 394 U.S. 705, 706, 708 (1969) (per curiam) (statement at political rally that, if inducted into Army and made to carry rifle, "the first man I want to get in my sights is L.B.J.," was, given its conditional nature and context in which it was made, political hyperbole and, therefore, not a "true threat" under 18 U.S.C. § 871[a]), with *United States v. Fulmer*, 108 F.3d 1486, 1490, 1492 (1st Cir. 1997) (voicemail message to Federal agent that "[t]he silver bullets are coming. . . . Enjoy the intriguing unraveling of what I said to you" was, given defendant's history of threats against the agent, reasonably understood as a "true threat" under 18 U.S.C. § 875[c]). See also *Chou*, 433 Mass. at 237, 741 N.E.2d at 23 (2001) (missing person flyer describing ex-girlfriend in sexually offensive and abusive language was a "true threat").

3. **Length of probationary sentence.** General Laws c. 275, § 4 authorizes a maximum sentence of six months imprisonment or, alternatively, a peace bond for a maximum period of six months. There is no six-month limitation on any probationary period. *Commonwealth v. Powers,* 73 Mass. App. Ct. 186, 896 N.E.2d 644 (2008).

4. **Threat against a third person.** The alleged victim of the threat, and of the threatened crime, need not be the same person. *Commonwealth v. Hamilton*, 459 Mass. 422, 428, 945 N.E.2d 877, 882 (2011) (probation officer threatened with harm to her daughter). In that circumstance, the judge should inquire of the Commonwealth who the alleged victim is and instruct accordingly.

6.720 VIOLATION OF ABUSE PREVENTION ORDER

G.L. c. 209A § 7
Revised May 2011

The defendant is charged with knowingly violating an abuse prevention order issued by a court. Section 7 of chapter 209A of our General Laws provides, in substance, that it is unlawful to violate an order issued pursuant to that chapter which orders the defendant:

(to refrain from abusing the person who requested the order) (or that person's child);

(or) (to refrain from contacting the person who requested the order)

(or that person's child) unless authorized by a court;

(or) (to stay a particular distance away from the person who requested the order) (or that person's child);

(or) (to vacate and remain away from the [household] [multiple family dwelling] of the person who requested the order);

(or) (to vacate and remain away from the work place of the person who requested the order).

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

First: **That a court had issued an order pursuant to chapter 209A of our General Laws which ordered the defendant:**

(to refrain from abusing *[name of plaintiff or child]*);

(or) (to refrain from contacting *[name of plaintiff or child]* (directly or indirectly) unless authorized by a court);

(or) (to stay a particular distance away from the person who requested the order [or that person's child]);

(or) (to vacate and remain away from the household or multiple family dwelling of *[name of plaintiff or child]*);

(or) (to remain away from the workplace of *[name of plaintiff or child]* [located at *[address]*]).

Second: **That such order was in effect on the date when its violation allegedly occurred;**

Third: **That the defendant knew that the pertinent term(s) of the order (was) (were) in effect, either by having received a copy of the order or by having learned of it in some other way;**

and *Fourth:* That the defendant violated the order by:

(abusing *[name of plaintiff or child]*); (or) (contacting *[name of plaintiff or child]* [directly or indirectly] unless authorized by a court);

(or) (failing to stay a particular distance away from the person who requested the order [or that person's child]);

(or) (failing to vacate and remain away from the household or multiple family dwelling of *[name of plaintiff or child]*)

(or) (failing to remain away from the workplace of *[name of plaintiff or child]* [located at *[address]*]).

Here the jury must be instructed on "Knowledge" (Instruction 3.140).

Commonwealth v. Gordon, 407 Mass. 340, 553 N.E.2d 915 (1990).

SUPPLEMENTAL INSTRUCTIONS

1. "Abuse." **By "abuse" the law means:**

(causing or attempting to cause another person physical harm);

(or) (placing another person in fear of immediate serious physical harm); (or) (causing another person by force or threat or duress to engage involuntarily in sexual relations).

G.L. c. 209A, § 1

2. Accidental contact. **If there is evidence that suggests that the alleged (contact) (encounter) may have occurred by accident, the Commonwealth must prove one of two things beyond a reasonable doubt: either that the alleged (contact) (encounter) did not occur by accident or, if it did occur by accident, that the defendant failed to take reasonable steps to end the accidental (contact) (encounter).**

An accident is an unexpected happening that occurs without intention or design on a person's part. A (contact) (encounter) was accidental if the defendant did not have reason to know or believe that ***[name of plaintiff or child]*** **would be present at that time or place.**

If a (contact) (encounter) occurred by accident, the defendant was required to take reasonable steps to end the (contact) (encounter). The defendant must be found not guilty unless the Commonwealth proves beyond a reasonable doubt that he (she) could have taken steps to terminate the accidental (contact) (encounter) but unreasonably delayed or failed to do so.

The Commonwealth is not required to prove that the defendant intended to violate the abuse prevention order. It must prove only that he (she) intended the act which would constitute a violation.

So if the evidence raises the possibility that the defendant did not know or could not reasonably have known that *[name of plaintiff or child]* would be present at the time and place alleged, then the Commonwealth must prove beyond a reasonable doubt either that the (contact) (encounter) was *not* accidental or, if it was accidental, that the defendant failed to take reasonable steps to end it.

If the Commonwealth has proved beyond a reasonable doubt each element of the offense and also proved beyond a reasonable doubt either that the (contact) (encounter) was *not* accidental or that the defendant did not take reasonable steps to end an accidental encounter, you should return a verdict of guilty.

If the Commonwealth failed to prove beyond a reasonable doubt any element of the offense, you must return a verdict of not guilty. In addition, if the Commonwealth failed to prove beyond a reasonable doubt either that the (contact) (encounter) was *not* accidental or that the defendant unreasonably delayed in ending an accidental (contact) (encounter), you must return a verdict of not guilty.

If a person subject to a restraining order happens upon a protected person whom he or she did not and could not reasonably know to be present at that time and place, the party subject to the order must make reasonable efforts to terminate the accidental encounter. *Commonwealth v. Stoltz*, 73 Mass. App. Ct. 642 (2009). When there is evidence that fairly raises the issue of accident, the burden falls on the Commonwealth to disprove it. See *Commonwealth v. Zezima*, 387 Mass. 748, 756, 443 N.E.2d 1282 (1982); *Commonwealth v. Ferguson*, 30 Mass. App. Ct. 580, 583, 571 N.E.2d 411(1991) ("W here the evidence raises the possibility of accident, the defendant is, as matter of due process, entitled upon request to a jury instruction that the Commonwealth has the burden of proving beyond a reasonable doubt that the act was not accidental").

See notes to Instruction 9.100 (Accident).

3. Incidental contact. **If there is evidence that suggests that the alleged contact may have been incidental to a legitimate, lawful activity such as *(e.g., contacting a child, going to work, going to school)*, then the Commonwealth must prove beyond a reasonable doubt that the alleged violation was not incidental to that permitted activity. Conduct that is incidental to legitimate, lawful activity is conduct which is connected to that activity — conduct which is purely or naturally a reasonable outgrowth or necessary part of that legitimate, lawful activity.**

So, for example, if a person subject to an abuse prevention order waited in the only public hallway of a courthouse for the start of a hearing, and the person protected by that order was waiting somewhere else in that same public hallway, that conduct would be incidental to a legitimate, lawful activity — attending the court hearing. Although there might be a stay away order in effect, there would be no violation of that order because the conduct was purely a natural and reasonable outgrowth of the scheduling of the hearing.

On the other hand, if the subject entered the public hallway and intentionally stood directly next to the plaintiff when the subject could have stood elsewhere, that would violate the order because it was not incidental or necessary to the lawful activity.

The Commonwealth may prove that the defendant's conduct was not incidental to a lawful activity by proving that the alleged violation was not purely or naturally a reasonable outgrowth or necessary part of that legitimate, lawful activity. Put another way, the Commonwealth must prove that the defendant's conduct was not a good faith attempt by the defendant to do that which was permitted.

In deciding whether there was any contact which violated the abuse prevention order, you may consider any evidence relevant to: (1) the nature and purpose of any contact; (2) the number of contacts over time; (3) the length of any contact; and (4) the substance and character of any statements made during any contact.

You should consider all the evidence in the case to decide whether any contact was made in good faith for a legitimate reason or whether that reason was merely a pretext or excuse for contacting the protected party, *[name of plaintiff or child]* .

If the Commonwealth has proved beyond a reasonable doubt each of the elements of the offense and also that the violation was not committed incidental to a legitimate, lawful activity, you should return a verdict of guilty. If the Commonwealth has failed to prove beyond a reasonable doubt any of the elements of the offense or failed to prove beyond a reasonable doubt that the contact(s) was (were) not incidental to a legitimate, lawful activity, you must return a verdict of not guilty.

Commonwealth v. Silva, 431 Mass. 194, 726 N.E.2d 408 (2000); *Commonwealth v. Consoli*, 58 Mass. App. Ct. 734, 738 (2003); *Commonwealth v. Stewart*, 52 Mass. App. Ct. 755, 756 N.E.2d 22 (2001); *Commonwealth v. Leger*, 52 Mass. App. Ct. 232, 752 N.E.2d 799 (2001); *Commonwealth v. Mendonca*, 50 Mass. App. Ct. 684, 687 n.8, 740 N.E.2d 799 n.8 (2001).

4. Violation through third party. **If there is evidence that the conduct by which the defendant is alleged to have violated the abuse prevention order resulted from the action of a third person, the Commonwealth must prove beyond a reasonable doubt that the defendant had an intent, or shared an intent with the third person, to do an act that could result in a violation of the protective order. The defendant is not guilty unless he (she) had such an intent or shared intent. The defendant cannot be found guilty for an act of another person which he (she) did not intend and over which he (she) had no control.**

The Commonwealth is not required to prove that the defendant specifically intended to violate the abuse prevention order. It is required only to prove that the defendant intended, or shared an intent with the third party, that an act be done which violated the order.

If the Commonwealth has proved beyond a reasonable doubt each of the elements of the offense and also that the defendant had an intent or shared intent with a third person to do an act that could result in a violation of a protective order, you should return a verdict of guilty. If the Commonwealth failed to prove beyond a reasonable doubt any element of the offense or failed to prove beyond a reasonable doubt that the defendant intended or shared the intent of a third party to commit such an act, you must return a verdict of not guilty.

If appropriate, here instruct on inferences (Instruction 3.100).
Commonwealth v. Collier, 427 Mass. 385, 389, 693 N.E.2d 673, 676 (1998) (where act constituting violation was committed by third party, Commonwealth must prove act was intended by defendant but not that defendant intended to violate order). See also *Commonwealth v. Russell*, 46 Mass. App. Ct. 307 705 N.E.2d 1144 (1999).

NOTES:

1. **Related violations of abuse restraining orders.** In appropriate cases, the model instruction may be adapted to indicate that it is now a criminal offense under G.L. c. 209A to violate an order to surrender any firearm, firearms license or firearms identification card, or to violate an abuse prevention order issued by another state. The model instruction may also be modified as appropriate for violations of restraining, vacate or no-contact orders entered under G.L. c. 208, §§ 18, 34B or 34C, G.L. c. 209, § 32, or G.L. c. 209C, §§ 15 or 20.

The model instruction should also be adapted in a case involving the aggravated offense of violating an abuse prevention order in retaliation for the plaintiff's having reported the defendant to the Department of Revenue for failing to pay child support or for the establishment of paternity.

2. **Attempted physical harm requires overt act.** The nature of an attempt to cause a person physical harm, "like criminal attempt, is predicated on an unsuccessful but affirmative effort at commission of the underlying offense." *Commonwealth v. Fortier,* 56 Mass. App. Ct. 116, 775 N.E. 2d 785 (2002). "Usually acts which are expected to bring about the end without further interference on the part of the criminal are near enough, unless the expectation is very absurd." *Fortier* at 122, citing *Commonwealth v. Kennedy,* 170 Mass. 18, 20-21 (1897).

3. **Service or knowledge of extended order.** A defendant may be prosecuted for violating an order that was extended unchanged after a "10-day" hearing, despite not being served with the

extended order, if he had been served with the prior ex parte temporary order, which provided sufficient notice that his failure to attend the scheduled hearing would result in the continuation of the temporary order by operation of law. *Commonwealth v. Delaney,* 425 Mass. 587, 682 N.E.2d 611 (1997). However, the same is not true of successive annual extensions of the order; failure to serve a copy of the current extended order is fatal where there have been successive annual extensions unless the Commonwealth proves constructive knowledge of the extension. *Commonwealth v. Molloy,* 44 Mass. App. Ct. 306, 690 N.E. 2d 836 (1998).

4. **Intent to violate order.** The statute does not require any specific mens rea or intent to violate the order, merely knowledge of and violation of the order. *Commonwealth v. Delaney,* 425 Mass. 587, 682 N.E.2d 611 (1997).

5. **Stalking.** Violating a G.L. c. 209A order (G.L. c. 209A, § 7) is a lesser included offense of stalking in violation of that same 209A order (G.L. c. 265, § 43[b]). As a result, a defendant may not be prosecuted for the latter offense based on incidents already prosecuted as violations of the 209A order. *Edge v. Commonwealth*, 451 Mass. 74, 76-77, 883 N.E.2d 928, 931 (2008).

6.740 VIOLATION OF A HARASSMENT PREVENTION ORDER

G.L. c. 258E, § 9
Revised May 2014

The defendant is charged with knowingly violating a harassment prevention order issued by a court. In order to prove the defendant guilty of this offense, the Commonwealth must prove four things beyond a reasonable doubt:

First: **That a court had issued an order pursuant to chapter 258E of our General Laws which ordered the defendant:**

(to refrain from abusing or harassing *[name of plaintiff]* **);**

(or) (to refrain from contacting *[name of plaintiff]* **directly or indirectly unless authorized by a court);**

(or) (to stay a particular distance away from *[name of plaintiff]* **);**

(or) (to remain away from the household or multiple family dwelling of

__*[name of plaintiff]*__);

(or) (to remain away from the workplace of __*[name of plaintiff]*

[located at ____*[address]*____]);

Second: **That such order was in effect on the date when its violation allegedly occurred;**

Third: **That the defendant knew that the pertinent term(s) of the order (was) (were) in effect, either by having received a copy of the order or by having learned of it in some other way;**

and *Fourth:* That the defendant violated the order by:

(abusing or harassing __*[name of plaintiff]*__);

(or) (contacting __*[name of plaintiff]*__ directly or indirectly unless authorized by a court);

(or) (failing to stay a particular distance away from __*[name of plaintiff]*__);

(or) (failing to remain away from the household or multiple family dwelling of __*[name of plaintiff]*__);

(or) (failing to remain away from the workplace of __*[name of plaintiff]*

[located at ____*[address]*____]).

Here the jury must be instructed on "Knowledge" (Instruction 3.140).

SUPPLEMENTAL INSTRUCTIONS

1. *"Abuse."* **By "abuse" the law means:**

(causing or attempting to cause another person physical harm);

(or) (placing another person in fear of immediate serious physical harm);

G.L. c. 258E, § 1.

2. *"Harass."* **By "harass" the law means:**

(a willful or malicious act aimed at *[name of plaintiff]* **committed with the intent to cause fear, intimidation, abuse, or damage to property);**

(or) (an act that by force, threat, or duress causes another to involuntarily engage in sexual relations;

(or) (an act that constitutes the crime of:

(indecent assault and battery on a child)

(indecent assault and battery on a person with an intellectual disability)

(indecent assault and battery)

(rape)

(forcible rape of a child)

(statutory rape)

(assault with intent to rape)

(assault with intent to rape a child)

(enticement of a child)

(criminal stalking)

(criminal harassment)

(drugging for sexual intercourse).

A person acts willfully if (he) (she) intends both the conduct and its harmful consequences.

A person acts maliciously if the act is characterized by cruelty, hostility, or revenge.

G.L. c. 258E, § 1.

The supplemental instructions, citations, and notes that follow arose under G.L. c. 209A. They appear to be relevant to cases arising under G.L. c. 258E, but have not been so held.

3. *Accidental contact.* **If there is evidence suggesting that the alleged contact may have occurred by accident because the defendant did not have reason to know or believe that** *[name of plaintiff]* **would be present at that time or place, then the Commonwealth must prove beyond a reasonable doubt that the alleged violation did not arise by accident, unknowingly, or through inadvertence. An accident is an unexpected happening that occurs without intention or design on a person's part.**

The Commonwealth is not required to prove that the defendant intended to violate the harassment prevention order. It must prove only that (he) (she) intended the act which would constitute a violation.

But if the evidence raises the possibility that a defendant violated an order either by accident, unknowingly, or inadvertently, the Commonwealth must disprove that possibility by proof beyond a reasonable doubt.

If the Commonwealth has proved beyond a reasonable doubt each element of the offense and has also proved beyond a reasonable doubt that the violation was not committed by accident, unknowingly, or through inadvertence, you should return a verdict of guilty. If the Commonwealth has failed to prove beyond a reasonable doubt any of the elements of the offense or failed to prove beyond a reasonable doubt that the violation was accidental, unknowing, or inadvertent, you must return a verdict of not guilty.

If a person subject to a restraining order happens upon a protected person whom he or she did not and could not reasonably know to be present at that time and place, the party subject to the order must make reasonable efforts to terminate the accidental encounter. *Commonwealth v. Stoltz*, 73 Mass. App. Ct. 642, 644-645 (2009). When there is evidence that fairly raises the issue of accident, the burden falls on the Commonwealth to disprove it. *Commonwealth v. Zezima*, 387 Mass. 748, 756 (1982); *Commonwealth v. Ferguson*, 30 Mass. App. Ct. 580, 583 (1991) ("Where the evidence raises the possibility of accident, the defendant is, as matter of due process, entitled upon request to a jury instruction that the Commonwealth has the burden of proving beyond a reasonable doubt that the act was not accidental.").

See notes to Instruction 9.100 (Accident).

4. *Incidental contact.* **If there is evidence that suggests that the alleged contact may have been incidental to a legitimate, lawful activity such as** *(e.g., contacting a child, going to work, going to school)* **, then the Commonwealth must prove beyond a reasonable doubt that the alleged violation was not incidental to that permitted activity. Conduct that is incidental to legitimate, lawful activity is conduct which is connected to that activity — conduct which is purely or naturally a reasonable outgrowth or necessary part of that legitimate, lawful activity.**

So, for example, if a person subject to a harassment prevention order waited in the only public hallway of a courthouse for the start of a hearing, and the person protected by that order was waiting somewhere else in that same public hallway, that conduct would be incidental to a legitimate, lawful activity — attending the court hearing. Although there might be a stay away order in effect, there would be no violation of that order because the conduct was purely a natural and reasonable outgrowth of the scheduling of the hearing.

On the other hand, if the subject entered the public hallway and intentionally stood directly next to the plaintiff when the subject could have stood elsewhere, that would violate the order because it was not incidental or necessary to the lawful activity.

The Commonwealth may prove that the defendant's conduct was not incidental to a lawful activity by proving that the alleged violation was not purely or naturally a reasonable outgrowth or necessary part of that legitimate, lawful activity. Put another way, the Commonwealth must prove that the defendant's conduct was not a good faith attempt by the defendant to do that which was permitted.

In deciding whether there was any contact which violated the harassment prevention order, you may consider any evidence relevant to: (1) the nature and purpose of any contact; (2) the number of contacts over time; (3) the length of any contact; and (4) the substance and character of any statements made during any contact.

You should consider all the evidence in the case to decide whether any contact was made in good faith for a legitimate reason or whether that reason was merely a pretext or excuse for contacting the protected party, _[name of plaintiff]_ .

If the Commonwealth has proved beyond a reasonable doubt each of the elements of the offense and also proved beyond a reasonable doubt that the violation was not committed incidental to a legitimate, lawful activity, you should return a verdict of guilty. If the Commonwealth has failed to prove beyond a reasonable doubt any of the elements of the offense or failed to prove beyond a reasonable doubt that the contact(s) (was) (were) not incidental to a legitimate, lawful activity, you must return a verdict of not guilty.

Commonwealth v. Silva, 431 Mass. 194 (2000); *Commonwealth v. Consoli*, 58 Mass. App. Ct. 734, 738 (2003); *Commonwealth v. Stewart*, 52 Mass. App. Ct. 755, 760-762 (2001); *Commonwealth v. Leger*, 52 Mass. App. Ct. 232, 234-238 (2001); *Commonwealth v. Mendonca*, 50 Mass. App. Ct. 684, 687 n.8 (2001).

5. Violation through third party. **If there is evidence that the conduct by which the defendant is alleged to have violated the harassment prevention order resulted from the action of a third person, the Commonwealth must prove beyond a reasonable doubt that the defendant had an intent, or shared an intent with the third person, to do an act that could result in a violation of that order. The defendant is not guilty unless (he) (she) had such an intent or shared intent. The defendant cannot be found guilty for an act of another person which (he) (she) did not intend and over which (he) (she) had no control.**

The Commonwealth is not required to prove that the defendant specifically intended to violate the harassment prevention order. It is required only to prove that the defendant intended, or shared an intent with the third party, that an act be done which violated the order.

If the Commonwealth has proved beyond a reasonable doubt each of the elements of the offense and also that the defendant had an intent or shared intent with a third person to do an act that could result in a violation of a harassment protection order, you should return a verdict of guilty. If the Commonwealth failed to prove beyond a reasonable doubt any element of the offense or failed to prove beyond a reasonable doubt that the defendant intended or shared the intent of a third party to commit such an act, you must return a verdict of not guilty.

If appropriate, here instruct on inferences (Instruction 3.100).

Commonwealth v. Collier, 427 Mass. 385, 389 (1998) (where act constituting violation was committed by third party, Commonwealth must prove act was intended by defendant but not that defendant intended to violate order). See also *Commonwealth* v. *Russell*, 46 Mass. App. Ct. 307 (1999).

NOTES INVOLVING G.L. c. 209A CASES:

1. **Attempted physical harm requires overt act.** The nature of an attempt to cause a person physical harm, "like criminal attempt, is predicated on an unsuccessful but affirmative effort at commission of the underlying offense." *Commonwealth v. Fortier,* 56 Mass. App. Ct. 116, 119 (2002). "'Usually acts which are expected to bring about the end without further interference on the part of the criminal are near enough, unless the expectation is very absurd.'" *Id.* at 122, quoting *Commonwealth v. Kennedy*, 170 Mass. 18, 20-21 (1897).

2. **Service or knowledge of extended order.** A defendant may be prosecuted for violating a G.L. c. 209A abuse prevention order that was extended unchanged after a "10-day" hearing, despite not being served with the extended order, if he had been served with the prior ex parte temporary order, which provided sufficient notice that his failure to attend the scheduled hearing would result in the continuation of the temporary order by operation of law. *Commonwealth v. Delaney*, 425 Mass. 587, 589-593 (1997). However, the same is not true of successive annual extensions of the order; failure to serve a copy of the current extended order is fatal where there have been successive annual extensions unless the Commonwealth proves constructive knowledge of the extension. *Commonwealth v. Molloy*, 44 Mass. App. Ct. 306 (1998).

3. **Intent to violate order.** General Laws c. 209A does not require any specific mens rea or intent to violate the abuse prevention order, merely knowledge of and violation of the order. *Commonwealth v. Delaney*, 425 Mass. 587, 595-597 (1997).

PUBLIC ORDER OFFENSES

7.100 BAIL JUMPING

G.L. c. 276 § 82A
2009 Edition

The defendant is charged with failing to appear in court after being released on (bail) (personal recognizance). Section 82A of chapter 276 of our General Laws provides as follows:

"A person who is released by court order

or other lawful authority

on bail or recognizance

on condition that he will appear personally

at a specified time and place

and who fails without sufficient excuse to so appear

shall be punished . . . ."

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

First: **That the defendant had been released on (bail) (personal recognizance) by a (judge) (bail magistrate);**

If relevant to evidence. **"Personal recognizance" means that a person is released on his own promise to appear, without having to post any money or a bond to guarantee his appearance.**

Second: **That the defendant was aware of a particular date and time on which he (she) was required to appear in court, as a condition of that release; and**

Third: **That the defendant failed to appear in court as required.**

See *Instruction 3.120* (Intent).

See *Commonwealth v. Coleman*, 390 Mass. 797, 805 n.8, 461 N.E.2d 157, 162 n.8 (1984) (since failure to appear is a separate criminal offense, it may not be considered by judge sentencing on original charge); *Commonwealth v. Sitko*, 372 Mass. 305, 313, 361 N.E.2d 1258, 1263 (1977) (same); *Sclamo v. Commonwealth*, 352 Mass. 576, 577-578, 227 N.E.2d 518, 519 (1967) (§ 82A is not a regulation of the court's contempt power but a separate criminal offense, and cannot be dealt with summarily); *Commonwealth v. Love*, 26 Mass. App. Ct. 541, 544-547, 530 N.E.2d 176, 179-180 (1988) (phrase "without sufficient excuse" is not unconstitutionally vague).

SUPPLEMENTAL INSTRUCTION

"Without sufficient cause." **The defendant has offered evidence suggesting that he (she) *did* have a sufficient excuse for failing to appear in court as required. Before you may find the defendant guilty of the offense as charged, the Commonwealth must prove beyond a reasonable doubt that the defendant did *not* have a sufficient excuse for his (her) failure to appear.**

In order to demonstrate this, the Commonwealth must prove beyond a reasonable doubt that the defendant's absence was deliberate or willful. If the defendant intended to be present in court, but was unable to do so, then the defendant must be found not guilty.

What might amount to a sufficient excuse? An accident, an illness, or the like would be a sufficient excuse, but the range of potential situations is very broad and you must evaluate any suggested excuse in all the circumstances. It would not be a sufficient excuse that a person was afraid of the possible outcome of a trial or sought to escape punishment.

Remember, the defendant must be found not guilty unless the Commonwealth proves beyond a reasonable doubt that the defendant had been released on (bail) (personal recognizance), knew that he (she) was required to appear in court on that date and time, failed to do so, and his (her) failure was deliberate.

Like other matters of justification, mitigation and excuse, the defendant has "the burden of producing some evidence of a 'sufficient excuse' before the Commonwealth would become obligated to shoulder the burden of negating that excuse by proof beyond a reasonable doubt . . . . Beyond the analogical force of these precedents in indicating how a proffered excuse under the bail-jumping statute should be treated at trial, we have the commonsense point that it is the defendant charged under the statute who in all likelihood knows the relevant facts, and there is no unfairness in requiring him to produce some evidence of them" before the Commonwealth must shoulder the burden of disproof. Love, supra.
The examples of sufficient and insufficient excuses are also drawn from the Love decision.

7.120 COMMON NIGHTWALKER

G.L. c. 272 § 53
2009 Edition

The defendant is charged with being a common nightwalker. Section 53 of chapter 272 of our General Laws provides that "common night walkers . . . shall be punished . . . ."

A common nightwalker is someone who is abroad at night, soliciting others to engage in unlawful sexual acts. Often it is a prostitute who solicits potential customers on the street.

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

First: **That the defendant was walking the streets at night; and**

Second: **That the defendant was attempting to solicit someone to engage in an unlawful sexual act, such as an act of prostitution.**

See *Instruction 3.120* (Intent). For a definition of "nighttime," see *Instruction 8.100* (Breaking and Entering).

Commonwealth v. Boyer, 400 Mass. 52, 53 n.1, 507 N.E.2d 1024, 1025 n.1 (1987) ("common night walker" is "someone who is abroad at night and solicits others to engage in illicit sexual acts"); *Commonwealth v. King*, 374 Mass. 5, 13-14, 372 N.E.2d 196, 202 (1977) (solicitation inferable from circumstantial "time, place, and frequency" of defendant's conduct); *Thomes v. Commonwealth*, 355 Mass. 203, 207, 243 N.E.2d 821, 824 (1969) (offense consists in being "abroad at night attempting to allure someone to illicit sexual intercourse," and generally has "come to mean a prostitute who solicits [customers] on the street"; actual attempt at solicitation is required, not just intent to do so, and as so construed, statute is not unconstitutionally vague); *Commonwealth v. Proctor*, 22 Mass. App. Ct. 935, 493 N.E.2d 879 (1986) (solicitation inferable from defendant's standing on corner frequented by prostitutes, speaking with a male motorist and getting into his auto, where defendant had regularly done so in the past; testimony of express soliciting conversation with prospective customer was not required).

NOTES:

1. **Selective prosecution of females**. The Massachusetts Equal Rights Amendment (art. 106 of the Articles of Amendment to the Massachusetts Constitution) requires that a common nightwalking charge against a female defendant be dismissed with prejudice upon an appropriate showing that the particular police department or prosecutor's office consistently prosecutes female nightwalkers but not their male customers. *Proctor*, 22 Mass. App. Ct. at 936, 493 N.E.2d at 881 (1986); *Commonwealth v. An Unnamed Defendant*, 22 Mass. App. Ct. 230, 233-236, 492 N.E.2d 1184, 1186-1188 (1986).

2. **Whether a continuing offense**. The statutory charging language for this offense suggests that it may be a continuing offense. G.L. c. 277, § 79 (sufficient form of complaint is "[t]hat *A.B.,* during the three months next before the making of this complaint, was a common nightwalker, habitually walking in the streets in the night time for the purpose of prostitution"). Historically, cases of a similar nature have been viewed as continuing offenses. See *Commonwealth v. McNamee*, 112 Mass. 285 (1873) (common drunkard); *Commonwealth v. Gardner*, 73 Mass. 494 (1856) (common seller of spiritous and intoxicating liquor); *Stratton v. Commonwealth*, 51 Mass. 217 (1845) (common railer and brawler). This issue has not arisen in the nightwalking cases cited above.

3. **Conviction does not require multiple acts.** Conviction does not require past or multiple acts. *King*, *supra* (this "is not a statute directed against recidivism and does not require proof of past convictions for prostitution to sustain a conviction for common night walking"). See *Commonwealth v. Nellie Cruz,* 30 Mass. App. Ct. 1113, 571 N.E.2d 435 (No. 90-P-894, May 9, 1991) ("where, as here, there is direct evidence of solicitation to engage in illicit sexual acts, additional evidence of 'habitual' activity is not necessary to establish guilt") (unpublished opinion under Appeals Court Rule 1:28).

7.140 DERIVING SUPPORT FROM EARNINGS OF A PROSTITUTE

G.L. c. 272 § 7
2009 Edition

The defendant is charged with knowingly (deriving support from) (sharing in) the earnings of a prostitute.

Chapter 7 of section 272 of our General Laws provides as follows:

"Whoever,

knowing a person to be a prostitute,

shall live or derive support or maintenance, in whole or in part, from the earnings or proceeds of his prostitution . . .

or shall share in such earnings [or] proceeds . . .

shall be punished . . . ."

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

First: **That a particular person was engaged in prostitution. A prostitute is a person who engages in common, indiscriminate sexual activity for hire.**

Second: **The Commonwealth must prove beyond a reasonable doubt that the defendant *knew* that such person was a prostitute; and**

Third: **The Commonwealth must prove beyond a reasonable doubt that the defendant shared in some way in the earnings or proceeds from that person's prostitution.**

See *Instruction 3.140* (Knowledge).

Note that this statute requires a mandatory minimum sentence of two years. *Commonwealth v. Lightfoot*, 391 Mass. 718, 721, 463 N.E.2d 545, 547 (1984). While the statute does not provide for a house of correction sentence, any District Court sentence must be to the house of correction. See Id.; *Commonwealth v. Graham*, 388 Mass. 115, 445 N.E.2d 1043 (1983); *Commonwealth v. Dupree*, 16 Mass. App. Ct. 600, 605, 453 N.E.2d 1071, 1075 (1983) ("The reference to State prison may well indicate the Legislature's use of the statutory shorthand for a felony, rather than an intent to preclude a . . . sentence [elsewhere]. It did not compel a sentence to State prison").

The statute also punishes anyone who lives or derives support "from monies loaned, advanced to or charged against him by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed." The model instruction may be appropriately adapted.

Commonwealth v. Bracy, 313 Mass. 121, 46 N.E.2d 580 (1943) (defendant can be charged and convicted solely for "shar[ing] in such earnings, proceeds or monies," but complaint that omits any antecedent for word "such" charges no crime); *Commonwealth v. Thetonia*, 27 Mass. App. Ct. 783, 543 N.E.2d 700 (1989) (friend chauffeuring prostitute in exchange for occasional gas money and drugs is insufficient; since statute is aimed at pimping, a minor indirect financial benefit not sufficient); *Commonwealth v. Roberts*, 5 Mass. App. Ct. 881, 882, 368 N.E.2d 829, 829 (1977) (statute is constitutional). The definition of prostitution is drawn from *Commonwealth v. King*, 374 Mass. 5, 12, 372 N.E.2d 196, 202 (1977).

NOTES:

1. **Deriving support from earnings of a minor prostitute** (G.L. c. 272, § 4B) is an aggravated form of § 7. It does not require that the defendant knew or should have known that the prostitute was a minor. *Commonwealth v. Baker,* 17 Mass. App. Ct. 40, 43, 455 N.E.2d 642, 643 (1983). The District Court does not have final jurisdiction over the aggravated offense, since it is a life felony, *Id.,* 17 Mass. App. Ct. at 41 n.2, 455 N.E.2d at 642 n.2, and is not listed in G.L. c. 218, § 26.

2. **Knowingly permitting premises to be used for prostitution**. The related offense of knowingly permitting a person to use premises under the defendant's control for prostitution (G.L. c. 272, § 6) requires proof: (1) that the defendant owned, managed or assisted in the management or control of certain premises; (2) that a person was present on those premises for the purpose of unlawfully having sexual intercourse; and (3) that the defendant induced or knowingly permitted the person's presence on the premises for that purpose. *Commonwealth v. Bucaulis,* 6 Mass. App. Ct. 59, 62, 373 N.E.2d 221, 224, cert. denied, 439 U.S. 827 (1978). A conviction under § 6 may not rest on the testimony of only one witness unless it is corroborated in a "material particular." G.L. c. 272, § 11. *Bucaulis,* 6 Mass. App. Ct. at 64, 373 N.E.2d at 225.

7.160 DISORDERLY CONDUCT

G.L. c. 272 § 53
2009 Edition

The defendant is charged with disorderly conduct. In order to prove the defendant guilty of this offense, the Commonwealth must prove three things beyond a reasonable doubt:

First: **The Commonwealth must prove that the defendant involved himself (herself) in at least one of the following actions: he (she) *either* engaged in fighting or threatening, *or* engaged in violent or tumultuous behavior *or* created a hazardous or physically offensive condition by an act that served no legitimate purpose of the defendant's;**

Second: **The Commonwealth must prove beyond a reasonable doubt that the defendant's actions were reasonably likely to affect the public; and**

Third: **The Commonwealth must prove beyond a reasonable doubt that the defendant *either* intended to cause public inconvenience, annoyance or alarm, *or* recklessly created a risk of public inconvenience, annoyance or alarm.**

See *Instruction 3.120* (Intent).

G.L. c. 272, § 53. *Commonwealth v. Feigenbaum*, 404 Mass. 471, 536 N.E.2d 325 (1989) ("hazardous or physically offensive condition" branch of the statute cannot be applied to political protesters who block passage); *Commonwealth v. A Juvenile*, 368 Mass. 580, 595-599, 334 N.E.2d 617, 627-629 (1975); *Alegata v. Commonwealth*, 353 Mass. 287, 302-304, 231 N.E.2d 201, 210-211 (1967), adopting Model Penal Code § 250.2(a) & (c) (1962); *Commonwealth v. Lopiano*, 60 Mass. App. Ct. 723,725-726, 805 N.E.2d 522, 525 (2004) (finding no violent or tumultuous behavior where defendant, upon being told by police that he would be summoned to court for assault and battery, began to flail his arms and shout at police); *Commonwealth v. Sinai*, 47 Mass. App. Ct. 544, 546, 714 N.E.2d 830, 833 (1999) (affirming first element of crime); *Commonwealth v. Bosk*, 29 Mass. App. Ct. 904, 906-907, 556 N.E.2d 1055, 1057-1058 (1990) (statute applicable to motorist who stood in traffic lane, forcing vehicles to pass around him, while debating with police officer and refusing to return to his car).

SUPPLEMENTAL INSTRUCTIONS

1. Prohibited conduct. **Our disorderly conduct law seeks to control intentional conduct which tends to disturb the public tranquility, or to alarm or provoke others. It prohibits four separate and distinct acts: It forbids conduct that involves the use of force or violence. It also prohibits making threats that involve the immediate use of force or violence. It forbids tumultuous and highly agitated behavior, which may not involve physical violence, but which causes riotous commotion and excessively unreasonable noise, and so constitutes a public nuisance. Finally, the law prohibits any conduct that creates a hazard to public safety or a physically offensive condition by an act that serves no legitimate purpose of the defendant's.**

Feigenbaum, supra; Alegata, supra; *Commonwealth v. Blavackas*, 11 Mass. App. Ct. 746, 749, 419 N.E.2d 856, 858 (1981).

2. "Public." **For the defendant to be found guilty, his (her) actions must have been reasonably likely to affect the public, that is, persons in a place to which the public or a substantial group has access.**

Alegata, supra. See *Commonwealth v. Templeman*, 376 Mass. ~~553~~ 533, 537, 381 N.E.2d 1300, 1303 (1978).

3. Recklessness. **A person acts recklessly when he consciously ignores, or is indifferent to, the probable outcome of his actions. The defendant was reckless if he (she) knew, or must have known, that such actions would create a substantial and unjustifiable risk of public inconvenience, annoyance or alarm, but he (she) chose, nevertheless, to run the risk and go ahead.**

Commonwealth v. Welansky, 316 Mass. 383, 397-401, 55 N.E.2d 902, 909-912 (1944); *Commonwealth v. Papadinis*, 23 Mass. App. Ct. 570, 574-575, 503 N.E.2d 1334, 1336 (1987), aff'd, 402 Mass. 73, 520 N.E.2d 1300 (1988).

NOTES:

1. **Offensive language**. General Laws c. 272, § 53 cannot constitutionally be applied to language and expressive conduct, even if it is offensive and abusive, unless it falls outside the scope of First Amendment protections, i.e. it constitutes "fighting words which by their very utterance tend to incite an immediate breach of the peace." *Commonwealth v. Richards*, 369 Mass. 443, 445-450, 340 N.E.2d 892, 894-897 (1976); *A Juvenile*, 368 Mass. at 587- 595, 334 N.E.2d at 622-627; *Commonwealth v. Sinai*, 47 Mass. App. Ct. 544 at 546, 714 N.E.2d at 833. See *Lewis v. New Orleans*, 415 U.S. 130, 94 S.Ct. 970 (1974); *Rosenfeld v. New Jersey*, 408 U.S. 901, 92 S.Ct. 2479 (1972); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766 (1942); *Blavackas,* 11 Mass. App. Ct. at 748-752, 419 N.E.2d at 857-859 (doubtful that public solicitation for sexual activity is "disorderly conduct," which seems to require proof at least of significant risk of violence or serious disturbance). However, non-expressive disorderly conduct is punishable even if accompanied by constitutionally protected speech or expressive conduct. *Richards, supra; Commonwealth v. Carson,* 10 Mass. App. Ct. 920, 921-922, 411 N.E.2d 1337, 1337-1338 (1980).

2. **Annoying and accosting persons of the opposite sex**. Regarding that portion of G.L. c. 272, § 53 dealing with annoying and accosting persons of the opposite sex, see Instruction 6.600.

3. **Political protesters**. The acts that may constitute disorderly conduct fall into two branches: (i) "engag[ing] in fighting or threatening, or in violent or tumultuous behavior," and (ii) "creat[ing] a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor." Model Penal Code § 250.2(a) & (c) (Proposed Official Draft, 1962). A disorderly conduct prosecution of political protesters is maintainable only under the first of the two branches. "[A]lthough conduct that is designed to call attention to a political cause, and may therefore have a legitimate purpose, may nevertheless be criminal under the common law or by some statute, it does not constitute disorderly conduct under [the second branch of] G.L. c. 272, § 53" because it does serve a legitimate purpose of the actor. *Feigenbaum, supra.*

4. **First Amendment**. As to the burden of proof when there is an assertion that the defendant's acts were protected by the First Amendment to the United State Constitution, see *Commonwealth v. Manzelli*, 68 Mass. App. Ct. 691, 864 N.E.2d 566 (2007).

7.180 DISSEMINATING OBSCENE MATTER; POSSESSING OBSCENE MATTER TO DISSEMINATE

G.L. c. 272 § 29
2009 Edition

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 p*atently 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).

7.200 DISTURBING THE PEACE

G.L. c. 272 § 53
2009 Edition

The defendant is charged with disturbing the peace. In order to prove the defendant guilty of this offense, the Commonwealth must prove three things beyond a reasonable doubt:

First: **That the defendant engaged in conduct which most people would find to be unreasonably disruptive, such as (making loud and disturbing noise) (tumultuous or offensive conduct) (hurling objects in a populated area) (threatening, quarreling, fighting, or challenging others to fight) (uttering personal insults that amount to fighting words, that is, are so offensive that they are inherently likely to provoke an immediate violent reaction);**

Second: **That the defendant's actions were done intentionally, and not by accident or mistake; and**

Third: **That the defendant did in fact annoy or disturb at least one person.**

To amount to disturbing the peace, the defendant's acts must have been voluntary, unnecessary, and contrary to normal standards of conduct.

You should consider all the circumstances, including such important factors as time and location, in determining whether the defendant disturbed the tranquility of at least one person in that area, or interfered with at least one person's normal activity.

See *Instruction 3.120* (Intent).

G.L. c. 272, § 53. *Commonwealth v. Orlando*, 371 Mass. 732, 733-736, 359 N.E.2d 310, 311-313 (1977) (definition; statute not unconstitutionally vague or overbroad); *Commonwealth v. Jarrett*, 359 Mass. 491, 269 N.E.2d 657 (1971); Commonwealth v. Oaks, 113 Mass. 8, 9 (1847); Commonwealth v. Piscopo, 11 Mass. App. Ct. 905, 905, 414 N.E.2d 630, 631 (1981) (fact that police were called will support inference that citizens of neighborhood were disturbed).

NOTE:

Offensive language. General Laws c. 272, § 53 cannot be applied to offensive and abusive language unless it falls outside the scope of First Amendment protection, i.e., it constitutes "profane, libelous, and insulting or fighting words which by their very utterance tend to incite an immediate breach of the peace." However, it is not a defense that proscribed behavior was accompanied by protected speech. *Commonwealth v. Bohmer,* 374 Mass. 368, 373-377, 372 N.E.2d 1381, 1386-1388 (1974) (disturbing a school or assembly [G.L. c. 272, § 40]); *Commonwealth v. Richards,* 369 Mass. 443, 448-449, 340 N.E.2d 892, 896 (1976) (disorderly conduct); *Commonwealth v. A Juvenile,* 368 Mass. 580, 584-598, 334 N.E.2d 617, 621-628 (1975) (same). See *Houston v. Hill,* 482 U.S. 451, 107 S.Ct. 2502 (1987) (ordinance forbidding "abuse" of police is unconstitutionally overbroad); *Lewis v. New Orleans,* 415 U.S. 130, 92 S.Ct. 2499 (1974) (statute forbidding cursing or using "obscene or opprobrious language" toward police is unconstitutionally overbroad); *Rosenfeld v. New Jersey,* 408 U.S. 901, 92 S.Ct. 2479 (1972); *Chaplinsky v. New Hampshire,* 315 U.S. 568, 62 S.Ct. 766 (1942) ("fighting words" can be constitutionally proscribed). Loud speech may be constitutionally proscribed when uttered late at night in a residential neighborhood, so that people are disturbed in their homes by the noise. *Orlando,* 371 Mass. at 735, 359 N.E.2d at 312 (disturbing the peace).

7.210 WILFUL INTERFERENCE WITH A FIRE FIGHTING OPERATION

G.L. c. 268, § 32A
Issued May 2014

The defendant is charged with wilful interference with a (fire fighter) (fire fighting force). In order to prove the defendant guilty of this offense, the Commonwealth must prove two things beyond a reasonable doubt:

First: **That the defendant obstructed, interfered with, or hindered a (fire fighter) (fire fighting force) in the lawful performance of (his) (her) (its) duty; and**

Second: **That the defendant did so wilfully.**

The defendant acted wilfully if (he) (she) acted both with the intent to commit the act or acts that obstructed, interfered with, or hindered the (fire fighter) (fire fighting force), and with the intent to cause obstruction, interference, or hindrance of the (fire fighter) (fire fighting operation).

If the Commonwealth has proven both elements beyond a reasonable doubt, then you should find the defendant guilty. If the Commonwealth has not proven both elements beyond a reasonable doubt, then your verdict must be not guilty.

See Instruction 3.120 (Specific Intent).

NOTE:

Defendant's "dual intent" makes no difference. The statutory requirements are met if the defendant has the required intent, even if he or she has other intentions as well. *Commonwealth v. Joyce*, 84 Mass. App. Ct. 574, 580 (2013) (defendant claimed he had the intention to save pets inside burning building; evidence supported finding that he shouted profanity and threats at safety personnel when he could have been trying to save animals).

7.220 ESCAPE

G.L. c. 268 § 16
June 2016

The defendant is charged with escaping from lawful custody. In order to prove the defendant guilty of this offense, the Commonwealth must prove three things:

First: **That the defendant was a prisoner who had been committed by legal procedures to the custody of a penal institution or correctional institution, or a jail;**

Second: **That the defendant (escaped from) (failed to return from any temporary release from) (that [institution] [jail]) (the grounds of that [institution] [jail]) (a courthouse) (the grounds of a courthouse) (the custody of an officer of that [institution] [jail] [courthouse] while being conveyed to or from that [institution] [jail]); and**

Third: **That the defendant intentionally left custody without permission, in the sense that it was not done by accident or mistake.**

See Instruction 3.120 (Intent).

The statute was broadened by St. 1989, c. 313, § 2 to include escapes from a jail or correctional institution, and St. 1993, c. 376 to include escapes from a courthouse. The statute also penalizes attempts to escape; in such cases the model instruction (including its statutory quotation) should be appropriately adapted, and the required fourth element (an overt act) added. *Commonwealth v. Gosselin*, 365 Mass. 116, 121-22 (1974). *See* Instruction 4.120 (Attempt). The model instruction (and its statutory quotation) may also be appropriately adapted for escapes by persons committed pursuant to G.L. c. 123A as sexually dangerous.

Commonwealth v. Best, 381 Mass. 60, 61-64 (1980) (escape from work release program in violation of G.L. c. 127, § 86F can also be prosecuted under G.L. c. 268, § 16); *Lynch, petitioner*, 379 Mass. 757, 760-61 (1980) (statute applicable to defendant who should have been paroled but had not been); *Commonwealth v. Reed*, 364 Mass. 545, 546-48 (1974) (because of G.L. c. 127, § 119, statute is applicable to prisoners temporarily transferred to a hospital); *Commonwealth v. Antonelli*, 345 Mass. 518, 520-21 (1963) (guard supervising prisoners is "officer" for purposes of statute); *Commonwealth v. Curley*, 101 Mass. 24, 25 (1869) (land "appurtenant thereto" is to be understood broadly to include all grounds "entirely devoted to the purpose, sufficiently secure and suitably protected from all persons without"); *Commonwealth v. Porter*, 87 Mass. App. Ct. 676, 678-82(failure to return to serve a weekend sentence constitutes escape), *rev. denied*, 473 Mass. 1103 (2015); *Commonwealth v. Clark*, 20 Mass. App. Ct. 962, 962-63 (1985) (lawfulness of custody is an element of offense, but Commonwealth need not demonstrate that original conviction was free of legal error); *Commonwealth v. Faulkner*, 8 Mass. App. Ct. 936, 937 (1979) (statute encompasses escape of pretrial detainee); *Commonwealth v. Giordano*, 8 Mass. App. Ct. 590, 592 (1979) (Commonwealth can demonstrate lawful pretrial custody of defendant obtained pursuant to interstate detainer by relying on presumption of regularity), *rev. denied*, 379 Mass. 927, *and cert. denied*, 446 U.S. 968 (1980); *Commonwealth v. Pettijohn*, 4 Mass. App. Ct. 847, 847-48 (1976) (statute encompasses escape from county jail or house of correction, and therefore deputy sheriff transporting sentenced prisoner from county jail to court); *Commonwealth v. Meranda*, 2 Mass. App. Ct. 890, 891 (1974) (wrongful intent is necessary element, but inferable from unlawful departure in absence of satisfactory explanation); *Commonwealth v. Gosselin*, 1 Mass. App. Ct. 849, 849-50 (1973) (prison librarian was not "officer"; offense requires proof that defendant left prison grounds, not just that whereabouts were unknown for a time), *aff'd on other grounds*, 365 Mass. 116 (1974).

SUPPLEMENTAL INSTRUCTIONS

1. "Prisoner." **A "prisoner" is defined as a person who is placed in custody in a penal institution or correctional institution or a jail, in accordance with law.**

See G.L. c. 125, § 1(k) & (m).

2. "Escape." **Escape" means absenting oneself from confinement without permission.**

United States v. Bailey, 444 U.S. 394, 407 (1980).

3. "Penal institution" or "correctional institution." **A "penal institution" or a "correctional institution" is defined as any building, enclosure, space or structure used for the custody, control and rehabilitation of committed offenders and of such other persons as may be placed in custody therein in accordance with law.**

G.L. c. 125, § 1(d), (e), & (k). A police station cell block is not a penal institution. *Commonwealth v. Clay*, 65 Mass. App. Ct. 215, 216-17 (2005). Nor does the statute seem to apply to persons who, in the absence of criminal charges, have been civilly committed under G.L. c. 123, §§ 7, 8. *Cf. Commonwealth v. Shaheed*, 76 Mass. App. Ct. 598, 601 (an inmate committed under G.L. c. 123, §§ 7, 8 may not be convicted of assault and battery on a correctional officer), *rev. denied*, 457 Mass. 1103 (2010).

4. "Jail." **A "jail" is a facility that is used for the detention of persons who are charged with a crime and committed by a court until they are tried.**

G.L. c. 126, § 4. "Jails may also be used for the detention of persons arrested without a warrant and not admitted to bail pending appearance before the district court" instead of a local lock-up." G.L. c. 126, § 4.

NOTES:

1. **Common law escape.** In Massachusetts an escape by a convicted criminal that is not encompassed by one of the various escape statutes may still be punished as an offense at common law. *Commonwealth v. Farrell,* 87 Mass. (5 Allen) 130 (1862).

2. **Necessity defense**. Necessity may be a defense to an escape charge. *Commonwealth v. Thurber,* 383 Mass. 328, 330-333, 418 N.E.2d 1253, 1256-1257 (1981); *Commonwealth v. Mandile,* 17 Mass. App. Ct. 657, 659- 661, 461 N.E.2d 838, 840-841 (1984); *Commonwealth v. O'Malley,* 14 Mass. App. Ct. 314, 319-322, 439 N.E.2d 832, 835-837 (1982). See Instruction 9.240 (Necessity or Duress).

7.240 FAILING TO REGISTER AS A SEX OFFENDER

G.L. c. 6 § 178H
2009 Edition

The sex offender registration statute (*G.L. c. 6, §§ 178C-178Q*) imposes different registration requirements on sex offenders depending on their circumstances and their classification level. For example, a sex offender moving into Massachusetts must initially register with the Sex Offender Registry Board on a Board-approved form within 2 days, providing all the information required by that form and signing under the penalties of perjury (§ 178E[g]), while a sex offender moving out of Massachusetts need only "notify" the Board of his or her change of status within 10 days (§ 178E[l]). Level 2 or 3 offenders must appear at the police department in the community where they live to verify their registration data or to notify the Board of certain changes in their status.

A summary of the statute by section and subsection is provided at the end of the notes following this instruction and can be used as a quick guide to finding pertinent sections of this complex statute. The judge may wish to narrow the issues to be tried by asking the Commonwealth to identify at the beginning of trial precisely which registration provisions the defendant is alleged to have violated.

Section 178H of chapter 6 of our General Laws provides that it is a crime for a person who is a designated sex offender to knowingly (fail to register with) (fail to verify information with) (fail to provide notice of [change of address] [change of employment] [school enrollment status] to) (provide false information to) the Sex Offender Registry Board.

To prove that the defendant committed this offense, the Commonwealth must prove beyond a reasonable doubt each of the following four elements:

To avoid confusion, the jury should be instructed on only one of the following unless the complaint is charged in the alternative. Alternatives are indicated throughout this instruction by a raised bullet.

First: **that the defendant**

- **(resided) (intended to reside) in Massachusetts.**
- **(worked) (intended to work) in Massachusetts.**
- **(worked) (intended to work) at an institution of higher learning in Massachusetts.**
- **(attended) (intended to attend) an institution of higher learning in Massachusetts.**
- *Applicable only to non-residents*: **(attended) (intended to attend) a secondary school, trade or professional institution in Massachusetts.**

Second: **that the defendant was previously**

- **(convicted of the offense of [*offense*]).**
- **(adjudicated as a youthful offender by reason of [*offense*]).**
- **(adjudicated a delinquent juvenile by reason of [*offense*]).**
- **(released from incarceration or parole or probation supervision, or custody with the Department of Youth Services, for a conviction or adjudication of [*offense*]).**
- **(adjudicated a sexually dangerous person on or after August 1, 1981).**

• (released from commitment as a sexually dangerous person on or after August 1, 1981).

Third: **that the defendant knew that he (she) was required to**

• (register with)

• (verify registration data with)

• (provide notice of a change of address to)

• (provide correct information to) the Sex Offender Registry Board.

and *Fourth:* that the defendant

• (failed to register).

• (failed to verify registration information).

• (failed to provide notice of a change of address).

• (provided false information when [registering] [verifying information] [reporting a change in employment or school status] [reporting a change of address]).

To prove the second element, the Commonwealth must prove that the defendant who is here in the courtroom is the same person who was previously

• (convicted of the offense of *[offense]*).

• (adjudicated as a youthful offender by reason of *[offense]*).

• (adjudicated a delinquent juvenile by reason of *[offense]*).

• (released from incarceration or parole or probation supervision, or custody with the Department of Youth Services, for a conviction or adjudication of *[offense]*).

• (adjudicated a sexually dangerous person on or after August 1, 1981).

• (released from commitment as a sexually dangerous person on or after August 1, 1981).

The Commonwealth cannot prove that the defendant is the same person simply by showing that this defendant has the same name — even the identical name — as the person who was previously (convicted) (adjudicated). The Commonwealth must prove beyond a reasonable doubt that this is actually the same person.

To prove the third element — that the defendant knew he (she) was required to

• (register)

• (verify registration data)

• (provide notice of a change in employment or school status)

• (provide notice of a change of address)

• (provide correct information)

— the Commonwealth must prove beyond a reasonable doubt that the defendant had actual notice of that obligation. The Commonwealth is not required to prove that notice of the obligation was provided to the defendant in any particular way, but it must prove that the defendant knew of his (her) obligation.

Before elaborating on the third (scienter) element, infra, the specific statutory provisions that the defendant is accused of violating should be identified.

Offenses under this statute will fall into one of four categories:
1. Failure to initially register with the Board;
2. Failure to report a change in status (e.g., new address, employment or school);
3. Failure to periodically verify (e.g., annual verification of registration information); or
4. Knowingly providing false information.

Within each of these categories, there are four different variables that the jury must be instructed on:
1. The circumstance that triggers the requirement to register, report a status change, or provide periodic verification;
2. The timeframe within which the sex offender must register, report a status change, or provide periodic verification;
3. The manner in which such registration, status change report, or periodic verification must be done (either by mail or in person at the police department); and
4. The form that must be used to register, report a status change, or provide periodic verification.

Because of statutory amendments, the date of the alleged offense must also be checked. For offenses occurring on or after 7/1/2006, secondary addresses or intended secondary addresses must be included in the information provided to the Board. The time interval for periodic verification was reduced from 90 days to 45 days for offenses committed on or after 7/1/2006 by those classified as sexually violent predators, and for offenses committed on or after 12/20/2006 by homeless sex offenders.

The Board-approved form requires that the sex offender provide his or her name, date of birth, home address or intended home address (and, if the offense occurred on or after 7/1/2006, any secondary addresses or intended secondary addresses), work address or intended work address, and the name and address of any institution of higher learning where the sex offender is or intends to become an employee or student. The form must be signed under the penalties of perjury.

A. Violations involving initial registration.

To prove the third element, the Commonwealth must prove beyond a reasonable doubt that the defendant knew that he (she) had to

• § 178E (a). **(register by mailing to the Sex Offender Registry Board, at least 2 days before release from custody, a Board-approved form that included all of the required information and was signed under the penalties of perjury).**

• § 178E (b) or (c). **(register by mailing to the Sex Offender Registry Board within 2 days**

[of receiving notice from the sentencing court]

[of receiving notice from the probation department]

[of receiving notice from the parole board]

[*where sentence was less than 90 days****:*** **after release from custody]) a Board-approved form that included all of the required information and was signed under the penalties of perjury).**

• § 178E(g). ***If defendant is a level 1 sex offender:*** **(register by mailing to the Sex Offender Registry Board within 2 days after moving to Massachusetts a Board-approved form that included all of the required information and was signed under the penalties of perjury).**

• §§ 178E(g) and 178F½. ***If defendant is a level 2 or 3 sex offender:*** **(register in person with the police department by completing and delivering within 2 days after moving to Massachusetts a Board-approved form that included all of the required information and was signed under the penalties of perjury).**

• § 178E(o). **(register by mailing to the Sex Offender Registry Board, within 10 days before commencing employment or enrollment at an institution of higher education, a Board-approved form that included all of the required information and was signed under the penalties of perjury).**

• § 178E(q). **(register by mailing to the Sex Offender Registry Board, within 10 days of attending an educational institution as a nonresident of Massachusetts, a Board-approved form that included all of the required information and was signed under the penalties of perjury).**

B. *Violations involving reporting status changes.*

• § 178E(h). ***If defendant is a level 1 sex offender:*** **(notify by mailing to the Sex Offender Registry Board, at least 10 days before moving to a different town, a Board-approved form that included all of the required information and was signed under the penalties of perjury).**

- §§ 178E(h) & 178F½. *If defendant is a level 2 or 3 sex offender:* **(notify by reporting in person to the police department of the town where he [she] resided at least 10 days before moving to a different town, and delivering by hand a Board-approved form that included all of the required information and was signed under the penalties of perjury).**

- § 178E(h). *If defendant is a level 1 sex offender:* **(notify the Sex Offender Registry Board in writing at least 10 days before moving within a town).**

- §§ 178E(h) & 178F½. *If defendant is a level 2 or 3 sex offender**:*** **(notify by reporting in person, at least 10 days before moving within a town, to the police department of that town and delivering by hand a Board approved form that included all of the required information and was signed under the penalties of perjury).**

- § 178E(l). ***If defendant is a level 1 offender:*** **(notify the Sex Offender Registry Board at least 10 days before moving out of Massachusetts).**

- §§ 178E(l) & 178F½. ***If defendant is a level 2 or 3 sex offender:*** **(notify by reporting in person to the police department of the town where he [she] resided at least 10 days before moving out of Massachusetts, and delivering by hand a Board-approved form that included all of the required information and was signed under the penalties of perjury).**

• § 178E(j). *If defendant is a level 1 sex offender**:*** **(notify the Sex Offender Registry Board in writing at least 10 days before changing work address).**

• §§ 178E(j) & 178F½. *If defendant is a level 2 or 3 sex offender**:*** **(notify by reporting in person to the police department of the town where he [she] resided, at least 10 days before changing work address, and delivering by hand a Board-approved form that included all of the required information and was signed under the penalties of perjury).**

• § 178E(p). **(notify by mailing to the Sex Offender Registry Board, at least 10 days before he [she] [transferred from] [stopped attending] an institution of higher education, a Board-approved form that included all of the required information and was signed under the penalties of perjury).**

C. *Violations involving periodic verification.*

• § 178F. **(verify periodically by mailing to the Sex Offender Registry Board annually a Board-approved form that included all of the required information and was signed under the penalties of perjury).**

- § 178F. *If defendant is a level 1 sex offender**:*** **(verify annually by mailing to the Sex Offender Registry Board, within five days of receipt of notice from the Board, a Board-approved annual verification form that included all of the required information and was signed under the penalties of perjury).**

- §§ 178F & 178F½. *If defendant is a level 2 or 3 sex offender**:*** **(verify annually by reporting in person to the police department of the town where he [she] resided within five days of receipt of notice from the Sex Offender Registry Board, and delivering by hand a Board approved form that included all of the required information and was signed under the penalties of perjury).**

- § 178F. *If defendant is a level 1 sex offender**:*** **(having listed a homeless shelter as his [her] place of residence, verify every** [*before 12/20/2006:* 90 days] [*as of 12/20/2006:* 45 days] **by mailing to the Sex Offender Registry Board a Board-approved form that included all of the required information and was signed under the penalties of perjury).**

• §§ 178F & 178F½. *If defendant is a level 2 or 3 sex offender**:*** **(having listed a homeless shelter as his [her] place of residence, verify** every [*before 12/20/2006:* 90 days] [*as of 12/20/2006:* 45 days] **by reporting in person to the police department of the town where he [she] resided within five days of receipt of notice from the Sex Offender Registry Board, and delivering by hand a Board-approved form that included all of the required information and was signed under the penalties of perjury).**

• § 178F1/2. **(As a sexually violent predator, verify every** [*before 12/20/2006:* 90 days] [*as of 12/20/2006:* 45 days] **by appearing in person at the police department of the town where he [she] resided and verifying under the penalties of perjury that all information remained true and accurate).**

SUPPLEMENTAL INSTRUCTION

"Secondary addresses." **Secondary addresses are:**

First, **the addresses of all places where a sex offender lives, abides, lodges, or resides for a period of 14 or more days in the aggregate during any calendar year and which is not a sex offender's primary address; and**

Second, **any place where a sex offender routinely lives, abides, lodges, or resides for a period of 4 or more consecutive or non-consecutive days in any month and which is not a sex offender's permanent address, including any out-of-state address.**

G.L. c. 6, § 178C requires that for offenses which occurred after July 1, 2006, sex offenders must provide information relating to secondary addresses on the Board approved form.

Conclusion.

You may not infer that the defendant is guilty of this offense because it is alleged that he (she) is a sex offender. He (she) is presumed innocent of the charge before you, that he (she) failed to comply with the sex offender registry law, unless and until the Commonwealth proves each element of the offense beyond a reasonable doubt.

To repeat, the Commonwealth must prove beyond a reasonable doubt each of the following four elements:

First: **that the defendant**

- **(resided) (intended to reside) in Massachusetts;**
- **(worked) (intended to work) in Massachusetts;**
- **(worked) (intended to work) at an institution of higher learning in Massachusetts;**

• **(attended) (intended to attend) an institution of higher learning in Massachusetts;**

• *Applicable only to non-residents*: **attended an educational institution in Massachusetts.**

Second: **that the defendant was previously**

• **(convicted of *[offense]*).**

• **(adjudicated as a youthful offender by reason of *[offense]*).**

• **(adjudicated a delinquent juvenile by reason of *[offense]*).**

• **(released from incarceration or parole or probation supervision, or custody with the Department of Youth Services, for a conviction or adjudication of *[offense]*).**

• **(adjudicated a sexually dangerous person on or after August 1, 1981).**

• **(released from commitment as a sexually dangerous person on or after August 1, 1981).**

Third: **that the defendant knew that he (she) was required to**

• **(register with)**

• **(verify registration data with)**

• **(provide notice of a change [of address] [in employment] [in school enrollment status] to)**

• (provide correct information to) the Sex Offender Registry Board.

Fourth: **that the defendant**

• (failed to register).

• (failed to verify registration information).

• (failed to provide notice of [a change of address] [change in employment] [school or employment status]).

• (provided false information).

If the Commonwealth has proved all four elements beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth has failed to prove one or more of the four elements beyond a reasonable doubt, you must find the defendant not guilty.

NOTES:

1. **Statutory amendments.** The statute has been frequently amended. The model instruction reflects amendments through St. 2008, c. 215 (effective July 31, 2008).

2. **Initial statutory implementation.** The original sex offender registration statute provided that "any sex offender residing in the commonwealth shall, on or before [October 1, 1996], register in person at the police department in the city or town where he resides." G.L. c. 6, § 178E(h), as enacted by St. 1996, c. 239, § 1 (effective October 1, 1996).

In 1999, the statute was amended to provide that "a sex offender residing or working in the commonwealth or working at or attending an institution of higher learning in the commonwealth shall, within ten days of the effective date of this section," register with the Board. G.L. c. 6, § 178E(l), as enacted by St. 1999, c. 74, § 2 (effective September 10, 1999). No appellate decision has considered whether this provision imposes any obligations on those who became sex offenders after the 1999 effective date of § 178E(l).

3. **Non-resident sex offenders employed in Massachusetts.** In 1999, sex offenders who were not residents of Massachusetts but who were "working in the commonwealth" were required to register with the Board within ten days of the September 10, 1999 effective date of G.L. c. 6, § 178E(l). See note 2, *supra.*

No section of the statute explicitly requires registration by a non-resident convicted of a sex offense outside of Massachusetts if his or her only contact with Massachusetts is employment that commenced after September, 1999 at a place other than an institution of higher learning. If employed at a place of higher education, registration is specifically required by §§ 178E(c) and 178E(o).

4. **Elements of offense.** The first two elements are taken from the definition of "sex offender" in G.L. c. 6, § 178C. By proving those elements, the Commonwealth proves that the defendant was a sex offender required to register with the Sex Offender Registry Board. The second two elements pertain to the state of knowledge required by G.L. c. 6, §178H, which is the prescriptive and penalty portion of the sex offender registry statute. Failure to provide all the statutorily-required information could result in a charge of failing to register. An offender who has registered but failed to fully complete the verification form may be charged with failing to verify.

5. **Registration in person at police department.** The model instruction is drafted with the assumption that the in-person annual registration requirements of § 178F½ govern only level 2 and level 3 sex offenders. Since § 178F establishes a procedure for verification by mail "except as provided in section 178F½ for a sex offender finally classified by the board as a level 2 or a level 3 sex offender," it seems clear that the in-person provisions of § 178F½ apply only to level 2 and 3 offenders. Even if a level 2 or 3 offender is intending to move to another town, § 178F½ requires that he or she report to the police department of the community where he or she currently lives to register annually and to report the intended change of address.

6. **Relief from registration requirement.** A sex offender may be relieved from the obligation to register. See G.L. c. 6, §§ 178E(e), 178E(f), 178G. The model instruction has been drafted with the view that the defendant has the burden of raising a claim of exemption, and that the Commonwealth need not routinely prove as an element that a defendant who fits the definition of a sex offender is not exempt. See Mass. R. Crim. P. 14(b)(3) and Instruction 3.160 (License or Authority).

Doe v. Sex Offender Registry Board, 450 Mass. 780, 882 N.E. 2d 298 (2008), held that the statutory prohibition on the Board granting discretionary relief from the registration requirement to any offender convicted of a "sexually violent offense" may not constitutionally be applied retroactively to those whose offenses predate the registration law. While the law is generally regulatory rather than punitive, this "conclusive presumption of risk" raises double jeopardy problems when applied retroactively because it is significant, permanent, and could be accomplished in a less burdensome manner. The Board may not automatically deny such offenders relief from the annual registration requirement, but must grant them a hearing and an opportunity to demonstrate that they should be granted such discretionary relief.

7. **False information: intent to deceive; free speech rights.** In a prosecution for providing false information, the Commonwealth is not required to prove that the defendant intended to deceive the Sex Offender Registry Board. The defendant's failure to provide information is not justified on free speech grounds. *Commonwealth* v. *Fondakowski*, 62 Mass. App. Ct. 939, 821 N.E.2d 481 (2005).

8. ***Doe v. Attorney General***, 426 Mass. 136, 686 N.E.2d 1007 (1997), found the original statute to be unconstitutional in part. That section of the statute was subsequently amended.

9. **Notice by publication insufficient.** The Sex Offender Registry Board's notices in Massachusetts newspapers about the obligation of sex offenders to register are insufficient to support a conviction for "knowingly" failing to register (G.L. c. 6, § 178H[a]), if the Commonwealth presents no evidence that the defendant routinely read any newspaper when the notices were

published. “While the defendant’s knowledge may be proven by circumstantial evidence, the proof must be specific to *this* defendant, rather than to the general population or some subset thereof. Absent a defendant’s conscious disregard of the information necessary to provide him with the requisite knowledge, the Commonwealth cannot meet its burden merely by establishing that the knowledge was available to the defendant.” *Commonwealth v. Ramirez*, 69 Mass. App. Ct. 9, 865 N.E.2d 1158 (2007).

10. **Summary of statute by section and subsection.** The sex offender registration statute is complex because its myriad variables result in different registration and verification requirements. Those variables include an offender’s actual or intended place of residence, employment or schooling, and the offender’s classification. The following list is a quick guide to finding pertinent sections of the statute:

Statutory Reference - Relevant Contents

G.L. c. 6, § 178C Definitions for such terms as employment, secondary address, sex offender, sex offense, sex offense involving child, and sexually violent offense, and sexually violent predator.

G.L. c. 6, § 178E(a) Requires that a sex offender be informed of the duty to register when in custody and has particulars about registering with the sex offender registry board prior to his/her release from custody.

G.L. c. 6, § 178E(b) Requires that a sex offender be informed of the duty to register while on probation or parole and has particulars about registering with the sex offender registry board.

G.L. c. 6, § 178E(c) Requires that a sex offender be informed by the sentencing court of the duty to register and has particulars about registering with the sex offender registry board.

G.L. c. 6, § 178E(g) Particular registration requirements for one who moves into Massachusetts.

G.L. c. 6, § 178E(h) Particular registration requirements for one who intends to move to a different city or town within Massachusetts or to a new address in a city or town.

G.L. c. 6, § 178E(i) Particular registration requirements for one who intends to move out of Massachusetts.

G.L. c. 6, § 178E(j) Registration requirements for one who intends to change his/her work address.

G.L. c. 6, § 178E(l) Notification and registration requirements for sex offenders at the time of the enactment of the registration statute.

G.L. c. 6, § 178E(o) Registration requirements for one who plans to work at or attend an institution of higher learning.

G.L. c. 6, § 178E(p) Registration requirements for one who intends to transfer from or stop attending an institution of higher learning.

G.L. c. 6, § 178E(q) Registration requirements for a nonresident sex offender in another state who is enrolled in school in Massachusetts.

G.L. c. 6, § 178F Continuing verification requirements for sex offenders who are not finally classified as level 2 or 3 offenders (annually) and for homeless offenders (every 45 days)

G.L. c. 6, § 178F1/2 In-person verification and registration requirements for level 2 and level 3 sex offenders and sexually violent predators, incorporating requirements of § 178E(g)-(j).

G.L. c. 6, § 178H Sets penalties for failing to register and verify information.

7.260 FALSE REPORT OF A CRIME

G.L. c. 269, § 13A
Revised May 2014

The defendant is charged with making a false report of a crime.

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

First: **That the defendant reported a crime to a police officer, or caused such a report to be made;**

Second: **That the report was false;**

Third: **That the defendant intended to make the false report to a police officer and it was not made merely by accident or through negligence; and**

Fourth: **That the defendant knew that the report (he) (she) was making or causing to be made was false.**

Commonwealth v. Salyer, 84 Mass. App. Ct. 346, 351-352 (2013).

If the Commonwealth has proved all four elements beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth has failed to prove any element of the offense beyond a reasonable doubt, you must return a verdict of not guilty.

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

7.270 CRUELTY TO ANIMALS

G.L. c. 272, § 77, May 2017

The defendant is accused of cruelty to animals.

In order to prove the defendant guilty of this charge, the Commonwealth must prove beyond a reasonable doubt any of the following:

(A) that the defendant (overdrove) (overloaded) (drove when overloaded) (overworked) (tortured) (tormented) (deprived of necessary sustenance) (cruelly beat) (cruelly mutilated) or (cruelly killed) an animal; or

(B) that the defendant caused or procured an animal to be (overdriven) (overloaded) (driven when overloaded) (overworked) (tortured) (tormented) (deprived of necessary sustenance) (cruelly beaten) (cruelly mutilated) or (cruelly killed); or

(C) that the defendant used a live animal in a cruel or inhuman manner in a race, game, or contest, or in training therefor, as lure or bait (except an animal if used as lure or bait in fishing); or

(D) that the defendant had the charge or custody of an animal, either as owner or otherwise, and (inflicted unnecessary cruelty upon it) or (unnecessarily failed to provide it with proper food, drink, shelter, sanitary environment, or protection from the weather); or

(E) that the defendant was the owner, possessor, or person having the charge or custody of an animal, and (cruelly drove or worked it when unfit for labor) or (willfully abandoned it) or (carried it or caused it to be carried in or upon a vehicle, or otherwise, in an unnecessarily cruel or inhuman manner or in a way and manner which might endanger the animal carried thereon); or

(F) that the defendant knowingly and willfully authorized or permitted an animal to be subjected to unnecessary torture, suffering, or cruelty of any kind.

The term "cruelty" means inflicting severe or unnecessary pain upon an animal without any justifiable cause.

Commonwealth v. Daly, 90 Mass. App. Ct. 48, 54-55 (2016).

The Commonwealth does not have to prove that the defendant knew (he) (she) was violating the statute or that (he) (she) specifically intended the harm that it forbids; but the Commonwealth must prove beyond a reasonable doubt that the defendant intentionally and knowingly did acts that were plainly of a nature as would violate the statute.

> "Specific intent to cause harm is not required; decisional law makes clear that in circumstances involving the direct infliction of pain on an animal all that must be proved is that the defendant intentionally and knowingly did acts which were plainly of a nature to inflict unnecessary pain. The defendant's guilt did not depend upon whether he thought he was unnecessarily cruel, but upon whether he was so in fact." *Commonwealth v. Szewczyk*, 89 Mass. App. Ct. 711, 716 (2016), quoting *Commonwealth v. Magoon*, 172 Mass. 214, 216 (1898).

7.280 FIGHTING ANIMALS

G.L. c. 272 § 94
2009 Edition

I. POSSESSION OF FIGHTING ANIMALS

The defendant is charged with a violation of General Laws Chapter 272, section 94, which prohibits the ownership, possession, keeping, or training of an animal with the intent that it engage in a fighting exhibition.

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

First: **That the defendant owned, possessed, kept, or trained a bird, dog or other animal; and**

Second: **That the defendant did so with the intent that the animal participate in a fighting exhibition.**

Here the jury must be instructed on "Possession" (*Instruction 3.220*) and "Specific Intent" (*Instruction 3.120*).

You should consider all the evidence, and any reasonable inferences you draw from the evidence, in determining whether the Commonwealth has proved beyond a reasonable doubt that the defendant acted with the intent to have a bird, dog or other animal participate in a fighting exhibition.

What is an exhibition? An exhibition is an exhibit, display, showing or presentation to others.

The Commonwealth does not have to prove that any exhibition actually occurred, but it must prove that the defendant intended to have a bird, dog or other animal with the purpose of participating in such an exhibition.

If the Commonwealth has proved beyond a reasonable doubt both elements of the offense — that the defendant owned, possessed, kept, or trained a bird, dog or other animal *and* that the defendant did so with the intent that it participate in a fighting exhibition — you should return a verdict of guilty. If the Commonwealth has failed to prove either element beyond a reasonable doubt, you must find the defendant not guilty.

II. PROMOTION OF EXHIBITION OF FIGHTING ANIMALS

The defendant is charged with a violation of General Laws chapter 272, section 94, which prohibits the promotion of an exhibition of fighting animals.

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

***First*: That the defendant established or promoted an exhibition; and**

***Second*: That the exhibition (was) (was to be) of fighting birds, dogs or other animals.**

What is an exhibition? An exhibition is an exhibit, display, showing or presentation to others.

What does it mean to establish or promote an exhibition? To "establish" something means to take some intentional, overt action for the purpose of bringing it into being. To "promote" means to take some overt action such as advertising, publicizing, contributing resources, or making arrangements for the purpose of making the exhibition happen or making it a success.

The Commonwealth does not have to prove that an exhibition actually occurred, but it must prove that the defendant intended for it to occur and also that the defendant took a an overt act — a step — toward bringing it to fruition or completion.

Here the jury must be instructed on "Specific Intent" (Instruction 3.120).

If the Commonwealth has proved beyond a reasonable doubt both elements of the offense — that the defendant established or promoted an exhibition, *and* that the exhibition was of fighting birds, dogs or other animals — you should return a verdict of guilty. If the Commonwealth has failed to prove either element beyond a reasonable doubt, you must find the defendant not guilty.

7.300 GIVING FALSE NAME UPON ARREST

G.L. c. 268 § 34A
2009 Edition

The defendant is charged with knowingly and willfully giving a false name to a police officer after being arrested. Section 34A of chapter 268 of our General Laws provides as follows:

"Whoever

knowingly and willfully furnishes a false name . . .

to a law enforcement officer or law enforcement official

following an arrest

shall be punished . . . ."

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

***First:* That the defendant was arrested;**

Second: **That the defendant then gave a false name to a police officer. A false name is one that a person has assumed for a dishonest purpose.**

and *Third:* That the defendant did so knowingly and willfully; that is, he (she) intentionally gave the police a name that he (she) had assumed for a dishonest purpose.

The law permits a person to change his (her) name at will, without resort to legal proceedings, merely by adopting another name, as long as he (she) is not using that name for a dishonest purpose. For purposes of this charge, a false name is one that a person has assumed for a dishonest purpose.

Commonwealth v. Clark, 446 Mass. 620, 846 N.E.2d 765 (2006).

SUPPLEMENTAL INSTRUCTIONS

1. Examples of dishonest purposes. **Dishonest purposes include, but are not limited to, concealing one's criminal record to avoid being charged as a multiple offender, concealing one's criminal record to obtain more favorable bail consideration, concealing one's identity to avoid answering to an outstanding warrant, or creating a new identity in order to default and avoid prosecution on the charge for which one has been arrested.**

***Clark*, supra.**

2. Prior identification to police using different name. **If a person previously has identified himself (herself) to any police department under a name that is different from the name he (she) used following this arrest and failed to disclose his (her) prior use of a different name, you are permitted to infer that his (her) failure to make such disclosure was for a dishonest purpose and that he (she) was using a false name. You do not have to draw this inference, but you may do so. It is entirely up to you.**

Clark*, supra.*

3. Proof of true name unnecessary. **The Commonwealth does not have to prove the defendant's true name. The Commonwealth is required to prove that he (she) used a false name, that is, that he (she) used a name for a dishonest purpose.**

Clark, supra.

7.320 ILLEGAL LOTTERY

G.L. c. 271 § 7
2009 Edition

The defendant is charged with (setting up) (promoting) (aiding) an illegal lottery. Section 7 of chapter 271 of our General Laws provides as follows:

"[W]hoever

(sets up) (promotes) a lottery for (money) (other property of value),

***or* by way of lottery disposes of any property of value, . . .**

with intent to make the disposal thereof dependent upon or connected with chance by (lot) . . . (numbers) (game) . . . (other gambling device),

whereby such chance or device is made an additional inducement to the disposal or sale of said property,

or [whoever] aids . . . (by printing) ([by] writing) (in any way concerned) in the (setting up) (managing) (drawing) of such lottery, or in such disposal or offer or attempt to dispose of property by such chance or device,"

commits a crime.

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

***First:* That the defendant (set up or promoted) (aided in setting up or promoting) the opportunity to win a prize,**

or **(disposed of) (aided in disposing of) a prize won by chance;**

Second: **That the defendant intended that winning the prize was predominantly dependent upon chance; and**

Third: **That payment of a price was necessary to win a prize.**

A "prize" is "a thing of value."

Something is a lottery if it involves the payment of a price for the possibility of winning a prize, dependent predominantly upon luck or chance rather than skill. The payment of a "price" refers to something of value given up by a participant for the opportunity to take a chance at winning a prize. There is a "price" when those who chose to pay are paying in part for the chance of a prize. (An indirect benefit to the person running the game – for example, having someone cross the threshold of one's business – is not a "price" for purposes of this statute.)

A person can "aid" a lottery in many different ways — for example, by printing or writing lottery chances, or by selling or offering them for sale, or by managing or conducting a lottery drawing.

Commonwealth v. Webb, 450 Mass. 1014, 877 N.E.2d 552 (2007) (since requiring participants to pay a "price" is an essential element of offense, game does not violate statute if there is an option to play for free); *Commonwealth v. Frate*, 405 Mass. 52, 537 N.E.2d 1235 (1989) (§ 7 applicable to a slot-machine- like device that generates numbers electronically without a drum or reel); *Commonwealth v. Lake*, 317 Mass. 264, 267, 57 N.E.2d 923, 924 (1944); *Commonwealth v. Wall*, 295 Mass. 70, 3 N.E.2d 28 (1936) (a

lottery would include one where tickets were free but a purchase was necessary assure one could collect the prize).

7.340 INDECENT EXPOSURE

G.L. c. 272 § 53
2009 Edition

The defendant is charged with indecent exposure. In order to prove the defendant guilty of this offense, the Commonwealth must prove three things beyond a reasonable doubt:

First: **That the defendant exposed his (her) (genitals) to one or more persons;**

Second: **That the defendant did so intentionally; and**

Third: **That one or more persons were offended by the defendant's thus exposing himself (herself).**

G.L. c. 272, § 53. See Instruction 3.120 (Intent). See also Instruction 7.400 (Open and Gross Lewdness and Lascivious Behavior, G.L. c. 272, § 16); Instruction 7.500 (Unnatural and Lascivious Act, G.L. c. 272, § 35); and Instruction 7.380 (Lewd, Wanton and Lascivious Act, G.L. c. 272, § 35).

NOTE:

1.Limited to exposure of genitalia. The misdemeanor of indecent exposure (G.L. c. 272, § 53) is applicable only to exposure of the genitalia, and not to exposure of the genital area, pubic hair, buttocks, or female breasts. *Commonwealth v. Arthur*, 420 Mass. 535, 650 N.E.2d 787 (1995). By contrast, the separate felony offense of open and gross lewdness and lascivious behavior (G.L. c. 272, § 16), includes the intentional exposure of genitalia, buttocks, or female breasts, but has the additional element that it must be done in such a way as to produce actual alarm or shock. See *Commonwealth v. Quinn,* 439 Mass 492, 789 N.E.2d 138 (2003); *Commonwealth v. Fitta,* 391 Mass. 394, 396, 461 N.E.2d 820, 822 (1984) (unlike open and gross lewdness, the crime of indecent exposure does not require that it be done in such a way as to produce alarm or shock); *Commonwealth v. Broadland,* 315 Mass. 20, 21-22, 51 N.E.2d 961, 962 (1943) (indecent exposure involves "an intentional act of lewd exposure, offensive to one or more persons"); *Commonwealth v. Bishop,* 296 Mass. 459, 462, 6 N.E.2d 369, 370 (1937) (offense need not be in public place or involve exposure to more than one person).

7.360 INTIMIDATING A WITNESS, JUROR, COURT OFFICIAL OR LAW ENFORCEMENT OFFICER

G.L. c. 268, § 13B
Revised May 2014

The defendant is charged with intimidation. In order to prove the defendant guilty of this offense, the Commonwealth must prove three things beyond a reasonable doubt:

***First*: The defendant directly or indirectly:**

- **(threatened)**
- **(attempted to cause physical injury to) (caused physical injury to)**
- **(attempted to cause emotional injury to) (caused emotional injury to)**
- **(attempted to cause economic injury to) (caused economic injury to)**
- **(attempted to cause property damage to) (caused property damage to)**
- **(conveyed a gift, offer, or promise of anything of value to)**
- **(misled)**
- **(intimidated)**

- **(harassed)**

another person;

***Second*: The other person was:**

- **a witness or potential witness at any stage of a (criminal investigation) (grand jury proceeding) (trial) (criminal proceeding of any type)**
- **a person who was aware of information, records, documents, or objects related to (a violation of a criminal statute) (a violation of conditions of probation) (parole) (bail)**
- **a (judge) (juror) (grand juror) (prosecutor) (police officer) (federal agent) (investigator) (defense attorney) (clerk) (court officer) (probation officer) (parole officer)**
- **furthering a (civil proceeding of any type) (criminal proceeding of any type) including a (criminal investigation) (grand jury proceeding) (trial) (probate and family proceeding) (juvenile proceeding) (housing proceeding) (land proceeding) (clerk's hearing) (court ordered mediation)**
- **(attending) (had made known an intention to attend) a (civil proceeding of any type) (criminal proceeding of any type) including a (criminal investigation) (grand jury proceeding) (trial) (probate and family proceeding) (juvenile proceeding) (housing proceeding) (land proceeding) (clerk's hearing) (court-ordered mediation);**

Third element when wilful conduct is alleged. **and *Third:* That the defendant did so willfully with the specific intent to (impede) (obstruct) (delay) or otherwise interfere with a (criminal investigation) (grand jury) (trial) (criminal proceeding, namely: _____).**

Third element when reckless conduct is alleged. **and *Third:* That the defendant acted in reckless disregard of the impact (his) (her) conduct would have in (impeding) (obstructing) (delaying) or otherwise interfering with that (civil) (criminal) proceeding.**

Further instruction on wilful conduct. **To prove the third element, the Commonwealth must prove that the defendant specifically intended to impede, obstruct, delay, or otherwise interfere with a (criminal investigation) (grand jury) (trial) (criminal proceeding). That is, it must prove the purpose or objective of any behavior of the defendant. Obviously, it is impossible to look directly into the defendant's mind. But in our everyday affairs, we often decide from the actions of others what their state of mind is. In this case, you may examine the defendant's actions and words, and all of the surrounding circumstances, to help you determine what (his) (her) intent was at the time.**

Further instruction on reckless conduct. **To prove the third element, it is not enough for the Commonwealth to prove that the defendant acted negligently — that is, acted in a way that a reasonably careful person would not. It must be shown that the defendant's actions went beyond mere negligence and amounted to recklessness. The defendant acted recklessly if (he) (she) knew, or should have known, that such actions were very likely to (impede) (obstruct) (delay) or otherwise interfere with the proceeding, but (he) (she) ran that risk and went ahead anyway.**

But it is not necessary that (he) (she) intended to interfere with the proceeding or that (he) (she) foresaw the harm that resulted. If the defendant actually realized in advance that (his) (her) conduct was very likely to interfere with the proceeding and decided to run that risk, such conduct would of course be reckless. But even if (he) (she) was not conscious of the result that was inherent in such conduct, it is still reckless conduct if a reasonable person, under the circumstances as they were known to the defendant, would have recognized that such actions were very likely to interfere with the proceeding.

If the Commonwealth has proved each of the three elements of the crime beyond a reasonable doubt, you should return a verdict of guilty. If any element of the crime has not been proved beyond a reasonable doubt, you must find the defendant not guilty.

SUPPLEMENTAL INSTRUCTIONS

1. "Investigator." **An "investigator" is defined by our law to mean an individual or group of individuals lawfully authorized by (a department or agency of the federal government, or any political subdivision thereof) (or) (a department or agency of the Commonwealth) (or) (a political subdivision of the Commonwealth, such as a city or town) to conduct or engage in an investigation of, prosecution for, or defense of an alleged violation of law in the course of his or her official duties.**

G.L. c. 268, § 13B(2).

2. "Harass." **To "harass" means to engage in any act directed at a specific person or person, which act seriously alarms or annoys such person or persons and would cause a reasonable person to suffer substantial emotional distress.**

Such act shall include, but not be limited to, an act conducted by mail, electronic mail, internet communications, facsimile communications, or other telephonic or telecommunications device.

Devices include, among others, those that transfer signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electronic, or photo-optical system. This includes transfers by electronic mail, internet communications, instant messages, or facsimile communications.

G.L. c. 268, § 13B(3).

NOTES:

1. **Effective date.** The model instruction applies to G.L. c. 268, § 13B, as amended by St. 2010, c. 256, § 120, effective November 4, 2010. Use the prior instruction for offenses under the statute which punished willfully endeavoring to interfere with a witness, a juror, or "any person furnishing information to a criminal investigator . . . ." or retaliating against a witness or person furnishing such information.

2. **Related statutes.** See G.L. c. 268, §§ 13 (bribing or attempting to bribe juror), 13A (picketing court to obstruct or influence), 13C (disrupting court proceedings), 14 (juror accepting bribe).

3. **Attempt to intimidate need not succeed.** In a prosecution for attempted intimidation it is immaterial that the witness had already recanted her testimony against the defendant before receiving his threatening telephone calls. *Commonwealth v. Pagels*, 69 Mass. App. Ct. 607, 614-615 (2007). See also *Commonwealth v. Robinson*, 444 Mass. 102, 109 (2005).

4. **"Criminal proceeding."** The trial does not end when the verdict is announced. *Commonwealth v. Cathy C.*, 64 Mass. App. Ct. 471, 474 (2005). When a show cause hearing was held and the application was either allowed or no decision had yet been announced, the proceeding was still ongoing. *Robinson*, 444 Mass. at 109-110.

5. **"Intimidation"** in G.L. c. 268, § 13B does not require that the victim be placed in fear or apprehension of actual harm. *Commonwealth v. Gordon*, 44 Mass. App. Ct. 233, 235 (1998). It is not necessary that the defendant's statement or conduct refer directly to a pending court case in order to constitute intimidation. *Commonwealth v. Drumgoole*, 49 Mass. App. Ct. 87, 91 (2000). The jury may infer that the act of pointing a cellular telephone camera at a witness waiting to testify in a criminal proceeding, and making a physical gesture consistent with taking a photograph of the witness, while not overtly threatening, falls within the meaning of intimidation. *Commonwealth v. Casiano*, 70 Mass. App. Ct. 705, 708-709 (2007). Photographing the victim's family near the victim's home on the day of a court hearing is sufficient for the jury to infer intent to intimidate. *Commonwealth v. Robinson*, 444 Mass. 102, 110 (2005). Intent to intimidate is inferable from the defendant's bizarre telephone call during stalking trial, though its content was similar to earlier calls. *Commonwealth* v. *Potter*, 39 Mass. App. Ct. 924, 926 (1995). It is not required that the defendant specifically articulated a warning against speaking to the police or other criminal investigator. The fact finder may evaluate the circumstances in which a statement was made, including its timing, to determine whether the defendant in fact intended to intimidate the victim. *Commonwealth v. King*, 69 Mass. App. Ct. 113, 120 (2007) (inferable that defendant's statement that "[i]f he saw [the victim] on [TV] News he was going to come back and kill [him]" was a shorthand warning against reporting a robbery to the police).

6. **"Witness."** The statute is applicable to any potential witness, whether or not actually called to testify, who has any relevant and material information, whether or not it bears directly on an essential element of the crime. *Commonwealth* v. *Burt*, 40 Mass. App. Ct. 275, 277-278 (1996). A court interpreter is not a "witness" within the meaning of § 13B. *Commonwealth* v. *Belete*, 37 Mass. App. Ct. 424, 426 (1994).

7. **"Harm" and "Punish."** The terms "harm" and "punish" are ambiguous and may not support a conviction for intimidation. *Commonwealth v. Hamilton*, 459 Mass. 422, 436-437 (2011).

8. **Evidence of acquittal in underlying proceeding.** It is in the judge's discretion whether to admit evidence that the underlying criminal proceeding ended in acquittal. *Commonwealth* v. *Orton*, 4 Mass. App. Ct. 593, 595 (1976).

9. **Future cooperation with police.** There is no requirement that the victim must be furnishing information on the day that the intimidating action is taken or statement made. *King*, 69 Mass. App. Ct. at 121. "It is enough that the jury reasonably conclude from the surrounding circumstances that it was likely that the victim would furnish to an official investigating authority information pertaining to the crime and that the defendant intended to discourage such communication." *Id.*

10. **Consciousness of guilt.** A threat made against a witness *after* the witness has already testified should not be admitted as consciousness of guilt. When a threat is too late to have any effect on the course of the trial, its probative value is outweighed by its inflammatory potential. *United States v. Pina*, 844 F.2d 1, 9 (1st Cir. 1988).

11. **Separate threats or inducements in same communication.** Separate and distinct threats or inducements may be charged as separate offenses even if they are contained within a single telephone call, letter or personal confrontation. *Commonwealth v. Lester*, 70 Mass. App. Ct. 55, 68 (2007) (a "person seeking to influence a witness may, in one telephone call, threaten physical harm to the witness, threaten to kill a family member, or offer varying inducements").

7.380 LEWD, WANTON AND LASCIVIOUS ACT

G.L. c. 272 § 53
2009 Edition [updated 2011]

The defendant is charged with having committed a lewd, wanton and lascivious act. Section 53 of chapter 272 of our General Laws provides that:

"lewd, wanton and lascivious persons

in speech or behavior . . .

may be punished . . . ."

This provision of our law is intended to punish the performance or solicitation of a sexual touching which does not rise to the level of a completed sexual act, and which is performed or intended to be performed in a public place where others may be offended by it.

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

First: **That the defendant (committed) (publicly solicited another person to commit) a sexual act;**

Second: **That the sexual act involved touching the genitals or buttocks, or the female breasts;**

Third: **That the defendant did this either for the purpose of sexual arousal or gratification, or for the purpose of offending other people; and**

Fourth: **That the sexual act (was) (was to be) committed 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 offense if he (she) desired privacy for a sexual act

If relevant to evidence: **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.

Commonwealth v. Roy, 420 Mass. 1, 647 N.E.2d 1179 (1995) (statute cannot be applied to solicitation for sexual conduct where unclear whether it was to occur in a public or private place); *Commonwealth v. Beauchemin*, 410 Mass. 181, 183-184, 571 N.E.2d 395, 397 (1991) (statute cannot be applied to sexual conduct in location where little likelihood of being observed by casual passersby); *Commonwealth v. Sefranka*, 382 Mass. 108, 117-118, 414 N.E.2d 602, 608 (1980) (provision "prohibits only the commission of conduct in a public place, or the public solicitation of conduct to be performed in a public place. . . . involving the touching of the genitals, buttocks, or female breasts, for purposes of sexual arousal, gratification, or offense, by a person who knows or should know of the presence of a person or persons who may be offended by the conduct," and can be applied to speech only if it solicits particular public sexual conduct which is itself criminal); *Commonwealth v. Templeman*, 376 Mass. 533, 537-538, 381 N.E.2d 1300, 1303 (1978) (provision cannot be applied to protected speech or expressive conduct); *Commonwealth v. Kelley*, 25 Mass. App. Ct. 180, 516 N.E.2d 1188 (1987) (masturbation) (place need not be one "to which the public or a substantial group has access," but "judges, in the interest of caution, would be well advised to charge that the offense requires either that the defendant 'intended public exposure or recklessly disregarded a substantial risk of exposure to one or more persons'"); *Commonwealth v. A Juvenile* (No. 2), 6 Mass. App. Ct. 194, 197 n.1, 374 N.E.2d 335, 337 n.1 (1978) (the terms "lewd, wanton and lascivious" appear "to be redundant rather than disjunctive").

NOTE:

1. **Private acts of prostitution**. Prior to *Sefranka, supra,* evidence of prostitution in a non-public place would also support a conviction of this offense, and therefore dual prosecutions were duplicitous. *A Juvenile (No. 2)*, 6 Mass. App. Ct. at 196-197, 374 N.E.2d at 337. The *Sefranka* opinion notes that it addressed only noncommercial sexual acts or solicitation, 382 Mass. at 118 n.10, 414 N.E.2d at 608 n.10, and it is unclear to what extent the *Sefranka* redefinition of this offense is applicable to commercial but private sexual acts or solicitation.

2. **Single penalty for one act with multiple victims.** Where there is a single incident of open and gross lewdness resulting in shock and alarm to more than one person, the legislature intended that only a single penalty attach to the conduct. For double jeopardy purposes, the "unit of prosecution" is conduct-based, not victim - based. *Commonwealth v. Botev*, 79 Mass. App. Ct. 281, 945 N.E.2d 956 (2011).

7.400 OPEN AND GROSS LEWDNESS AND LASCIVIOUS BEHAVIOR

(G.L. c. 272, § 16), May 2017

The defendant is charged with open and gross lewdness and lascivious behavior.

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

First: **That the defendant exposed his (her) (genitals) (buttocks) (*or*) (female breasts) to one or more persons;**

Second: **That the defendant did so intentionally;**

[*In a prosecution for intentional exposure to a single person in a private setting, the following element should be rephrased by deleting the word "public" and replacing the word "others" with "another person."*]

Third: **That the defendant did so "openly," that is, either he (she) intended public exposure, or he (she) recklessly disregarded a substantial risk of public exposure, to others who might be offended by such conduct;**

Fourth: **That the defendant's act was done in such a way as would alarm or shock a reasonable person; and**

Fifth: **That at least one person was alarmed or shocked.**

Alarm or shock means the defendant's conduct created a serious, negative emotional experience. Alarm or shock requires more than proof of mere nervousness or offense.

Commonwealth v. Maguire, 476 Mass. 156, 158, 161 (2017);
Commonwealth v. Kessler, 442 Mass. 770, 774 (2008).

NOTES:

1. **Constitutionality.** The criminal prohibition of open and gross lewdness (G.L. c. 272, § 16), as limited by prior decisions, is facially constitutional. *Commonwealth v. Ora,* 451 Mass. 125, 128 (2008). The statute prohibits the imposition of lewdness or nudity on an unsuspecting or unwilling person, and cannot be applied to expressive conduct that falls within the ambit of the First Amendment (which does not include legally obscene acts) and is offered to a willing audience. *Mendoza v. Licensing Bd. of Fall River, 444 Mass. 188, 197 (2005)* (nude dancing enjoys constitutional protection as a form of expression under both the First Amendment to the U.S. Constitution as well as art. 16 of the Massachusetts Declaration of Rights); *Revere v. Aucella,* 369 Mass. 138, 142-143, appeal dismissed sub nom (statute does not apply to nude go-go dancing where there is no imposition of the lewdness or nudity on an unsuspecting or unwilling person).

2. **Degree and nature of shock clarified.** The display of nudity must be intentional, done in a manner to produce alarm or shock, and must actually produce alarm or shock that is a "serious negative emotional experience," and not just nervousness and offense." *Commonwealth v. Kessler,* 442 Mass. 770, 774 (2004). Vicarious concern for other people or even disgust does not "convert any ordinary indecent exposure case into one for open and gross lewdness." *Commonwealth* v. *Maguire*, 476 Mass. 156, 160 (2016) (insufficient where detective was "disgusted", not for himself, but rather out of concern for the women seated nearby and no evidence that the women sustained a "serious negative emotional experience" stronger than "mere nervousness and offense"). See *Commonwealth v. Ora,* 451 Mass. 125, 127 (2008) (as a felony, it "is thus a much more serious offense than the misdemeanor of indecent exposure, G. L. c. 272, § 53, and consequently requires a substantially more serious and negative impact as a result of the behavior").

The fourth element has an objective standard which is satisfied only if the factfinder determines that the subjective response was reasonable. *Commonwealth* v. *Maguire*, 476 Mass. 156, 161(2016).

3. **"Buttocks" or "female breasts."** Open and gross lewdness is not limited to exposure of the genitals, and may include exposure of the "buttocks" or "female breasts." *Commonwealth v. Quinn*, 439 Mass. 492, 501 (2003) (exposure of thong-clad buttocks); *Commonwealth v. Ora*, 451 Mass. at 127.

4. **Open.** Requirement that act be "open" refers to defendant's intent that act be seen by one or more unwilling persons present and does not require that it be done in a public place. *Commonwealth v. Kelley*, 25 Mass. App. Ct. 180, 184-85 (1987). See *Commonwealth v. Wardell,* 128 Mass. 52, 53-54 (1880) (salesman exposed himself in private home to minor children)*; Commonwealth v. Guy G.*, 53 Mass. App. Ct. 271, 273 (2001) (student defendant exposed penis to female student in shared cubicle)*; Commonwealth v. Montez*, 45 Mass. App. Ct. 802, 806, (1997) (standing in window of apartment and masturbating); *Commonwealth v. Gray*, 40 Mass. App. Ct. 901, 901 (1996) (fellatio in public bathroom)*;*. Compare *Commonwealth v. Ferguson,* 384 Mass. 13, 14-15 (1981) (statute inapplicable to sexual acts in car parked in dark parking lot reasonably expected to be private) with *Commonwealth v. Adams,* 389 Mass. 265, 272 (1983) (masturbating in a public place "certainly falls within the common understanding" of the offense).

5. **Eyewitness testimony.** There is no requirement that the Commonwealth must prove the exposure element solely through the victim's eyewitness testimony. *Commonwealth v. Poillucci*, 46 Mass. App. Ct. 300, 303 n.3 (1999).

6. **Indecent exposure is lesser included offense.** Indecent exposure (G.L. c. 272, § 53) is a lesser included offense of open and gross lewdness (G.L. c. 272, § 16). *Commonwealth v. Alvin B. Fields*, 71 Mass. App. Ct. 1116 (2008) (unpublished opinion under Appeals Court Rule 1:28). (See Instruction 7.340) However, indecent exposure may be used to prosecute only exposure of the genitals and not exposure of non- genital pubic areas. *Commonwealth v. Arthur*, 420 Mass. 535, 541 (1995).

7. **Single penalty for one act with multiple victims.** Where there is a single incident of open and gross lewdness resulting in shock and alarm to more than one person, the legislature intended that only a single penalty attach to the conduct. For double jeopardy purposes, the "unit of prosecution" is conduct-based, not victim-based. *Commonwealth v. Botev*, 79 Mass. App. Ct. 281 (2011).

7.410 FURNISHING ALCOHOL TO A MINOR

G.L. c. 138, § 34
Issued May 2014

The defendant is charged with furnishing alcohol to a minor.

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

First: **That the defendant knowingly or intentionally supplied, gave, or provided a beverage to someone, or allowed someone to possess a beverage on premises or property owned or controlled by the defendant;**

Second: **That the person to whom the beverage was furnished was under 21 years of age;**

Third: **That the beverage in question was alcohol or an alcoholic beverage; and**

Fourth: **That the defendant knew that the beverage was alcohol or an alcoholic beverage.**

If the Commonwealth has proven all four things beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth has failed to prove one or more of these things beyond a reasonable doubt, you must return a verdict of not guilty.

NOTES:

1. **Statute does not criminalize parent giving alcohol to own child in parent's own home.** The legislative intent of G.L. c. 138, § 34 was to allow parents the freedom to decide whether they wish to provide alcohol to their own children without fear of criminal liability, "regardless whether that act is characterized as furnishing or delivering." *Commonwealth v. Parent*, 465 Mass. 395, 410 (2013).

2. **Defendant under age of 21 may be prosecuted under this statute.** See *Commonwealth v. Kneram*, 63 Mass. App. Ct. 371, 375 (2005).

3. **Knowledge of age is not required.** "Generally, when age is a factor in an offense, the government is not required to prove that the offender knew the age of the person to whom age is relevant, whether that person be victim or collaborator." *Commonwealth v. Montalvo*, 50 Mass. App. Ct. 85, 87 (2000) (citing G.L. c. 138, § 34). The Supreme Judicial Court has held that the earlier versions of G.L. c. 138, § 34 imposed strict criminal liability with respect to the age of the person obtaining alcohol. *Commonwealth v. Corey*, 351 Mass. 331, 333 (1966); *Commonwealth v. Gould*, 158 Mass. 499, 507 (1893) ("Knowledge that the purchaser was a minor was not essential to the offense.").

4. **"Furnish."** This term is defined in G.L. c. 138, § 34 as "to knowingly or intentionally supply, give, or provide to or allow a person under 21 years of age except for the children and grandchildren of the person being charged to possess alcoholic beverages on premises or property owned or controlled by the person charged. Nothing in this section shall be construed to prohibit any person licensed under this chapter from employing any person 18 years of age or older for the direct handling or selling of alcoholic beverages or alcohol. Notwithstanding the provisions of clause (14) of section 62 of chapter 149, a licensee under this chapter may employ a person under the age of 18 who does not directly handle, sell, mix or serve alcohol or alcoholic beverages."

5. **"Alcohol."** This term is defined in G.L. c. 138, § 1 as "all alcohol other than denatured alcohol or alcohol described in section three hundred and three A of chapter ninety-four." Section 303A of G.L. c. 94 provides:
"No person other than a registered druggist shall engage in the business of manufacturing, buying, selling, transporting, importing, exporting or dealing in **methyl alcohol**, or **wood alcohol**, so called, or any preparation, other than shellac varnish or shellac solvent or paint remover or varnish remover, used for manufacturing or commercial purposes which contains **more than three per cent of methyl alcohol** and is **intended for use other than as a beverage**, without being licensed so to do as provided in section three hundred and three B" (emphasis added).

6. **"Alcoholic beverages."** This term is defined in G.L. c. 138, § 1 as "any liquid intended for human consumption as a beverage and containing one half of one per cent or more of alcohol by volume at sixty degrees Fahrenheit."

7.420 POSSESSION OF FIREWORKS

G.L. c. 148 § 39
2009 Edition

The defendant is charged with possession of fireworks. Section 39 of chapter 148 of our General Laws provides as follows:

"Whoever shall have in his possession or under his control, or whoever shall use or explode or cause to explode any fireworks in violation of this section shall be punished . . . ."

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

First: **That the defendant (possessed) (had under his [her] control) (used) (exploded) (or) (caused to explode) an item;**

Second: **That the item meets the legal definition of "fireworks"; and**

Third: **That the defendant knew he (she) (possessed) (had under his [her] control) (used) (exploded) (or) (caused to explode) the fireworks.**

Here the jury must be instructed on "Possession" (Instruction 3.220).

"Fireworks" are defined as any combustible or explosive composition or substance, or any combination of such compositions or substances, or any other article which was prepared for the purpose of producing a visible or audible effect by combustion, explosion, detonation, or deflagration — which means to burn rapidly and give off intense heat and sparks — including (blank cartridges or toy cannons in which explosives are used) (the type of toy balloon which requires fire underneath to propel it) (firecrackers) (cherry bombs) (silver salutes) (M-80's)(torpedoes) (sky-rockets) (Roman candles) (sparklers) (rockets) (wheels) (colored fires) (fountains) (mines) (serpents) (other fireworks of like construction) (any fireworks containing any explosive or flammable compound) (or) (any tablets or other device containing any explosive substance).

The Commonwealth must prove beyond a reasonable doubt that the defendant knew he (she) (possessed) (had under his [her] control) (used) (exploded) (or) (caused to explode) these items, and that the defendant knew the items were fireworks.

Here the jury must be instructed on "Knowledge" (*Instruction 3.140*).

7.440 REGISTERING BETS

G.L. c. 271 § 17
2009 Edition

The defendant is charged with unlawfully (keeping a place for registering bets or buying or selling pools) (being present and involved in registering bets or buying or selling pools). Section 17 of chapter 271 of our General Laws provides as follows:

> **"Whoever keeps a (building) (room) . . .**
> **with (apparatus) (books) (any device)**
> **for (registering bets) (buying or selling pools)**
> **upon the result of (a trial or contest of skill, speed or endurance) (a game [or] competition) . . .**
> **or whoever is present in [any] place, . . . engaged in such business or employment . . .**
> **shall be punished . . . ."**

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

Either: **that the defendant knowingly kept a (building) (room) in which there were books or devices for (registering bets) (buying or selling pools upon [a contest of skill, speed or endurance] [a game or competition]);**

Or: **that the defendant was present in a place where he (she) was knowingly involved in the business of (registering bets) (buying or selling pools upon [a contest of skill, speed or endurance] [a game or competition]).**

The model instruction may be modified as necessary for other alternatives that may be charged under G.L. c. 271, § 17. Contrary to a literal reading of some parts of the statute, conviction under § 17 requires scienter and therefore the defendant must always have some connection, beyond unwitting presence, with a place of illicit gaming. *Commonwealth v. Murphy*, 342 Mass. 393, 173 N.E.2d 630 (1961).

7.460 RESISTING ARREST

G.L. c. 268 § 32B
2009 Edition

The defendant is charged with resisting arrest. Section 32B of chapter 268 of our General Laws provides as follows:

"A person commits the crime of resisting arrest if he [she] knowingly prevents or attempts to prevent a police officer, acting under color of his [her] official authority, from effecting an arrest of [himself] or another [either] by using or threatening to use physical force or violence against the police officer or another;

or [by] using any other means which creates a substantial risk of causing bodily injury to such police officer or another."

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

***First*: That the defendant prevented or attempted to prevent a police officer from making an arrest (of the defendant) (or) (of another person);**

***Second:* That the officer was acting under color of his (her) official authority at the time;**

Third: **That the defendant resisted: either by using, or threatening to use, physical force or violence against the police officer (or another person); or by using some other means which created a substantial risk of causing bodily injury to the police officer (or another person); and**

Fourth: **That the defendant did so knowingly; that is to say, that the defendant knew at the time that he (she) was acting to prevent an arrest by a police officer acting under color of his (her) official authority.**

As I have indicated, the Commonwealth must prove that the police officer was acting "under color of official authority." A police officer acts "under color of official authority" when, in the regular course of assigned duties, he (she) makes a judgment in good faith, based on the surrounding facts and circumstances, that he (she) should make an arrest.

G.L. c. 268, § 32B(b).

The Commonwealth must also prove that the defendant *knew* that the person seeking to make the arrest was a "police officer." The Commonwealth may do so by proving that the officer was in uniform or, if not in uniform, identified himself (herself) by exhibiting his (her) credentials as a police officer while attempting to make the arrest. Such credentials would include such things as a badge, insignia, identification card, police radio, or other police equipment such as a clearly identified police vehicle.

G.L. c. 268, § 32B(c). See *Commonwealth v. Winston* W., 61 Mass. App. Ct. 1106, 808 N.E.2d 1257, 2004 WL 1124719 (No. 03-P-407, May 20, 2004) (unpublished opinion under Appeals Court Rule 1:28) (plainclothes officer was sufficiently identified by verbally identifying himself, carrying a police department radio, and badge visibly clipped to his belt).

The Commonwealth must prove that the defendant *knew* that the (officer was) (officers were) attempting to arrest him (her).

Commonwealth v. Grant, 71 Mass. App. Ct. 205, 880 N.E.2d 820 (2008) (defendant must know that attempted seizure is to effect an arrest, based on police words or actions communicating that intention before or during pursuit). See *Commonwealth v. Muhammad Taroon*, 71 Mass. App. Ct. 1116, 883 N.E.2d 343, 2008 WL 859688 (No. 06-P-1415, April 1, 2008) (unpublished opinion under Appeals Court Rule 1:28) (defendant must know both that person is a police officer and was attempting to arrest him).

The Commonwealth must also prove that the defendant's resistance occurred before the arrest was completed. An arrest is completed when a person has been detained, placed securely in custody, and is under the control of the police.

Commonwealth v. Ocasio, 71 Mass. App. Ct. 304, 882 N.E.2d 341 (2008) (physical resistance to being placed in cruiser after being placed under arrest and handcuffed may be prosecuted under § 32B); *Commonwealth v. Katykin*, 59 Mass. App. Ct. 261, 794 N.E.2d 1291 (2003) (same). Compare *Commonwealth v. Grandison*, 433 Mass. 135, 143-147, 741 N.E.2d 25, 34-37 (2001) (post-arrest physical resistance at stationhouse cannot be prosecuted under § 32B) with *Commonwealth v. Joe Wayne Baker*, 72 Mass. App. Ct. 1111, 891 N.E.2d 716, 2008 WL 2951797 (No. 07-P-1363, August 4, 2008) (unpublished opinion under Appeals Court Rule 1:28) (evidence of post-arrest conduct does not require

reversal where, unlike Grandison, Commonwealth did not argue that charge could be proved by post-arrest conduct), and *Commonwealth v. Richard P. Unaitis*, 57 Mass. App. Ct. 1111, 784 N.E.2d 50, 2003 WL 721146 (No. 01-P-1657, March 3, 2003) (unpublished opinion under Appeals Court Rule 1:28) (Grandison indicated that it "has no bearing on prosecutions based on a continuing course of conduct" and therefore jury could properly hear about defendant's continued lashing out after arrest in an uninterrupted "single chain of events" rather than subsequent and distinct acts).

In summary, then, the Commonwealth must prove four elements beyond a reasonable doubt:

First: **That the defendant prevented or attempted to prevent a police officer from making an arrest (of the defendant) (or) (of another person);**

Second: **That the officer was acting under color of authority at the time;**

Third: **That the defendant resisted:**

<u>either</u> by using, or threatening to use, physical force or violence against the police officer (or another person)

<u>or</u> by using some other means which created a substantial risk of causing bodily injury to the police officer (or another person); and

Fourth: **That the defendant did so knowingly; that is to say, that the defendant knew at the time that he (she) was acting to prevent an arrest by a police officer acting under color of his (her) official authority.**

If the Commonwealth has proved beyond a reasonable doubt all four elements of the crime, you should return a verdict of guilty.

If it has failed to prove any element of the offense beyond a reasonable doubt, you must return a verdict of not guilty.

<u>SUPPLEMENTAL INSTRUCTIONS</u>

1. Police use of unreasonable or excessive force. **A police officer may not use unreasonable or excessive force in making an arrest. A person is allowed to use reasonable force to protect (himself) (herself) from physical harm when unreasonable or excessive force is used. If a police officer uses unreasonable or excessive force to make an arrest, the person who is being arrested may defend (himself) (herself) with as much force as reasonably appears necessary. The person arrested is required to stop resisting once (he) (she) knows or should know that if he stops resisting, the officer will also stop using unreasonable or excessive force.**

If there is some evidence that the police used unreasonable or excessive force, the Commonwealth must prove beyond a reasonable doubt that the defendant did not act in self-defense.

To prove that the defendant did not act in self-defense, the Commonwealth must prove at least one of the following three things beyond a reasonable doubt:

First: **That the defendant did not reasonably believe that the police officer was using unreasonable and excessive force and putting the defendant's personal safety in immediate danger; or**

Second: **That the defendant did not do everything that was reasonable in the circumstances to avoid physical combat before resorting to force; or**

Third: **That the defendant used more force to defend (himself) (herself) than was reasonably necessary in the circumstances.**

Commonwealth v. Rodriguez, 370 Mass. 684, 692 n.10, 352 N.E.2d 203 (1976); *Commonwealth v. Kendrick*, 351 Mass. 203, 211; 218 N.E.2d 408, 414 (1966); *Commonwealth v. Urkiel*, 63 Mass.App.Ct. 445, 826 N.E.2d 769 (2005); Commonwealth v. Graham, 62 Mass. App. Ct. 642, 818 N.E.2d 1069 (2004). See Commonwealth v. James Manns, 56 Mass. App. Ct. 1114, 779 N.E.2d 1005, 2002 WL 31749107 (No. 01-P-224, Dec. 9, 2002) (unpublished opinion under Appeals Court Rule 1:28) (failure to use term "self defense" not error where jury was informed that it could consider whether any resistance was in response to excessive police force).

For additional notes on self defense see *Instruction 9.260* ("Self Defense").

2. Unlawful arrest not a defense. **It is not a defense to this charge that a police officer was attempting to make an arrest which was unlawful, if the officer was acting under color of his (her) official authority and used only reasonable force in attempting to make the arrest.**

3. Evidence of intoxication. **You may consider whether the defendant was intoxicated in determining whether the Commonwealth has proved beyond a reasonable doubt that the defendant knew that the person(s) with whom he (she) was engaged (was a) (were) police officer(s) acting under the color of (his) (her) (their) authority, and also knew that he (she) was preventing or attempting to prevent the officer(s) from effecting an arrest.**

Commonwealth v. Lawson, 46 Mass. App. Ct. 627, 708 N.E.2d 148 (1999) (intoxication is a defense to the knowledge element of the offense, i.e., whether "defendant both knew that the persons with whom he was engaged were police officers acting under the color of their authority and that he was preventing or attempting to prevent them from effecting an arrest").

NOTE:

1.Flight. Running away to evade the police does not itself constitute resisting arrest (G.L. c. 268, § 32B), even while being chased for a stop or patfrisk, unless a reasonable person in the defendant's position would have understood that the attempted seizure was to effect an arrest. *Commonwealth v. Grant*, 71 Mass. App. Ct. 205, 880 N.E.2d 820 (2008).

7.480 SEXUAL CONDUCT FOR A FEE

G.L. c. 272 c. § 53A
2009 Edition

I. PROSTITUTE

The defendant is charged with either engaging in sexual conduct for a fee, or agreeing to engage in sexual conduct for a fee, or offering to engage in sexual conduct for a fee — the activity that is commonly referred to as prostitution.

Section 53A of chapter 272 of our General Laws provides as follows:

> **"Any person who engages, agrees to engage, or offers to engage in sexual conduct with another person in return for a fee . . . may be punished . . . ."**

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

First: **That the defendant either engaged, or agreed to engage, or offered to engage, in sexual conduct with another person; and**

Second: **That the sexual conduct (was) (was to be) done in return for a fee.**

The defendant may be convicted only if the sexual conduct (was) (was to be) in exchange for a fee — that is, if the transaction was of a commercial nature.

From the passage of St. 1959, c. 304 until the enactment of St. 1983, c. 66, the punishment of "prostitutes" was provided for in G.L. c. 272, § 53. Prostitution was defined as "common indiscriminate sexual activity for hire, in distinction from sexual activity confined exclusively to one person." *Commonwealth v. King*, 374 Mass. 5, 12, 372 N.E.2d 196, 202 (1977). See *Commonwealth v. Walter*, 388 Mass. 460, 463, 446 N.E.2d 707, 709 (1983); *Commonwealth v. United Food Corp*., 374 Mass. 765, 767, 374 N.E.2d 1331, 1335-1336 (1978); *Commonwealth v. Cook*, 12 Met. 93, 97 (1846); *Commonwealth v. A Juvenile* (No. 2), 6 Mass. App. Ct. 194, 196, 374 N.E.2d 335, 337 (1978) (prostitution comprises both "the performance of indiscriminate sexual acts for hire and the indiscriminate solicitation or agreement to perform sexual acts for hire"). Acts of prostitution are not constitutionally protected, since "[c]ommercial sex is performed for profit and the sexual contact involved is incidental to that profit . . . . The decision to engage in the business of sex for money is not the type of intimate, personal decision which is protected by the right to privacy" under either Federal or Massachusetts law. *Walter*, 388 Mass. at 465, 446 N.E.2d at 710.

Statute 1983, c. 66 removed the word "prostitutes" from G.L. c. 272, § 53, and created a new statutory offense (§ 53A) which punishes both the prostitute and the prostitute's client. *Commonwealth v. An Unnamed Defendant*, 22 Mass. App. Ct. 230, 234-235, 492 N.E.2d 1184, 1187 (1986). Therefore, it is no longer necessary to define prostitution in terms of the King case.

II. CUSTOMER OR PROCURER

The defendant is charged with (paying) (agreeing to pay) (offering to pay) another person to engage in sexual conduct with (him) (her) (some third person).

Section 53A of chapter 272 of our General Laws provides as follows:

> **"Any person who pays, agrees to pay or offers to pay another person to engage in sexual conduct or to agree to engage in sexual conduct with another natural person may be punished . . . ."**

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

First: **That the defendant (paid) (agreed to pay) (or) (offered to pay) another person; and**

Second: **That the payment was in exchange (for that person's engaging in sexual conduct) (or) (for that person's agreeing to engage in sexual conduct) with (the defendant) (or) (another person).**

The defendant may be convicted only if the sexual conduct (was) (was to be) in exchange for a fee, that is, if the transaction was of a commercial nature.

See also G.L. c. 272, § 8 (soliciting for a prostitute).

SUPPLEMENTAL INSTRUCTION

"Sexual conduct." The **term "sexual conduct" includes (sexual intercourse) (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).**

The term "'sexual activity' . . . encompass[es] all acts commonly understood to be described by the term, including masturbation" of another as well as sexual intercourse and deviate sexual intercourse, and is not unconstitutionally vague. Walter, 388 Mass. at 463, 465-466, 446 N.E.2d at 709-710. See, e.g. *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"); *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 penetration of vagina, vulva or labia).

NOTE:

Selective prosecution of females. The Massachusetts Equal Rights Amendment (art. 106 of the Articles of Amendment to the Massachusetts Constitution) requires that a § 53A charge against a female defendant be dismissed with prejudice upon an appropriate showing that the particular police department or prosecutor's office consistently prosecutes female prostitutes but not their male customers. *An Unnamed Defendant,* 22 Mass. App. Ct. at 233-236, 492 N.E.2d at 1186-1188. See *Commonwealth v. Hackett,* 383 Mass. 888, 888-889, 421 N.E.2d 769, 771 (1981); *King,* 374 Mass. at 17-22, 372 N.E.2d at 204-207.

7.500 UNNATURAL AND LASCIVIOUS ACT

G.L. c. 272 § 35
2009 Edition

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.

7.520 USE OF TELEPHONE FOR BETTING

G.L. c. 271 § 17A
2009 Edition

The defendant is charged with unlawfully (using a telephone) (permitting a telephone to be used) for betting purposes. Section 17A of chapter 271 of our General Laws provides as follows:

"[W]hoever uses a telephone

(or) (being the occupant in control of premises where a telephone is located or a subscriber for a telephone, knowingly permits another to use [that] telephone . . .)

for the purpose of (accepting wagers or bets) (buying or selling of pools) (placing . . . a wager with another) upon the result of (a trial or contest of skill, speed, or endurance) (an athletic game or contest) (the lottery called the numbers game)

or for the purpose of reporting [the results of (a trial or contest of skill, speed, or endurance) (an athletic game or contest) (a numbers game)] to a headquarters or booking office . . .

shall be punished . . . ."

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

First: **That the defendant (used) (was the subscriber for) (was in control of premises containing) a telephone; and**

Second: **That the defendant knowingly (used the telephone) (permitted the telephone to be used) for (accepting wagers or bets) (buying or selling pools) (placing bets upon a contest of skill, speed or endurance, or an athletic game) (placing bets in a numbers game) (reporting the results of a contest of skill, speed or endurance, or an athletic game to a headquarters or booking office) (reporting the results of a numbers game to a headquarters or booking office).**

Commonwealth v. Murphy, 342 Mass. 393, 398, 173 N.E.2d 630, 633 (1961) (statute requires scienter); *Commonwealth v. Jensky*, 318 Mass. 350, 352-354, 61 N.E.2d 532, 534 (1945) (police answering the suspect telephone anonymously may testify as to what callers said).

7.540 POSSESSION OF CHILD PORNOGRAPHY

G.L. c. 272 § 29C
January 2013

The defendant is charged with knowingly (purchasing) (possessing) (an image) (images) of a child engaged in sexual conduct in violation of section 29C of chapter 272 of the General Laws. In order to prove the defendant guilty, the Commonwealth must prove four things beyond a reasonable doubt.

First: **That the defendant knowingly (purchased) (possessed) the image(s);**

Second: **That there is an image of a person under the age of eighteen who is:**

(actually or by simulation engaged in any act of sexual contact involving the [sex organs of the child] [mouth, anus or sex organs of the child and the sex organs of another person or animal]);

(or) (actually or by simulation engaged in any act of masturbation);

(or) (actually or by simulation portrayed as being the object of, or otherwise engaged in, any act of lewd fondling, touching, or caressing involving another person or animal);

(or) (actually or by simulation engaged in any act of excretion or urination within a sexual context);

(or) (actually or by simulation portrayed or depicted as bound, fettered, or subject to sadistic, masochistic, or sadomasochistic abuse in any sexual context);

(or) (depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed genitals, pubic area, or buttocks);

(or) (a female depicted or portrayed in any pose, posture or setting involving lewd exhibition of a fully or partially developed breast of the child);

Third: **That the defendant knew or reasonably should have known the person in the image was under the age of eighteen; and**

Fourth: **That the defendant knew of the nature or content of the image(s).**

In order to prove the first element, the Commonwealth must prove beyond a reasonable doubt that the defendant knowingly purchased or possessed the image(s). The word "knowingly" means intentionally as opposed to accidentally or negligently. A person possesses something if he (she) has direct physical control or custody of it at a given time. A person possesses something even if it is not physically with the person if three circumstances exist: the person has knowledge of the item; the person has the ability to exercise control over it either directly or through someone else; and the person has the intent to exercise control over it.

In order to prove the second element, the Commonwealth must prove that the image was a (negative) (slide) (book) (magazine) (film) (videotape) (photograph or other similar visual reproduction) (depiction by computer; a depiction by computer includes stored data accessible as a graphic image). Proof that an image contains nudity is not alone sufficient for a conviction. The image must be of a person engaged in (an activity) (one of the activities) specified in the second element.

Commonwealth v. Hinds, 437 Mass. 54, 63-64, 768 N.E.2d 1067, 1074-1075 (2002) (depiction by computer).

In order to prove the third element, the Commonwealth must prove beyond a reasonable doubt that the defendant knew or reasonably should have known that the child depicted was under eighteen years of age. It is not sufficient that one might guess or speculate that the child was under the age of eighteen; the evidence must establish that the defendant or a reasonable person in his (her) position knew or reasonably should have known the depiction was of a child under the age of eighteen.

In order to prove the fourth element, the Commonwealth must prove beyond a reasonable doubt that the defendant knew of the nature or content of the image(s). The law defines "knowledge" in this context as "a general awareness of the character of the matter." You may consider any evidence of the defendant's actions or words, and all the surrounding circumstances, to help you determine whether the defendant knew of the nature or content of the images. If all the elements have been proved beyond a reasonable doubt – that the defendant knowingly purchased or possessed (an image) (images) of a child engaged in one of the specified activities where he (she) knew or should reasonably have known that the person depicted was under the age of eighteen and he (she) knew the nature or content of the image(s) – you should return a verdict of guilty. If any of the four elements has not been proved beyond a reasonable doubt, you must find the defendant not guilty.

SUPPLEMENTAL INSTRUCTIONS

Additional definitions. **The term "masturbation" refers to manual erotic stimulation of one's own genital organs.**

The term "sex organs" refers to the genitals, the buttocks, or the breasts of a female.

The term "lewd" means indecent or offensive. In determining whether an image is lewd, you may consider whether its focal point is on the child's genitalia or pubic area, whether the setting is sexually suggestive – that is, in a place or pose generally associated with sexual activity – whether the child is in an unnatural pose, or in inappropriate attire, considering the age of the child, whether the child is fully or partially clothed, or nude, whether the depiction suggests sexual coyness or a willingness to engage in sexual activity, and whether the depiction is intended or designed to elicit a sexual response from the viewer.

See *Commonwealth v. Kenney*, 449 Mass. 840, 850 n.8, 874 N.E.2d 1089, 1098 n.8 (2007); *Commonwealth v. Sullivan*, 82 Mass. App. Ct. 293, 302-303, 972 N.E.2d 476, 483-484 (2012).

The term "sadistic abuse" refers to inflicting physical ormental pain on another to obtain sexual gratification.

The term "masochistic abuse" refers to inflicting pain or humiliation on oneself to obtain sexual gratification.

The term "sadomasochistic abuse" refers to inflicting physical or mental pain on others or on oneself to derive pleasure.

NOTES:

1. **Elements.** In a case involving photographs received on a cell phone, the Appeals Court described the following four elements of possession of child pornography: "The Commonwealth must present evidence that the defendant (1) knowingly possessed a photograph or other similar visual reproduction or depiction by computer; (2) depicting a child that the defendant knew or reasonably should have known was under the age of eighteen; (3) in a pose of a lewd or sexual nature as defined in the statute; and (4) with knowledge of the nature or content of the material." *Commonwealth v. Hall*, 80 Mass. App. Ct. 317, 327, 952 N.E.2d 951, 959 (2011).

2. **Mere nudity.** "The depiction of mere nudity is not enough to support a conviction under c. 272, § 29A." *Commonwealth v. Bean*, 435 Mass. 708, 715 n.17, 761 N.E.2d 501, 508 n.17 (2002).

FIREARMS AND WEAPONS OFFENSES

7.600 POSSESSION OF A FIREARM WITHOUT A LICENSE OUTSIDE HOME OR BUSINESS

G.L. c. 269 § 10[a]
January 2013

The offense found in G.L. c. 269, § 10(a) is commonly referred to as "carrying" a firearm, to distinguish it from the offense of "possession" of a firearm without a firearm ID card, found in § 10(h). The name is no longer really accurate, since St. 1990, c. 511 (effective January 2, 1991) eliminated movement of the firearm as an element of § 10(a).

I. FIREARM WITH BARREL UNDER 16 INCHES

The defendant is charged under section 10(a) of chapter 269 of our General Laws with knowingly possessing a firearm unlawfully.

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

First: **That the defendant possessed a firearm (*or*) (that he [she] had a firearm under his [her] control in a vehicle);**

Second: **That what the defendant (possessed) (*or*) (had under his [her] control in a vehicle) met the legal definition of a "firearm"; (and)**

Third: **That the defendant *knew* that he (she) (possessed a firearm) (*or*) (had a firearm under his [her] control in a vehicle).**

If there is evidence of one of the statutory exceptions, use one of the following:

A. If there is evidence that it was in the defendant's residence or place of business.

and *Fourth:* that the defendant possessed the firearm outside of his (her) residence or place of business. A person's "residence" or "place of business" does not include common areas of an apartment or office building, but only areas that are under that person's exclusive control.

B. If there is evidence that the defendant had a license to carry firearms.

and *Fourth:* that the defendant did *not* have a valid license to possess a firearm outside his (her) home or office.

C. If there is evidence that the defendant was esempt from the licensing requirement.

and *Fourth:* that the defendant did *not* qualify for one of the exemptions in the law that are a substitute for having a license to possess a firearm outside his (her) home or business.

The statute exempts a defendant who:
"(1) [was] present in or on his residence or place of business; or
(2) [had] in effect a license to carry firearms issued under [G.L. c. 140, § 131]; or
(3) [had] in effect a license to carry firearms issued under [G.L. c. 140, § 131F to a nonresident or alien]; or
(4) [had] complied with the provisions of [G.L. c. 140, §§ 129C and 131G, granting certain categorical exemptions from the requirement of a license to carry]; or
(5) [had] complied as to possession of an air rifle or BB gun with the requirements imposed by [G.L. c. 269, § 12B]."

General Laws c. 278, § 7 places on the defendant the burden of producing evidence of one of these exemptions; the Commonwealth must then disprove beyond a reasonable doubt the applicability of the claimed exemption. Until there is such evidence, the exemptions are not at issue. *Commonwealth v. Seay*, 376 Mass. 735, 738, 383 N.E.2d 828, 830 (1978) (former statute); *Commonwealth v. Jones*, 372 Mass. 403, 406-407, 361 N.E.2d 1308, 1310-1311 (1977) (same); *Commonwealth v. Davis*, 359 Mass. 758, 270 N.E.2d 925 (1971) (same); *Commonwealth v. Baker*, 10 Mass. App. Ct. 852, 853, 407 N.E.2d 398, 399 (1980) (lack of license need not be charged in complaint).

A "firearm" is defined in our law as:

"a pistol, revolver or other weapon . . . loaded or unloaded, from which a shot or bullet can be discharged and . . . the length of [whose] barrel is less than sixteen inches . . . ."

That definition can be broken down into three requirements: *First,* it must be a weapon; *Second,* it must be capable of discharging a shot or bullet; and *Third,* it must have a barrel length of less than 16 inches. The term "barrel length" refers to "that portion of a firearm . . . through which a shot or bullet is driven, guided or stabilized, and [includes] the chamber."

G.L. c. 140, § 121. *Commonwealth v. Williams*, 422 Mass. 111, 120, 661 N.E.2d 617, 624 (1996) (not necessary that firearm be loaded); *Commonwealth v. Bartholomew*, 326 Mass. 218, 219, 93 N.E.2d 551, 552 (1950) (same); *Commonwealth v. Tuitt*, 393 Mass. 801, 810, 473 N.E.2d 1103, 1110 (1985) (jury can determine from inspection that "firearm"); *Commonwealth v. Fancy*, 349 Mass. 196, 204, 207 N.E.2d 276, 282 (1965) (same); *Commonwealth v. Sampson*, 383 Mass. 750, 753, 422 N.E.2d 450, 452 (1981); *Commonwealth v. Sperrazza*, 372 Mass. 667, 670, 363 N.E.2d 673, 675 (1977) (testimony about "revolver" or "handgun" will support inference that barrel was under 16 inches).

If the firearm may have been "under [the defendant's] control in a vehicle. **To establish that a firearm was under the defendant's "control" in a vehicle, it is not enough for the Commonwealth just to prove that the defendant was present in the same vehicle as the firearm. The Commonwealth must also prove that the defendant knew that the firearm was there, and that the defendant had both the ability and the intention to exercise control over the firearm, although this did not have to be exclusive control.**

See *Instruction 3.220* (Possession).

Where the issue is constructive possession rather than actual physical possession, the Commonwealth must prove that "in addition to knowledge and the ability to exercise control over the firearm, the defendant must have the intention to do so." *Commonwealth v. Costa*, 65 Mass. App. Ct. 227, 838 N.E.2d 592 (2005); *Commonwealth v. Sann Than*, 442 Mass. 748, 748, 817 N.E.2d 705 (2004).

Commonwealth v. Brown, 401 Mass. 745, 519 N.E.2d 1291 (1988); *Commonwealth v. Bailey*, 29 Mass. App. Ct. 1007, 563 N.E.2d 1378 (1990); *Commonwealth v. Diaz*, 15 Mass. App. Ct. 469, 471-472, 446 N.E.2d 415, 416-417 (1983); *Commonwealth v. Gray*, 5 Mass. App. Ct. 296, 299, 362 N.E.2d 543, 545 (1977); *Commonwealth v. Mott*, 2 Mass. App. Ct. 47, 53-54, 308 N.E.2d 557, 561-562 (1974).

As I mentioned before, the Commonwealth must prove beyond a reasonable doubt that the defendant knew that he (she) (possessed this item) (*or*) (had this item under his [her] control in a vehicle), *and* also knew that the item was a "firearm," within the common meaning of that term. If it was a conventional firearm, with its obvious dangers, the Commonwealth is not required to prove that the defendant knew that the item met the *legal* definition of a firearm.

See *Instruction 3.140* (Knowledge).

Commonwealth v. Sampson, 383 Mass. 750, 762, 422 N.E.2d 450, 457 (1981); *Commonwealth v. Bacon*, 374 Mass. 358, 359, 372 N.E.2d 780, 781 (1978) (knowledge need not be alleged in complaint); *Commonwealth v. Jackson*, 369 Mass. 904, 916-917, 344 N.E.2d 166, 174 (1976); *Commonwealth v. Boone*, 356 Mass. 85, 87, 248 N.E.2d 279, 280 (1969) ("control" in vehicle requires knowledge); *Commonwealth v. Papa*, 17 Mass. App. Ct. 987, 987-988, 459 N.E.2d 128, 128-129 (1984).

II. RIFLE OR SHOTGUN

The defendant is charged under section 10(a) of chapter 269 of our General Laws with knowingly possessing a rifle or shotgun unlawfully.

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

First: **That the defendant possessed a rifle or shotgun (*or*) (that he [she] had a rifle or shotgun under his [her] control in a vehicle);**

Second: **That what the defendant (possessed) (*or*) (had under his [her] control in a vehicle) met the legal definition of a "rifle" or a "shotgun"; (and)**

Third: **That the defendant *knew* that he (she) (possessed a rifle or shotgun) (*or*) (had a rifle or shotgun under his [her] control in a vehicle.**

If there is evidence of one of the statutory exceptions, use one of the following:

A. If there is evidence that it was in the defendant's residence or place of business.

and *Fourth:* that the defendant possessed the rifle or shotgun outside of his (her) residence or place of business. A person's "residence" or "place of business" does not include common areas of an apartment or office building, but only areas that are under that person's exclusive control.

B. If there is evidence that the defendant had a license to carry firearms.

and *Fourth:* that the defendant did *not* have a valid license to carry a firearm.

C. If there is evidence that the defendant was exempt from the licensing requirement.

and *Fourth:* that the defendant did *not* qualify for one of the exemptions in the law that are a substitute for having a license to carry a firearm.

See notes to I, above.

A "rifle" is defined in our law as:

"a weapon having a rifled bore

with a barrel length equal to or greater than sixteen inches,

capable of discharging a shot or bullet

for each pull of the trigger."

A "shotgun" is defined as:

"a weapon having a smooth bore

with a barrel length equal to or greater than eighteen inches

with an overall length equal to or greater than twenty-six inches,

capable of discharging a shot or bullet

for each pull of the trigger."

The term "barrel length" refers to "that portion of a firearm . . . through which a shot or bullet is driven, guided or stabilized, and [includes] the chamber."

G.L. c. 140, § 121.

If the rifle or shotgun may have been "under [the defendant's] control in a vehicle."

To establish that a rifle or shotgun was under the defendant's "control" in a vehicle, it is not enough for the Commonwealth just to prove that the defendant was present in the same vehicle as the rifle or shotgun. The Commonwealth must also prove that the defendant knew that the rifle or shotgun was there, and that the defendant had both the ability and the intention to exercise control over the rifle or shotgun, although this did not have to be exclusive control.

See notes to I, above.

As I mentioned before, the Commonwealth must prove beyond a reasonable doubt that the defendant knew that he (she) (possessed this item) (*or*) (had this item under his [her] control in a vehicle), *and* also knew that the item was a "rifle" or "shotgun" within the common meaning of that term. If it was a conventional rifle or shotgun, with its obvious dangers, the Commonwealth is not required to prove that the defendant knew that the item met the *legal* definition of a rifle or shotgun.

See notes to I, above.

SUPPLEMENTAL INSTRUCTIONS

1. Non-firing firearm, rifle or shotgun. **A weapon that was originally a (firearm) (rifle or shotgun) may become so defective or damaged that it will no longer fire a projectile, and then the law no longer considers it to be a (firearm) (rifle or shotgun). But a weapon remains a (firearm) (rifle or shotgun) within the meaning of the law when a slight repair, replacement or adjustment will again make it an effective weapon.**

Commonwealth v. Colton, 333 Mass. 607, 608, 132 N.E.2d 398, 398 (1956) (insertion of ammo clip); *Bartholomew*, 326 Mass. at 220, 93 N.E.2d at 552 (insertion of firing pin); *Commonwealth v. Raedy*, 24 Mass. App. Ct. 648, 652-656, 512 N.E.2d 279, 282-284 (1987) (jury question whether gun that could be fired if inverted was "firearm"; judge who distinguishes between "major" and "minor" repairs need not instruct that Commonwealth must prove that this particular defendant had ability and knowledge to repair gun); *Commonwealth v. Rhodes*, 21 Mass. App. Ct. 968, 969-970, 489 N.E.2d 216, 217 (1986) (not a firearm where bent part rendered inoperable until repaired). See *Commonwealth v. Gutierrez*, 82 Mass. App. Ct. 1118, 977 N.E.2d 105 (No. 11-P-1612, October 25, 2012) (unpublished opinion under Appeals Ct. Rule 1:28) (noting objective "slight repair" standard for operability of firearm).

2. Firearms identification card. **A "firearms identification card" is not the same thing as a "license to carry a firearm." When a person has a valid firearms identification card, that card gives him the right to possess a firearm within his residence or place of business. But it does not give him the right to possess it outside of his (her) home or business, which requires a license to possess a firearm.**

G.L. c. 140, §§ 129B-129D. A firearms identification card is a defense to a charge of carrying a rifle or shotgun, but not other firearms. G.L. c. 269, § 10(a).

***3. Passenger in vehicle*. Merely being present in a motor vehicle in which a (firearm) (rifle or shotgun) is found is not sufficient by itself to permit an inference that the person knew about the presence of the (firearm) (rifle or shotgun) without other indications of knowledge.**

Commonwealth v. Albano, 373 Mass. 132, 134-136, 365 N.E.2d 808, 810-811 (1977) (gun in plain view; defendant acted suspiciously); *Commonwealth v. Bailey*, 29 Mass. App. Ct. 1007, 563 N.E.2d 1378 (1990) (gun in plain view near defendant's feet; car had been broken into; attempted escape); *Commonwealth v. Lucido*, 18 Mass. App. Ct. 941, 943, 467 N.E.2d 478, 480 (1984) (gun in glove compartment with defendant's personal letters); *Commonwealth v. Montgomery*, 23 Mass. App. Ct. 909, 910, 499 N.E.2d 853, 854 (1986) (gun on defendant's side of auto and defendant had appropriate ammo clip); *Commonwealth v. Donovan*, 17 Mass. App. Ct. 83, 85-86, 455 N.E.2d 1217, 1219 (1983) (gun under seat of borrowed auto surrounded by defendant's acknowledged property); *Diaz*, supra (gun in plain view on floor in front of defendant). Compare *Commonwealth v. Brown*, 401 Mass. 745, 519 N.E.2d 1291 (1988) (insufficient to prove defendant drove stolen car, in which guns were found under passenger seat and both occupants bent forward in unison when stopped); *Commonwealth v. Almeida*, 381 Mass. 420, 422-423, 409 N.E.2d 776, 778 (1980) (insufficient to prove gun inside console of borrowed auto); *Commonwealth v. Boone*, 356 Mass. 85, 87, 248 N.E.2d 279, 280 (1969) (insufficient to prove defendant a passenger in an auto with a gun under a seat); *Commonwealth v. Hill*, 15 Mass. App. Ct. 93, 94-97, 443 N.E.2d 1339, 1340-1341 (1983) (insufficient to prove gun inside woman's purse at male passenger's feet).

***4. Absence of evidence of license.* You have heard some reference to (a license to carry a firearm) (a legal exemption from the requirement of a license to carry a firearm). There was no evidence in this case that the defendant had a license to carry a firearm, and no evidence that the defendant qualified for one of the legal exemptions that are a substitute for having such a license. For that reason, the issue of a license or exemption is not relevant to your deliberations in this case, and therefore you should put it out of your mind.**

This instruction is recommended only when there has been some reference to, but not evidence of, such a license or exemption in the jury's presence.

5. Knowledge of licensing requirement. **You have heard some mention that the defendant did not know that he (she) was required to have a license before carrying a firearm under these circumstances. The Commonwealth is *not* required to prove that the defendant knew that the law required him (her) to have a license before (possessing a firearm) (*or*) (having a firearm under his [her] control in a vehicle) outside of his (her) home or place of business.**

This instruction is recommended only when it is necessary to correct such a misimpression.

NOTES:

1. **Elements.** "To sustain a conviction under G.L. c. 269, § 10(a), the Commonwealth must prove that the defendant knowingly possessed a firearm without either being present in his residence or place of business or having in effect a license to carry firearms or [in the case of a rifle or shotgun] a firearm identification card. The Commonwealth must prove that the gun the defendant possessed met the definition of a working firearm set forth in G.L. c. 140, § 121, that is, that it had a barrel less than sixteen inches long [or was a rifle or shotgun] and was capable of discharging a bullet." *Commonwealth v. White,* 452 Mass. 133, 136, 891 N.E.2d 675, 678 (2008).

2. **Air rifles and BB guns**. In decisions under the earlier version of G.L. c. 269, § 10(a), air guns, BB guns and CO_2 guns were held to be regulated solely by G.L. c. 269, § 12B and not by § 10(a). *Commonwealth v. Fenton,* 395 Mass. 92, 94-95, 478 N.E.2d 949, 950-951 (1985); *Commonwealth v. Rhodes,* 389 Mass. 641, 644, 451 N.E.2d 1151, 1153 (1983). The current text of § 10(a) applies to anyone who carries "a firearm . . . without . . . having complied as to possession of an air rifle or BB gun with the requirements imposed by [§ 12B]." Thus, compliance with § 12B is a defense to a prosecution under § 10(a), just as the possession of a firearm license would be. *Commonwealth v. Sayers,* 438 Mass. 238, 240, 780 N.E.2d 24, 26 (2002).

3. **Ballistics certificate**. "A certificate by a ballistics expert of the firearms identification section of the department of public safety or of the city of Boston of the result of an examination made by him of an item furnished him by any police officer, signed and sworn to by such expert, shall be prima facie evidence of his findings as to whether or not the item furnished is a firearm, rifle, shotgun, machine gun, sawed off shotgun or ammunition, as defined by [G.L. c. 140, § 121], provided that in order to qualify as an expert under this section he shall have previously qualified as an expert in a court proceeding." G.L. c. 140, § 121A. The certificate's prima facie effect must be put to the jury in permissive terms. *Commonwealth v. Crawford,* 18 Mass. App. Ct. 911, 912, 463 N.E.2d 1193, 1194 (1984). See Instruction 3.260 (Prima Facie Evidence).

The admission of such a certificate is the "record of a primary fact made by a public officer in the performance of [an] official duty" that raises no Confrontation Clause problem under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004). *Commonwealth v. Morales,* 71 Mass. App. Ct. 587, 884 N.E.2d 546 (2008).

4. **Constitutionality.** The one-year mandatory sentencing provision of § 10(a) is constitutional. *Commonwealth v. Jackson,* 369 Mass. 904, 344 N.E.2d 166 (1976).

5. **Flare guns**. A flare gun is not a "firearm" for purposes of G.L. c. 269, § 10(a). *Sampson,* 383 Mass. at 753-761, 422 N.E.2d at 452-456.

6. **Necessity defense**. The Supreme Judicial Court has assumed that a threat of death or serious injury, if it is direct and immediate, may excuse momentary carrying of a firearm. *Commonwealth v. Lindsey,* 396 Mass. 840, 843-845, 489 N.E.2d 666, 668-669 (1986). See *Commonwealth v. Iglesia*, 403 Mass. 132, 135-136, 525 N.E.2d 1332, 1333-1334 (1988); *Commonwealth v. Franklin,* 376 Mass. 885, 888 n.2, 385 N.E.2d 227, 230 n.2 (1978). See Instruction 9.240 (Necessity or Duress).

7. **Notice of affirmative defense**. Massachusetts R. Crim. P. 14(b)(3) requires a defendant who intends to rely upon a defense based upon a license, a claim of authority or ownership, or exemption to file an advance notice of such defense with the prosecutor and the clerk-magistrate. The rule provides that if the defendant does not comply with that requirement, the defendant may not rely upon such a defense. The judge may allow late filing of the notice, order a continuance, or make other appropriate orders.

8. **Notice of license revocation.** See *Police Comm'r of Boston v. Robinson*, 47 Mass. App. Ct. 767, 773, 774, 716 N.E. 2d 652, 656 (1999) (proving notice of license revocation by certified mail requires proof of receipt); *Commonwealth v. Hampton*, 26 Mass. App. Ct. 938, 940, 525 N.E.2d 1341, 1343 (1988) (defendant who purposefully or wilfully evaded notice of license revocation sent by certified mail had constructive notice of license revocation).

9. **Probable cause.** Possession of a firearm, standing alone and without indication that the person was involved in criminal activity, does not provide probable cause to believe that the person was unlicensed to carry that firearm. *Commonwealth v. Couture,* 407 Mass. 178, 552 N.E.2d 538, cert. denied, 498 U.S. 951, 111 S.Ct. 372 (1990). However, additional evidence of criminal activity and flight would provide such probable cause. *Commonwealth v. Brookins,* 416 Mass. 97, 104, 617 N.E.2d 621, 625 (1993).

10. **"Residence."** See *Commonwealth v. Coren*, 437 Mass. 723, 734, 774 N.E.2d 623, 632 (2002) (defining "residence" to include "all areas in and around a defendant's property, including outside areas, over which defendant retains exclusive control," but not including "public streets, sidewalks, and common areas to which occupants of multiple dwellings have access"); *Commonwealth v. Dunphy,* 377 Mass. 453, 458-460, 386 N.E.2d 1036, 1039-1040 (1979) (jury issue whether backyard was common area); *Commonwealth v. Morales,* 14 Mass. App. Ct. 1034, 1035, 442 N.E.2d 740, 741 (1982) (jury issue whether area was a common area to which other occupants or owner had access); *Commonwealth v. Domingue,* 18 Mass. App. Ct. 987, 990, 470 N.E.2d 799, 802 (1984) (defendant privileged to carry at place of business); *Commonwealth v. Samaras,* 10 Mass. App. Ct. 910, 910, 410 N.E.2d 743, 744 (1980) (no privilege to carry on sidewalk in front of defendant's house).

7.620 POSSESSION OF A FIREARM

G.L. c. 269 § 10[h]
June 2016

The defendant is charged with unlawfully possessing a firearm. In order to prove the defendant guilty of this offense, the Commonwealth must prove (three) (four) things beyond a reasonable doubt:

First: **That the defendant possessed an item;**

Second: **That the item meets the legal definition of a "firearm"; (and)**

Third: **That the defendant knew that (he) (she) possessed that firearm.**

If there is evidence of one of the statutory exceptions, use one of the following:

A. If there is evidence that the defendant had a firearm ID card. **And *Fourth:* That the defendant did *not* have a valid firearm ID card.**

B. If there was evidence that the defendant was exempt. **And *Fourth:* That the defendant did *not* qualify for one of the exemptions in the law that are a substitute for having a valid firearm ID card.**

See Instruction 3.160 (License or Authority).

G.L. c. 278, § 7; *Commonwealth v. Jones*, 372 Mass. 403, 406-07 (1977). The issuance of firearm identification cards is governed by G.L. c. 140, §§ 129B-129D. Section 129B also lists a number of exemptions from the requirement of a firearms identification card. *See also* Op. A.G. No. 86/87-4 (Oct. 31, 1986) (18 U.S.C. § 926A provides a defense to a charge under § 10[h] for a non-resident traveling through the Commonwealth with an unloaded and inaccessible handgun who is in compliance with the firearms laws of the states of origin and destination).

Here define "possession" (Instruction 3.220).

A "firearm" is defined in our law as:

"a pistol, revolver or other weapon . . .

loaded or unloaded,

from which a shot or bullet can be discharged

and . . . the length of [whose] barrel is less than sixteen inches."

That definition can be broken down into three requirements: *First,* it must be a weapon; *Second,* it must be capable of discharging a shot or bullet; and *Third,* it must have a barrel length of less than 16 inches. The term "barrel length" refers to "that portion of a firearm . . . through which a shot or bullet is driven, guided or stabilized, and [includes] the chamber."

G.L. c. 140, § 121; *Commonwealth v. Sampson*, 383 Mass. 750, 753 (1981); *see* *Commonwealth v. Tuitt*, 393 Mass. 801, 810 (1985) (jury can determine from inspection that a weapon admitted into evidence is a "firearm"); *Commonwealth v. Fancy*, 349 Mass. 196, 204 (1965) (same); *Commonwealth v. Sperrazza*, 372 Mass. 667, 670 (1977) (testimony about "revolver" or "handgun" will support inference that barrel was under 16 inches); *Commonwealth v. Bartholomew*, 326 Mass. 218, 219 (1950) (not necessary that firearm be loaded).

As I mentioned before, the Commonwealth must prove beyond a reasonable doubt that the defendant knew that (he) (she) (possessed this item) (or) (had this item under [his] [her] control in a vehicle), *and* also knew that the item was a "firearm," within the common meaning of that term. If it was a conventional firearm, with its obvious dangers, the Commonwealth is not required to prove that the defendant knew that the item met the *legal* definition of a firearm.

See *Instruction 3.140* *(Knowledge).*

General Laws c. 269, § 10(h) punishes "own[ing]" or "transfer[ring]" possession as well as possession, and is applicable to a "rifle, shotgun or ammunition" as well as a firearm. In cases with such fact patterns, the model instruction may be adapted accordingly. *See* G.L. c. 140, § 121 for definitions of "rifle," "shotgun," and "ammunition."

Commonwealth v. Sampson, 383 Mass. 750, 762 (1981); *Commonwealth v. Bacon*, 374 Mass. 358, 359 (1978) (knowledge need not be alleged in the charging document); *Commonwealth v. Jackson*, 369 Mass. 904, 916-17 (1976) (knowledge must be proved); *Commonwealth v. Boone*, 356 Mass. 85, 87 (1969) (same); *see Commonwealth v. Papa*, 17 Mass. App. Ct. 987, 987-88 (1984) (defendant need not know that the firearm met the legal definition).

SUPPLEMENTAL INSTRUCTIONS

1. Absence of evidence of firearm ID card. **You have heard some reference to (a firearm ID card) (a legal exemption from the requirement of a firearm ID card). There was no evidence in this case that the defendant had a firearm ID, and no evidence that the defendant qualified for one of the legal exemptions that are a substitute for having a firearm ID card. For that reason, the issue of a firearm ID card or exemption is not relevant to your deliberations in this case, and therefore you should put it out of your mind.**

This instruction is recommended only when, in the jury's presence, there has been some reference to, but not evidence of, a firearm ID card or exemption.

2. Knowledge of firearm ID card requirement. **You have heard some mention that the defendant did not know that (he) (she) was required to have a firearm ID card before possessing a firearm. The Commonwealth is *not* required to prove that the defendant knew that the law required (him) (her) to have a firearm ID card before (possessing a firearm) (*or*) (having a firearm under [his] [her] control in a vehicle).**

This instruction is recommended only when it is necessary to correct such a misimpression.

3. Expired license. **One of the exemptions to the requirement of a valid firearm ID card provided by law is for certain persons with an expired firearm ID card. This exemption is intended to exempt from**

criminal punishment persons whose licenses became invalid inadvertently but who would otherwise not be disqualified from holding a valid license.

The defendant is entitled to this exemption if (his) (her) license to carry was expired and (he) (she) had not been notified of any revocation or suspension of the license, or pending revocation or suspension of the license, or denial of a renewal application. The Commonwealth has the burden to establish beyond a reasonable doubt that the exemption does not apply. To prove this, the Commonwealth must prove beyond a reasonable doubt one of the following things:

One, that the defendant never had a valid firearm ID card;

Two, that the defendant had been notified that the license was revoked or suspended or that revocation or suspension was pending, and that the revocation or suspension was not because of failure to provide a change of address; or

Three, that the defendant had been notified of the denial of an application to renew (his) (her) firearm ID card.

G.L. c. 140, § 131(m); *Commonwealth v. Indrisano*, 87 Mass. App. Ct. 709, 716-17 (2015). The mere production of an expired license is insufficient to warrant this instruction, but testimony that the defendant had never applied to renew the license, had never received notice of denial, and had never received notice of revocation or suspension entitles a defendant to the instruction. *Indrisano*, 87 Mass. App. Ct. at 714.

NOTES:

1. **Possession of a firearm (§ 10[h]) as a lesser included offense of carrying a firearm (§ 10[a]).** Prior to 1991, possession of a firearm (§ 10[h]) was a lesser included offense of carrying a firearm (§ 10[a]). See *Commonwealth v. Nessolini,* 19 Mass. App. Ct. 1016, 1016, 476 N.E.2d 976, 977 (1985). Statute 1990, c. 511 (effective January 2, 1991) amended § 10(h) to provide that "[a] violation of this subsection shall not be considered a lesser included offense to a violation of subsection (a) . . . ." and that no one shall "prosecute as a violation of [§ 10(h)] the mere possession of a firearm, rifle, or shotgun by an unlicensed person not being present in or on his residence or place of business, nor shall the court allow an attempt to so prosecute." However, both 1991 amendments were repealed by St. 1998, c. 180, § 69 (effective October 21, 1998).

2. **Non-firing firearm.** See the first supplemental instruction to Instruction 7.600 (Carrying a Firearm).

3. **Passenger in vehicle.** See the third supplemental instruction to Instruction 7.600 (Carrying a Firearm).

7.625 POSSESSION OF AMMUNITION

G.L. c. 269, § 10(h), May 2017

The defendant is charged with unlawfully possessing ammunition.

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

First: **That the defendant possessed an item;**

Second: **That the item meets the legal definition of "ammunition"; (and)**

Third: **That the defendant knew that he (she) possessed that ammunition.**

If there is evidence of one of the statutory exceptions, use one of the following:

A. If there is evidence that the defendant had a firearm ID card. **and**

Fourth: **That the defendant did *not* have a valid firearm ID card.**

B. If there is evidence that the defendant was exempt. **and**

Fourth: **That the defendant did *not* qualify for one of the exemptions in the law that are a substitute for having a valid firearm ID card.**

See Instruction 3.160 (License or Authority).

G.L. c. 278, § 7; *Commonwealth v. Gouse*, 461 Mass. 787, 802-07 (2012); *Commonwealth v. Jones,* 372 Mass. 403, 406-07(1977).

To prove the first element, the Commonwealth must prove beyond a reasonable doubt that the defendant possessed the ammunition. A person obviously "possesses" something if he (she) has direct physical control or custody of it at a given time. An object is also considered to be in a person's possession if he (she) has

- **knowledge of the object,**
- **the ability to exercise control over that object, either directly or through another person, and**
- **the intent to exercise control over the object.**

Whether the defendant possessed the item in question is something that you must determine from all the facts and any reasonable inferences that you can draw from the facts. However, I caution you to remember that merely being present in the vicinity of an item, even if one knows that it is there, does not amount to possession.

Refer to Instruction 3.220 for a detailed explanation of "possession," and "joint possession."

To prove the second element, the Commonwealth must prove beyond a reasonable doubt that the item(s) in question was ammunition. Ammunition is defined in our law as cartridges or cartridge cases, primers (igniters), tear gas cartridges, bullets or propellant powder designed for use in any firearm, rifle or shotgun.

G.L. c. 269, § 10(o)(¶ 2)

To prove the third element, the Commonwealth must prove beyond a reasonable doubt that the defendant knew he (she) was in possession of ammunition. This requires you to make a decision about the defendant's state of mind at that time. You may examine the defendant's actions and words, and all of the surrounding circumstances, to help you determine the extent of the defendant's knowledge at the time.

Refer to Instruction 3.140 for a detailed explanation of "knowledge."

General Laws c. 269, § 10(h) also punishes "own[ing]" or "transfer[ring] possession" as well as possession of ammunition. In cases with such fact patterns, the model instruction may be adapted accordingly.

SUPPLEMENTAL INSTRUCTIONS

1. Absence of evidence of firearm ID card **You have heard some reference to (a firearm ID card) (a legal exemption from the requirement of a firearm ID card). There was no evidence in this case that the defendant had a firearm ID, and no evidence that the defendant qualified for one of the**

legal exemptions that are a substitute for having a firearm ID card. For that reason, the issue of a firearm ID card or exemption is not relevant to your deliberations in this case, and therefore you should put it out of your mind.

This instruction is recommended only when, in the jury's presence, there has been some reference to, but not evidence of, a firearm ID card or exemption.

2. Knowledge of firearm ID card requirement. **You have heard some mention that the defendant did not know that he (she) was required to have a firearm ID card before possessing ammunition. The Commonwealth is *not* required to prove that the defendant knew that the law required him (her) to have a firearm ID card before possessing ammunition.**

This instruction is recommended only when it is necessary to correct such a misimpression.

NOTES:

1. **Notice of affirmative defense.** The affirmative defense of license or exemption from the licensing requirement is available only if notice of such a claim has been properly given pursuant to Mass. R. Crim. P. 14(b)(3). *See Commonwealth* v. *Humphries*, 465 Mass. 762, 771 (2013).

2. **Firearm identification cards, exemptions**. The issuance of firearm identification cards is governed by G.L. c. 140, §§ 129B-129D. Section 129C lists a number of exemptions from the requirement of a firearm identification card. Generally, these exemptions cover nonresidents in various circumstances, federally licensed firearms manufacturers or wholesale dealers and persons employed by them, persons in the military, police officers and other peace officers of any jurisdiction either in performance of their duties or who are duly authorized to possess, members of a veteran's organization when on official parade duty or ceremonial occasions, to list a few. G.L. c. 140, § 129C, ¶ 4 (a) - (u).

3. **Duplicative convictions**. A conviction for unlawful possession of ammunition is duplicative of a conviction for unlawful possession of a loaded firearm where all of the ammunition is loaded in the firearm. *Commonwealth v. Johnson*, 461 Mass. 44, 53-54 (2011) (separate sentences for each crime violated the double jeopardy clause because the defendant was punished twice for possession of the same ammunition). This is distinguishable from situations where ammunition is found loaded in a firearm and also found elsewhere in the possession of the defendant as the jury can be instructed to distinguish among the ammunition. *Id*. at 53.

7.630 IMPROPER STORAGE OF A FIREARM

G.L. c. 140, § 131L
Issued May 2014

The defendant is charged with improperly storing a (firearm) (rifle) (shotgun).

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

First: **That the defendant stored or kept a (firearm) (rifle) (shotgun);**

Second: **That the defendant was not carrying the (firearm) (rifle) (shotgun) or did not have the (firearm) (rifle) (shotgun) under (his) (her) immediate control; and**

Third: **That the (firearm) (rifle) (shotgun) was not secured in one of two ways — either by storing the (firearm) (rifle) (shotgun) in a locked container, or with a properly engaged tamper-resistant mechanical lock or other safety device.**

A (firearm) (rifle) (shotgun) is carried when there is actual physical possession of the (firearm) (rifle) (shotgun). A (firearm) (rifle) (shotgun) is also under the control of a person if the person is sufficiently near the (firearm) (rifle) (shotgun) to immediately prevent its unauthorized use.

A safety device is properly engaged if it renders the (firearm) (rifle) (shotgun) inoperable by any person other than the owner or other lawfully authorized user.

Here, define "Possession" (Instruction 3.220).

A "firearm" is defined in our law as:

> **"a pistol, revolver or other weapon . . .**
>
> **loaded or unloaded,**
>
> **from which a shot or bullet can be discharged**
>
> **and . . . the length of [whose] barrel . . . is less than sixteen inches."**

That definition can be broken down into two requirements: *First*, it must be a weapon capable of discharging a shot or bullet; and *Second*, it must have a barrel length of less than 16 inches. The term "barrel length" refers to "that portion of a firearm . . . through which a shot or bullet is driven, guided or stabilized, and [includes] the chamber."

G.L. c. 140, § 121. *Commonwealth v. Tuitt*, 393 Mass. 801, 810 (1985) (jury can determine from inspection that a weapon is a "firearm"); *Commonwealth v. Fancy*, 349 Mass. 196, 204 (1965) (same). See *Commonwealth v. Sperrazza*, 372 Mass. 667, 670 (1977) (testimony about "revolver" or "handgun" will support inference that barrel was under 16 inches); *Commonwealth v. Bartholomew*, 326 Mass. 218, 219 (1950) (not necessary that firearm be loaded).

A "rifle" is defined in our law as: "A weapon having a rifled bore with a barrel length equal to or greater than 16 inches and capable of discharging a shot or bullet for each pull of the trigger." The term "barrel length" refers to "that portion of a . . . rifle . . . through which a shot or bullet is driven, guided or stabilized, and [includes] the chamber."

G.L. c. 140, § 121.

A "shotgun" is defined in our law as: "A weapon having a smooth bore with a barrel length equal to or greater than 18 inches with an overall length equal to or greater than 26 inches, and capable of discharging a shot or bullet for each pull of the trigger." The term "barrel length" refers to "that portion of a . . . shotgun . . . through which a shot or bullet is driven, guided or stabilized, and [includes] the chamber."

G.L. c. 140, § 121.

The Commonwealth must prove beyond a reasonable doubt that the defendant stored the item *and* also knew that the item was a (firearm) (rifle) (shotgun) within the common meaning of that term. If it was a conventional (firearm) (rifle) (shotgun), with its obvious dangers, the Commonwealth is not required to prove that the defendant knew that the item met the legal definition of a (firearm) (rifle) (shotgun).

See Instruction 3.140 (Knowledge).

SUPPLEMENTAL INSTRUCTION

Securely locked container. **To qualify as a securely locked container, the container must be capable of being unlocked only by means of a key, combination, or other similar means. Examples of securely locked containers may include safes, (firearm) (rifle) (shotgun) boxes, locked cabinets, gun cases, and lock boxes. In determining whether a particular storage container is a securely locked container, you may consider all the circumstances presented by the evidence including the nature of the locking mechanism, whether the container was itself within a place, a compartment, or a container that was itself locked and alarmed, and whether under all the circumstances it was secured adequately to deter all but the most persistent persons from gaining access.**

NOTES:

1. **A weapon not stored if "carried" or "under the control."** The weapon shall not be deemed stored or kept if carried by or under the control of the owner or other lawfully authorized user. G.L. c. 140, §131L(a). "Carried" requires actual physical possession of the firearm, and "under the control" requires that a person be sufficiently nearby the firearm to prevent immediately its unauthorized use. *Commonwealth v. Reyes*, 464 Mass. 245, 258 n.19 (2013), citing *Commonwealth v. Patterson*, 79 Mass. App. Ct. 316, 319 (2011).

2. **Non-firing firearm.** See the first supplemental instruction to Instruction 7.600 (Carrying a Firearm).

3. **Jurisdiction.** There is no District Court jurisdiction for violations of G.L. c. 140, § 131L involving a large capacity weapon or machine gun, as defined in G.L. c. 140, § 121, or in other cases in which minors may have access. G.L. c. 140, § 131L(b)-(e).

4. **Statute not applicable to certain weapons.** The statute does not apply to the storage or keeping of any firearm, rifle, or shotgun with matchlock, flintlock, percussion cap, or similar type of ignition system manufactured in or prior to the year 1899, or to any replica of any such firearm, rifle, or shotgun if such replica is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition. G.L. c. 140, § 131L(f).

7.640 DEFACING FIREARM SERIAL NUMBER; RECEIVING FIREARM WITH DEFACED SERIAL NUMBER

G.L. c. 269 11C
2009 Edition

I. DEFACING FIREARM SERIAL NUMBER

The defendant is charged with defacing or obliterating the serial or identification number of a firearm. Section 11C of chapter 269 of our General Laws provides as follows:

"Whoever removes, defaces, alters, obliterates or mutilates in any manner the serial number or identification number of a firearm, or in any way participates therein, shall be punished . . . ."

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

First: **That the item in question was a firearm;**

Second: **That defendant knew that it was a firearm; and**

Third: **That the defendant intentionally removed, defaced, altered, obliterated or mutilated in some manner a serial or identification number on the firearm.**

Our law provides that every firearm shall bear a serial number permanently inscribed on a visible metal area of the firearm. You must determine whether the Commonwealth has proven beyond a reasonable doubt that a serial or identification number on the firearm was removed, defaced, altered, obliterated or mutilated by the defendant. The Commonwealth need not prove that every part of the number was physically damaged. It must prove that some part of the number was intentionally removed, defaced, altered, obliterated or mutilated or, to use other words, damaged, scratched out, or destroyed by the defendant.

Definition of firearm. **The Commonwealth must prove that the damaged number was on a "firearm." A firearm is defined in section 121 of chapter 140 of our General Laws as:**

"a pistol, revolver or other weapon . . . loaded or unloaded, from which a shot or bullet can be discharged and the length of [whose] barrel is less than sixteen inches . . . ."

For an item to be a firearm, it must:

First: **be a weapon;**

Second: **be capable of discharging a shot or bullet; and**

Third: **have a barrel length of less than 16 inches. "Barrel length" refers to "that portion of a firearm . . . through which a shot or bullet is driven, guided or stabilized, and [includes] the chamber."**

G. L. c. 140 § 121.

The Commonwealth must also prove that defendant *knew* that the item was a "firearm," within the common meaning of that term. If the item is a conventional firearm, with its obvious dangers, the Commonwealth is not required to prove that the defendant knew that the item met the *legal* definition of a firearm.

SUPPLEMENTAL INSTRUCTION

Possession as prima facie evidence of defacing. **You have heard some evidence in this case suggesting that the defendant possessed a firearm with a (defaced) (altered) (obliterated) serial number. If you find that fact to be proven, you are permitted to accept it also as sufficient proof that the defendant was the person who removed, defaced, altered, obliterated or mutilated the serial or identification number on that firearm.**

If there *is* contrary evidence about whether it was the defendant who caused the damage, you are to treat this testimony about possession like any other piece of evidence, and you should weigh it along with all the rest of the evidence on the issue of who caused the damage. In the end you must be satisfied that, on all the evidence, it has been proven beyond a reasonable doubt that the defendant removed, defaced, altered, obliterated, or mutilated the serial or identification number on the firearm.

See Instruction 3.260 (Prima Facie Evidence).

Here the jury must be instructed on specific intent from Instruction 3.120 (Intent).

To summarize, the Commonwealth must prove three things beyond a reasonable doubt:

First: **That the defendant intentionally removed, defaced, altered, obliterated or mutilated in some manner a serial or identification number;**

Second: **That the number was on a firearm; and**

Third: **That the defendant knew it was a firearm.**

If you find the Commonwealth has proven each of these elements beyond a reasonable doubt, you should find defendant guilty on this charge. If you find the Commonwealth has not proven one or more of these three elements beyond a reasonable doubt, you must find defendant not guilty on this charge.

Commonwealth v. Rupp, 57 Mass. App. Ct. 377, 386, 783 N.E.2d 475, 482 (2003).

II. RECEIVING FIREARM WITH DEFACED SERIAL NUMBER

The defendant is charged with receiving a firearm with a defaced or obliterated serial or identification number. Section 11C of chapter 269 of our General Laws provides as follows:

"Whoever... receives a firearm with knowledge that its serial number or identification number has been removed, defaced, altered, obliterated or mutilated in any manner shall be punished . . . ."

To prove the defendant guilty of this offense, the Commonwealth must prove five things beyond reasonable doubt:

First: **That the item in question was a firearm;**

Second: **That the defendant received the firearm;**

Third: **That the defendant knew that the item was a firearm;**

Fourth: **That the serial number or identification number on the firearm was removed, defaced, altered, obliterated, or mutilated in some manner; and**

Fifth: **That the defendant knew that the serial or identification number had been removed, defaced, altered, obliterated, or mutilated in some manner at the time when he (she) received it.**

Our law provides that every firearm shall bear a serial number permanently inscribed on a visible metal area of the firearm. You must determine whether the Commonwealth has proven beyond a reasonable doubt that a serial or identification number on the firearm at issue here had been removed, defaced, altered, obliterated or mutilated. The Commonwealth need not prove that every part of the number was physically damaged. It must prove that some part of the number was removed, defaced, altered, obliterated or mutilated or, to use other words, damaged, scratched out, or destroyed.

Here the jury must be instructed on the definition of a "Firearm" as set forth in I above.

To prove that the defendant "received" the firearm, the Commonwealth must prove that he (she) knowingly took custody or control of it. It is not necessary that the defendant personally possessed the firearm, as long as it is proved that he (she) knowingly exerted control over it in some way.

To establish that a firearm was under the defendant's "control," it is not enough for the Commonwealth just to prove that the defendant was present in the same place as the firearm. The Commonwealth must also prove that the defendant knew that the firearm was there, and that the defendant had both the power and intent to exercise control over the firearm. It is not necessary for the Commonwealth to prove that the defendant had exclusive control over the firearm.

SUPPLEMENTAL INSTRUCTION

Possession as prima facie evidence of knowledge of defacing. **You have heard some evidence in this case suggesting that the defendant knowingly received a firearm whose serial identification number had been removed, defaced, altered or obliterated, or mutilated in some manner at the time when he (she) received it. If you find that fact to be proven, you are permitted to accept it also as sufficient proof that defendant knew that the serial or identification number on that firearm had been removed, defaced, altered, obliterated or mutilated. You are not required to accept that as proven, but you may. If there *is* contrary evidence on that issue you are to treat the testimony about the defendant's receipt of the firearm like any other piece of evidence, and you should weigh it along with all the rest of the evidence on the issue of whether the defendant knew that the serial identification number had been removed, defaced, altered or obliterated, or mutilated in some manner at the time when he (she) received it.**

In the end, you must be satisfied that, on all the evidence, it has been proven beyond a reasonable doubt that the defendant knew that the serial or identification number had been removed, defaced, altered, obliterated, or mutilated in some manner at the time when he received it.

See *Instruction 3.260* (Prima Facie Evidence).

To summarize, the Commonwealth must prove five things beyond reasonable doubt:

First: **That the item in question is a firearm;**

Second: **That the defendant received the firearm;**

Third: **That the defendant knew that the item was a firearm;**

Fourth: **That the serial number or identification number on the firearm was removed, defaced, altered, obliterated, or mutilated in some manner; and**

Fifth: **That the defendant knew that the serial or identification number had been removed, defaced, altered, obliterated, or mutilated in some manner at the time when he received it.**

If you find that the Commonwealth has proven each of these five elements beyond reasonable doubt, you should find defendant guilty on this charge. If you find that the Commonwealth has failed to prove one or more of these five elements beyond reasonable doubt, you must find defendant not guilty on this charge.

See *Commonwealth v. Alcala*, 54 Mass. App. Ct. 49, 52; 763 N.E.2d 516, 519 (2002) as to circumstances which may evidence "guilty knowledge," or " consciousness of guilt" in connection with receiving items not immediately identifiable as illegal.

7.660 POSSESSION OF FIREARM WITH DEFACED SERIAL NUMBER DURING FELONY

G.L. c. 269, § 11B
2009 Edition

The defendant is charged with possessing a firearm with a removed, defaced, altered, obliterated or mutilated serial number or identification number while committing a felony.

Section 11B of chapter 269 of our General Laws provides as follows:

"Whoever, while in the commission or attempted commission of a felony, has in his possession or under his control a firearm the serial number or identification number of which has been removed, defaced, altered, obliterated or mutilated in any manner

shall be punished . . . ."

To prove the defendant guilty of this offense, the Commonwealth must prove four things, beyond a reasonable doubt:

***First:* That the defendant committed or attempted to commit a felony;**

***Second*: That while doing so, the defendant knowingly possessed a firearm (*or*) had a firearm under his (her) control;**

Third: **That the serial or identification number on that firearm had been removed, defaced, altered, obliterated or mutilated in some manner; and**

Fourth: **That the defendant knew that the serial or identification number had been removed, defaced, altered, obliterated or mutilated.**

The Commonwealth is not required to prove that the defendant caused the damage to the serial or identification number.

I will now explain some of these legal principles and words in detail.

To prove that the defendant was committing or attempting to commit a felony, the Commonwealth must prove that the defendant was committing or attempting to commit a crime for which a person may be sentenced to state prison. Other, lesser offenses are called "misdemeanors."

If you conclude that the defendant was committing or was attempting to commit the crime of _____ (or _____), I instruct you as a matter of law that (either of those) (any of those) offense(s) would be a felony.

Here instruct on Possession (*Instruction 3.220*) and on "Attempt" (*Instruction 4.120*) if required by the evidence.

If no specific felony was charged, or the evidence suggests a different felony.

The Commonwealth is not required to prove that the defendant was committing or attempting to commit any particular felony, but it must prove that the defendant was committing or attempting to commit *some* felony.

The Commonwealth must prove that the object (possessed) (or) (controlled) was a "a pistol, revolver or other weapon . . . loaded or unloaded, from which a shot or bullet can be discharged and . . . the length of [whose] barrel is less than sixteen inches . . . ."

Proof that an object is a firearm requires proof of three things:

***First:* That the item is a pistol, revolver or other weapon;**

***Second:* That it is capable of discharging a shot or bullet; and**

***Third:* That it has a barrel length of less than 16 inches.**

"Barrel length" refers to "that portion of a firearm . . . through which a shot or bullet is driven, guided or stabilized, and [includes] the chamber."

G.L. c. 269, § 11A; G.L. c. 140, § 121.

The Commonwealth must also prove that the defendant knew that the item was a "firearm." However, if it was a conventional firearm, with its obvious dangers, the Commonwealth is not required to prove that the defendant knew that the item met the legal definition of a firearm.

Our law provides that every firearm shall bear a serial number permanently inscribed on a visible metal area of the weapon. The Commonwealth must prove beyond reasonable doubt that the serial or identification number on the firearm involved here had been removed, defaced, altered, obliterated or mutilated. It is not necessary for the Commonwealth to prove that absolutely every part of the number had been physically removed, only that the number had been removed, defaced, altered, obliterated or mutilated in some manner or, to use other words, that the number had been damaged, scratched out or destroyed.

The Commonwealth must also prove that the defendant knew at the time of the offense that the number had been removed, defaced, altered, obliterated or mutilated. This requires you to make a decision about the defendant's state of mind at that time. It is obviously impossible to look directly into a person's mind. But in our everyday affairs, we often look to the actions of others in order to decide what their state of mind is at the time. In this case, you may examine the defendant's actions and words, and all of the surrounding circumstances, to help you determine the extent of the defendant's knowledge at that time.

You should consider all of the evidence, and any reasonable inferences you draw from the evidence, in determining whether the Commonwealth has proved beyond a reasonable doubt, as it must, that the defendant acted with the knowledge that the serial or identification number had been damaged.

To summarize, the Commonwealth must prove four things beyond a reasonable doubt:

***First:* That the defendant committed or attempted to commit a felony;**

***Second*: That while doing so, the defendant knowingly possessed a firearm (*or*) had a firearm under his (her) control;**

***Third:* That the serial or identification number of that firearm had been removed, defaced, altered, obliterated or mutilated in some manner;**

and

***Fourth:* That the defendant knew that the serial or identification number had been removed, defaced, altered, obliterated or mutilated.**

If you find the Commonwealth has proven each of these four elements beyond a reasonable doubt, you should find the defendant guilty on this charge. If you find the Commonwealth has not proven one or more of these four elements beyond reasonable doubt, you must find the defendant not guilty on this charge.

SUPPLEMENTAL INSTRUCTIONS

1. Knowledge of law not required. **The requirement that the defendant's act must have been done "knowingly" to be a criminal offense means that it must have been done voluntarily and intentionally, and not because of mistake, accident, negligence or other innocent reason. But it is not necessary for the defendant to have known of the law that makes it a crime to commit or attempt to commit a felony while in possession or control of a firearm which has a defaced serial or identification number. Generally ignorance of the law is not an excuse for violating the law.**

2. "Serial number." **A firearm's "serial number" is the number stamped or placed on that firearm by the manufacturer when the firearm was made.**

G.L. c. 269, § 11A**.**

3. "Identification number." **A firearm's "identification number" is the number that has been stamped or placed on that firearm by the Massachusetts State Police.**

G.L. c. 269, § 11A.

NOTE:

1.Definition of Firearm. General Laws c. 269, § 11A provides that for purposes of § 11B the definition of "firearm" in G.L. c. 140, § 121 is to be used: "a pistol, revolver or other weapon of any description, loaded or unloaded, from which a shot or bullet can be discharged and of which the length of the barrel or barrels is less than 16 inches or 18 inches in the case of a shotgun as originally manufactured; provided, however, that the term firearm shall not include any weapon that is: (i) constructed in a shape that does not resemble a handgun, short-barreled rifle or short-barreled shotgun including, but not limited to, covert weapons that resemble key-chains, pens, cigarette-lighters or cigarette-packages; or (ii) not detectable as a weapon or potential weapon by x-ray machines commonly used at airports or walk- through metal detectors."

7.680 CARRYING CERTAIN DANGEROUS WEAPONS

G.L. c. 269, § 10 [b]
2009 Edition

The defendant is charged with unlawfully carrying a _____ (on his [her] person) (on his [her] person or under his [her] control in a vehicle).

Section 10(b) of chapter 269 of our General Laws provides as follows:

"Whoever, except as provided by law,

(carries on his person) (carries on his person or under his control in a vehicle)

(any stiletto)

(any . . . dagger)

(any . . . device or case which enables a knife with a locking blade to be drawn at a locked position)

(any ballistic knife)

(any knife with a detachable blade capable of being propelled by any mechanism)

(any . . . dirk knife)

(any knife having a double-edged blade)

(a switch knife)

(any knife having an automatic spring release device by which the blade is released from the handle, having a blade of over one and one-half inches)

(a slung shot)

(a . . . blowgun)

(a . . . blackjack)

(metallic knuckles or knuckles of any substance which could be put to the same use with the same or similar effect as metallic knuckles)

(nunchaku, zoobow, also known as klackers or kung fu sticks, or any similar weapon consisting of two sticks of wood, plastic or metal connected at one end by a length of rope, chain, wire or leather)

(a shuriken or any similar pointed starlike object intended to injure a person when thrown)

(any armband, made with leather which has metallic spikes, points or studs or any similar device made from any other substance)

(a cestus or similar material weighted with metal or other substance and worn on the hand)

(a manrikigusari or similar length of chain having weighted ends)

. . . shall be punished . . . .”

To prove that the defendant is guilty of this offense, the Commonwealth must prove three things beyond a reasonable doubt:

First: **That the item involved is a _____ ;**

Second: **That the defendant carried the item (on his [her] person) (under his [her] control in a vehicle); and**

Third: **That the defendant knew that he (she) was carrying the item (on his [her] person) (under his [her] control in a vehicle).**

This model instruction covers the offense set out in the first clause of G.L. c. 269, § 10(b). See Instruction 7.700 (Carrying a Dangerous Weapon When Arrested) for the offense set out in the second clause of § 10(b).

See *Commonwealth v. Miller*, 22 Mass. App. Ct. 694, 494 N.E.2d 29 (1986) (definition of dirk knife).

NOTE:

Advance notice of defense based on exemption. A defendant may not rely on a defense based on a license, exemption, or claim of authority or ownership unless he or she has filed an advance notice of such defense with the court and the prosecutor. For cause shown, the judge may allow late filing or a continuance, or may make other appropriate orders. Mass. R. Crim. P. 14(b)(3).

7.700 CARRYING A DANGEROUS WEAPON WHEN ARRESTED

G.L. c. 269, § 10 [b]
2009 Edition

The defendant is charged with carrying a dangerous weapon (on his [her] person) (under his [her] control in a vehicle) when he (she) was arrested (on a warrant) (for a breach of the peace).

Section 10(b) of chapter 269 of our General Laws provides as follows:

"[W]hoever, when arrested (upon a warrant for an alleged crime) (while committing a breach or disturbance of the public peace) (is armed with) (has on his person) (has on his person or under his control in a vehicle)

a . . . dangerous weapon . . .

shall be punished . . . ."

To prove that the defendant is guilty of this offense, the Commonwealth must prove four things beyond a reasonable doubt:

First: **That the defendant was (arrested on a warrant) (arrested without a warrant for committing a breach of the peace);**

Second: **That at the time of his (her) arrest the defendant (was armed with** *[alleged weapon]* **) (had** *[alleged weapon]* **on his [her] person) (had** *[alleged weapon]* **under his [her] control in a vehicle);**

Third: **That the defendant knew that he (she) was carrying the** *[alleged weapon]* **(on his [her] person) (under his [her] control in a vehicle);**

and

Fourth: **That the** *[alleged weapon]* **was a dangerous weapon.**

A. If the alleged weapon is dangerous per se. **A dangerous weapon is an item which, by its nature, is capable of causing serious injury or death. I instruct you that, as a matter of law, a _____ is a dangerous weapon.**

B. If the alleged weapon is not dangerous per se. **An item is a dangerous weapon if it is used in a way that it reasonably appears to be capable of causing serious injury or death to another person. In deciding whether an item is a dangerous weapon, you may consider the circumstances under which it was possessed, the nature, size and shape of the item, and the manner in which it was handled or controlled.**

Commonwealth v. O'Connor, 7 Allen 583, 584 (1863) (statutory purpose is to ensure safety of arresting officers); *Commonwealth v. Blavackas*, 11 Mass. App. Ct. 746, 752-753, 419 N.E.2d 856, 859-860 (1981) (complaint that does not charge first element charges no crime). For cases on what constitutes a "dangerous weapon," see the notes to Instruction 6.300 (Assault and Battery by Means of a Dangerous Weapon).

This model instruction covers the offense set out in the second clause of G.L. c. 269, § 10(b). Note that this offense is inapplicable to firearms, rifles and shotguns (which are covered by § 10[a]) and to the per se dangerous weapons which are listed in the first clause of § 10(b). See Instruction 7.680 (Carrying Certain Dangerous Weapons) for the offense set out in the first clause of § 10(b). See the notes to Instruction 6.300 (Assault and Battery by Means of a Dangerous Weapon) as to what constitutes a dangerous weapon.

SUPPLEMENTAL INSTRUCTION

Breach of the peace. **In this case you have heard testimony suggesting that the defendant was arrested without a warrant for committing the offense of** *[alleged offense for which arrested]* **. If it is proved to you beyond a reasonable doubt that the defendant committed that offense, I instruct you that as a matter of law such an offense constitutes a breach of the public peace.**

Not every crime is a breach of the peace. An affray, assault, or disorderly conduct is a typical breach of the peace. *Commonwealth v. Gorman*, 288 Mass. 294, 298-299, 192 N.E. 618, 620 (1934) (OUI is a breach of the peace). See *Commonwealth v. Cavanaugh*, 366 Mass. 277, 280-281, 317 N.E.2d 480,

482-483 (1974) (high speed traffic chase is a breach of the peace); *Commonwealth v. Wright*, 158 Mass. 149, 158-159, 33 N.E. 82, 86 (1893) (possession of short lobsters is not a breach of the peace); *McLennon v. Richardson*, 15 Gray 74, 77 (1860) (illegal sale of alcohol is not a breach of the peace). See also Instruction 7.200 (Disturbing the Peace).

NOTES:

1. **Possession of billy.** The statute also specifically punishes possession of a “billy” when the defendant is arrested under one of the two specified circumstances. If the alleged weapon is a billyclub, the model instruction should be adapted appropriately.

2. **Knives as dangerous weapons.** Straight knives typically are regarded as dangerous per se while folding knives, at least those without a locking device, typically are not. Possession of a closed folding knife is a dangerous weapon for purposes of this offense only if used or handled in a manner that made it a dangerous weapon. *Commonwealth v. Turner,* 59 Mass. App. Ct. 825, 798 N.E.2d 315 (2003). See also the notes to Instruction 6.300 (Assault and Battery by Means of a Dangerous Weapon).

DRUG OFFENSES

7.800 DISTRIBUTION OF A CONTROLLED SUBSTANCE; POSSESSION WITH INTENT TO DISTRIBUTE A CONTROLLED SUBSTANCE

G.L. c. 94C §§ 32-32D
2009 Edition

The defendant is charged with having unlawfully (distributed) (possessed with the intent to distribute) a Class ___ controlled substance, namely ____ .

Section ___ of chapter 94C of our General Laws provides as follows:

"Any person who knowingly or intentionally . . . (distributes) (possesses with intent to . . . distribute)

a controlled substance

[categorized by the law] in Class ___ . . .

shall be punished . . . ."

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

***First:* That the substance in question is a Class ___ controlled substance, namely _____ ;**

Second: **That the defendant (distributed some perceptible amount of that substance to another person or persons) (possessed some perceptible amount of that substance with the intent to distribute it to another person or persons); and**

Third: **That the defendant did so knowingly or intentionally.**

The relevant statutory sections (G.L. c. 94C, §§ 32 [Class A], 32A [Class B], 32B [Class C], 32C [Class D], and 32D [Class E]) also penalize manufacturing, dispensing, cultivating, or possession with intent to manufacture, dispense or cultivate a controlled substance. Where such alternatives are charged, the model instruction may be adapted as necessary. Definitions of "manufacture" and "dispense" may be found in G.L. c. 94C, § 1.

Since the enactment of St. 1987, c. 266, the District Court has final jurisdiction only over first offenses involving distribution of Class A, B or C controlled substances, but has final jurisdiction over both first and subsequent offenses involving distribution of Class D or E controlled substances.

See G.L. c. 94C, § 31 for the statutory schedule of controlled substances.

As to the first element, I instruct you as a matter of law that our statutes define _____ as a Class ___ controlled substance. It is your duty to determine whether or not the material in question is in fact _____ . In doing so, you may consider all the relevant evidence in the case, including the testimony of any witness who may have testified either to support or to dispute the allegation that the material in question was _____.

As to the second element, (distribution) (possession with intent to distribute), the term "distribute" means to actually deliver a controlled substance to another person. It is irrelevant whether any money or other compensation was involved.

If the charge is possession with intent to distribute.

First define "possession" from Instruction 3.220.

If it has been proved that the defendant did possess a controlled substance, you will have to determine whether it was held solely for his (her) own use, or whether it was intended for distribution to others. Among the factors you may consider in making that determination are (how large a quantity of drugs were possessed) (how pure in quality the drugs were) (what the street value of the drugs was) (what the defendant's financial resources were) (how the drugs were packaged) (whether other items were found along with the drugs which might suggest drug sales, such as cutting powder or packaging materials, scales, or large amounts of cash) (whether there is any evidence suggesting that a sale was in progress) (whether there is any evidence that these drugs were part of a larger stash of drugs) (whether there is any evidence that the defendant repeatedly traveled at short intervals to known drug centers).

A number of relevant but complex definitions are given in G.L. c. 94C, § 1. To "distribute" is to "deliver other than by administering or dispensing." To "deliver" is defined in turn as "to transfer, whether by actual or constructive transfer, a controlled substance from one person to another, whether or not there is an agency relationship." "Administer" is defined as "the direct application of a controlled substance whether by injection, inhalation, ingestion, or any other means . . . by . . . a practitioner, or . . . a nurse at the direction of a practitioner in the course of his professional practice, or . . . an ultimate user or research subject at the direction of a practitioner in the course of his professional practice." To "dispense" is defined as "to deliver a controlled substance to an ultimate user or . . . [his] agent . . . by a practitioner or pursuant to the order of a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling, or compounding necessary for such delivery." Because of their complexity, it is recommended that the jury be given these definitions in full only where there is an issue as to whether the drugs were possessed or distributed lawfully.

The third thing the Commonwealth must prove beyond a reasonable doubt is that the defendant not only (distributed a Class ___ controlled substance) (possessed a Class ___ controlled substance with the intent to distribute it), but did so knowingly or intentionally. You may find that the defendant acted knowingly or intentionally if he (she) did so consciously, voluntarily and purposely, and not because of ignorance, mistake or accident.

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

The Commonwealth is required to prove only that the defendant knew that she possessed a controlled substance, but not necessarily that she knew she possessed any particular drug. *Commonwealth v. DePalma*, 41 Mass. App. Ct. 798, 802, 673 N.E.2d 882, 885 (1996) (cocaine).

Where it is charged that the violation occurred within 1,000 feet of school property or within 100 feet of a public park or playground, here give *Instruction 7.860*.

NOTES:

1. **DPH, State Police or U. Mass. Medical School certificate of analysis**. See the supplemental instruction to Instruction 7.820. For the statutory pretrial procedure for destroying all but a sample of large quantities of controlled substances, see G.L. c. 94C, § 47A.

2. **Forfeiture motions to forfeit drug proceeds** can be filed in a criminal case pursuant to G.L. c. 94C, § 47(b), without the need for a separate in rem civil forfeiture action in the Superior Court pursuant to § 47(d). As to time and hearing requirements, see *Commonwealth v. Goldman*, 398 Mass. 201, 203-204, 496 N.E.2d 426, 427-428 (1986). While § 47(b) contains no dispositional provisions, the funds should be distributed in the same manner as specified in § 47(d) — i.e., half to the prosecuting district attorney, and half to the involved police department(s). *District Attorney for the Northwestern Dist. v. Eastern Hampshire Div. of Dist. Court Dep't*, 452 Mass. 199, 892 N.E.2d 710 (2008).

As to whether a judge has discretion to exclude questions at trial to prosecution witnesses about potential forfeitures, allegedly probative of bias, see *Commonwealth v. Sendele*, 18 Mass. App. Ct. 755, 760-761, 470 N.E.2d 811, 814 (1984).

3. **Possession a lesser included offense**. Possession of a controlled substance is a lesser included offense of a charge of distribution or possession with intent to distribute that controlled substance. *Commonwealth v. Perry*, 391 Mass. 808, 813-814, 464 N.E.2d 389, 393 (1984); *Commonwealth v. Ruggerio*, 32 Mass. App. Ct. 964, 966, 592 N.E.2d 753, 755 (1992). Knowingly being present where heroin is kept (G.L. c. 94C, § 35) is not a lesser included offense of a charge of distribution or possession with intent to distribute a Class A controlled substance, which does not require presence. *Commonwealth v. Saez*, 21 Mass. App. Ct. 408, 412 n.3, 487 N.E.2d 549, 552 n.3 (1986); *Commonwealth v. Rodriguez*, 11 Mass. App. Ct. 379, 381, 416 N.E.2d 540, 542 (1981).

A defendant cannot be convicted and sentenced both for possession of and for possession with intent to distribute the same quantity of drugs. *Commonwealth v. Amendola*, 26 Mass. App Ct. 713, 713

n.1, 532 N.E.2d 75, 76 n.1 (1988). See *Kuklis v. Commonwealth,* 361 Mass. 302, 307, 280 N.E.2d 155, 159 (1976). Such separate convictions for distributing and for possession with intent to distribute are not duplicitous where separate quantities of a controlled substance are involved. *Commonwealth v. Diaz,* 383 Mass. 73, 82-85, 417 N.E.2d 950, 956-958 (1981).

4. **Sufficiency of evidence of intent to distribute.** See *Commonwealth v. Clermy*, 421 Mass. 325, 331, 656 N.E.2d 1253, 1257 (1995) (packaging of drugs in many small packets as well as possession of telephone pager, a traditional accouterment of illegal drug trade); *Commonwealth v. Roman*, 414 Mass. 642, 645, 609 N.E.2d 1217, 1219 (1993) (possession of large amount of illegal drugs raises inference of intent to distribute); *Commonwealth v. Johnson,* 413 Mass. 598, 602 N.E.2d 555 (1992) (purchase with another's money intending to transfer drugs to such person constitutes distribution); *Commonwealth v. Scala,* 380 Mass. 500, 511, 404 N.E.2d 83, 90 (1980) (relevant factors include quantity possessed); *Commonwealth v. Rugaber,* 369 Mass. 765, 770, 343 N.E.2d 865, 867-868 (1976) (same); *Commonwealth v. Ellis,* 356 Mass. 574, 578-579, 254 N.E.2d 408, 411 (1970) (inference from large quantities of one drug not applicable to small quantities of another drug); *Commonwealth v. Martin*, 48 Mass. App. Ct. 391, 392- 393, 721 N.E.2d 395, 397 (1999) (manner of packaging, area of high drug activity, vigorous attempt to avoid apprehension); *Commonwealth v. Pena*, 40 Mass. App. Ct. 905-906, 661 N.E.2d 119, 120 (1996) (area of high drug dealing). But see *Commonwealth v. Reid*, 29 Mass. App. Ct. 537, 538-539, 562 N.E.2d 1362, 1364 (1990) (despite arrest in "area of high drug activity," court held that "[o]n the scanty evidence of the defendant's actions, . . . it was equally as likely that the defendant was the purchaser as that he was the seller"). See *Commonwealth v. Watson*, 36 Mass. App. Ct. 252, 259-260, 629 N.E.2d 1341, 1346 (1994) ("[S]parse furnishings of the apartment indicated that it was a stash house, used solely for storing and selling drugs."); *Commonwealth v. Monterosso*, 33 Mass. App. Ct. 765, 770-771, 604 N.E.2d 1338, 1341 (1992) (several persons making short visits to defendant's apartment shortly before the search supported inference of drug distribution as opposed to possession for personal use). *Commonwealth v. Poole,* 29 Mass. App. Ct. 1003, 1004, 563 N.E.2d 253, 255 (1990) (possession as bailee with intent to retransfer to its owner constitutes distribution); *Commonwealth v. LaPerle,* 19 Mass. App. Ct. 424, 428, 475 N.E.2d 81, 84 (1985) (where other indicia of distribution, minute quantity can suffice, since defendant not required to have intended to distribute the precise quantity possessed); *Sendele,* 18 Mass. App. Ct. at 758-759, 470 N.E.2d at 813 (relevant factors include quantity, purity, packaging, separation from personal quantity, cash, price list, repeated travel to notorious drug centers); *Commonwealth v. Miller,* 17 Mass. App. Ct. 991, 991, 459 N.E.2d 136, 138 (1984) (relevant factors include apparent prior drug sales); *Commonwealth v. Woodon,* 13 Mass. App. Ct. 417, 422-424, 433 N.E.2d 1234, 1238-1239 (1982) (relevant factors include cash, whether sale in progress, whether part of larger stash; separate packages relevant only if more consistent with distribution than personal use); *Commonwealth v. Fiore,* 9 Mass. App. Ct. 618, 624, 403 N.E.2d 953, 957, cert. denied, 449 U.S. 938 (1980) (relevant factors include street value of drugs).

See also *Commonwealth v. Marchese*, 54 Mass. App. Ct. 916, 918, 767 N.E.2d 103, 105 (2002) (prosecutor's comment that there was no evidence of defendant's personal use of drugs improper because it could be construed as "asking the jury to infer the defendant's guilt from his failure to produce direct evidence of his use of cocaine"); *Commonwealth v. McShan,* 15 Mass. App. Ct. 921, 922, 444 N.E.2d 948, 950 (1983) (reversible error to exclude question to police witness whether quantity consistent with personal use); *Commonwealth v. Huffman,* 11 Mass. App. Ct. 185, 190, 414 N.E.2d 1032, 1035 (1981) (reversible error to exclude defendant's testimony that drugs intended solely for personal use), aff'd on other grounds, 385 Mass. 122, 430 N.E.2d 1190 (1982).

7.820 POSSESSION OF A CONTROLLED SUBSTANCE

G.L. c. 94C § 34
2009 Edition

The defendant is charged with unlawful possession of _____ . Section 34 of chapter 94C of our General Laws provides as follows:

"No person knowingly or intentionally shall possess a controlled substance unless such substance was obtained directly [from], or pursuant to a valid prescription or order from,

a [licensed] practitioner [who was] acting in the course of his professional practice,

or except as otherwise authorized [by law]."

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

***First:* That the substance in question is a controlled substance, namely: _____ ;**

***Second:* That the defendant possessed some perceptible amount of that substance; and**

***Third:* That the defendant did so knowingly or intentionally.**

As to the first element, I instruct you as a matter of law that _____ is defined as a controlled substance by our statute. It is your duty to determine whether or not the material in question is in fact _____ . In doing so, you may consider all the relevant evidence in the case, including the testimony of any witness who may have testified either to support or to dispute the allegation that the material in question was _____ .

Commonwealth v. Dawson, 399 Mass. 465, 466-467, 504 N.E.2d 1056, 1057-1058 (1987) (since offense may be proven by circumstantial evidence, it is not mandatory that drug be introduced or chemically analyzed, although sight identification alone would rarely be sufficient); *Commonwealth v. Cantres*, 405 Mass. 238, 245-246, 540 N.E.2d 149, 153-154 (1989) (same; familiarity can be based on prior use or sale coupled with observation of present substance); *Commonwealth v. LaPerle*, 19 Mass. App. Ct. 424, 428, 475 N.E.2d 81, 84 (1985) (a quantity visible to the naked eye but measurable only on an analytical balance will support a possession conviction); *United States v. Drougas*, 748 F.2d 8, 15 (1st Cir. 1984) (same). See G.L. c. 94C, § 31 for the schedule of controlled substances.

Here instruct on the definition of "Possession" (Instruction 3.220).

Finally, the Commonwealth must prove beyond a reasonable doubt that the defendant not only possessed _____, but did so knowingly or intentionally. You may find that the defendant knowingly or intentionally possessed _____ if he (she) did so consciously, voluntarily and purposely, and not because of ignorance, mistake or accident.

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

If the defendant maintains that the controlled substance was lawfully possessed pursuant to a prescription, see *Instruction 3.160* (License or Authority).

SUPPLEMENTAL INSTRUCTION

DPH, State Police, or U.Mass. Medical Center certificate of analysis. **You may consider a properly-executed certificate from (an analyst employed by the Department of Public Health) (a chemist employed by the Department of State Police) (an analyst employed by the University of Massachusetts Medical School) as evidence of the chemical composition, purity and weight of the substance tested. You are not required to accept such evidence, but you may.**

See *Instruction 3.260* (Prima Facie Evidence).

G.L. c. 22C, § 39 (State Police chemist's certificate of drug analysis); G.L. c. 111, § 13 (D.P.H. or U.Mass. Medical School chemist's certificate of drug analysis). See also G.L. c. 94C, § 47A (in misdemeanor cases, officer's testimony that he or she sent drugs by registered mail for analysis, together with return receipt, is prima facie evidence that drugs are those seized). *Commonwealth v. Chappee*, 397 Mass. 508, 520, 492 N.E.2d 719, 726 (1986) (certificate remains probative evidence throughout trial even if contradicted); *Commonwealth v. Sheline*, 391 Mass. 279, 285-286, 461 N.E.2d 1197, 1202-1203 (1984) (certificate should be sanitized of any aliases); *Commonwealth v. Claudio*, 405 Mass. 481, 541 N.E.2d 993 (1989) (erroneous to charge that certificate creates a "presumption" that must be followed "unless there is any evidence to the contrary to rebut that presumption"); *Commonwealth v. Reynolds*, 36 Mass. App. Ct. 963, 635 N.E.2d 254 (1994) (immaterial that certificate of analysis lacked notary public's seal).

Commonwealth v. Verde, 444 Mass. App. Ct. 279, 827 N.E.2d 701 (2005), held that the admission of a drug analysis certificate under G.L. c. 111, § 13 raises no Confrontation Clause problem under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004). See also Commonwealth v. Luis E. Melendez-Dias, 69 Mass. App. Ct. 1114, 870 N.E.2d 676, 2007 WL 2189152 (No. 05-P-1213, July 31, 2007) (unpublished opinion under Appeals Court Rule 1:28) (following Verde), further app. review denied, 449 Mass. 1113, 874 N.E.2d 407 (2007), cert. granted, — U.S. —, 128 S.Ct. 1647 (2008).

A certificate of analysis is not a prerequisite to proving that a substance is a controlled substance. *Commonwealth v. Alisha* A., 56 Mass. App. Ct. 311, 313, 777 N.E.2d 191, 193 (2002); see also *Commonwealth v. Dawson*, 399 Mass. 465, 467, 504 N.E.2d 1056, 1057 (1987) ("Proof that a substance is a particular drug need not be made by chemical analysis and may be made by circumstantial evidence").

NOTES:

1. **Medical necessity defense unavailable for marihuana.** A defendant may not offer as a defense to marihuana possession that it provides the only effective alleviation of the side effects of scleroderma, a disease resulting in the painful buildup of scar tissue throughout the body. Any benefit resulting from

alleviation of the defendant's medical symptoms would not outweigh the possible negative impact on the enforcement of the drug laws. *Commonwealth v. Hutchins*, 410 Mass. 726, 575 N.E.2d 741 (1991).

2. **Constructive possession.** In the case of constructive possession, possession implies "knowledge coupled with the ability and intention to exercise dominion and control." *Commonwealth v. Brzezinski* , 405 Mass. 401, 409, 540 N.E.2d 1325, 1331 (1989); *Commonwealth v. Amparo*, 43 Mass. App. Ct. 922, 923, 686 N.E.2d 201, 202 (1997) (setting aside verdict where no evidence that defendant "rented, occupied, spent a great deal of time or exercised control over the apartment or its contents"). Behavior tending to show that defendant knew of the presence of drugs is not sufficient, by itself, to prove that he had the ability and intent to control the drugs. *Commonwealth v. Cruz*, 34 Mass. App. Ct. 619, 623, 614 N.E.2d 702, 705 (1993); *Amparo*, 43 Mass. App. Ct. at 924, 686 N.E.2d at 202 (evidence that defendant attempted to flee out back door and possessed beeper insufficient).

3. **Joint possession.** To be a joint possessor, one must actively and personally participate in the procurement of the drugs. *Commonwealth v. Minor*, 47 Mass. App. Ct. 928, 928, 716 N.E.2d 658, 659 (1999) (holding insufficient evidence that defendant contributed to pool of money with which co-defendant bought drugs).

7.840 SALE OF DRUG PARAPHERNALIA; POSSESSION WITH INTENT TO SELL DRUG PARAPHERNALIA

G.L. c. 94C § 32I
2009 Edition

The defendant is charged with (selling drug paraphernalia) (possessing drug paraphernalia with the intent to sell it). Section 32I of Chapter 94C of our General Laws provides as follows:

> **"No person shall (sell) (possess with intent to sell) . . . drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to (plant) (propagate) (cultivate) (grow) (harvest) (manufacture) (compound) (convert) (produce) (process) (prepare) (test) (analyze) (pack) (repack) (store) (contain) (conceal) (ingest) (inhale) (or) (otherwise introduce into the human body)**
>
> **a controlled substance in violation of [the law]."**

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

First: **That the item(s) in question is (are) drug paraphernalia. Our law defines "drug paraphernalia" to include:**

"[A]ll equipment, products, devices, and materials of any kind which are primarily intended, or designed for use in (planting) (propagating) (cultivating) (growing) (harvesting) (manufacturing) (compounding) (converting) (producing) (processing) (preparing) (testing) (analyzing) (packaging) (repackaging) (storing) (containing) (concealing) (ingesting) (inhaling) (or) (otherwise introducing into the human body) a controlled substance in violation of [the law]."

Our law also lists a number of factors that you as the jury are to consider in determining whether a particular item is "drug paraphernalia."

They include the following:

- **"The proximity of the [item], in time and space, to [any] direct violation of [the law governing controlled substances];**
- **The proximity of the [item] to [any] controlled substances;**
- **The existence of any residue of controlled substances on the [item];**
- **Instructions, oral or written, provided with the [item] concerning its use;**
- **Descriptive materials accompanying the [item] which explain or depict its use;**
- **National and local advertising concerning its use;**
- **The manner in which the [item] is displayed for sale;**

• Whether the owner, or anyone in control of the [item], is a supplier of [similar] or related [items] to the community, such as a licensed distributor or dealer of tobacco products;

• Direct or circumstantial evidence of the ratio of sales of the [item] to the total sales of the business enterprise;

• The existence and scope of legitimate uses for the [item] in the community;

• Expert testimony concerning its use;

• [and any other factors you find to be relevant.]"

G.L. c. 94C, § 1, as amended by St. 1998, c. 50, § 1, and St. 2006, c. 172, § 1. *Commonwealth v. Jasmin*, 396 Mass. 653, 658, 487 N.E.2d 1383, 1387 (1986) (jury is to determine whether an item is drug paraphernalia, on instructions that include, among other considerations, reference to the statutory factors).

Because of the large number of alternatives in the statutory definition of "drug paraphernalia," it is recommended that the judge mention only those potentially relevant to the evidence in the case. The judge may also wish to permit the deliberating jury to have a copy of the statutory definition and list of relevant factors. See *Commonwealth v. Dilone*, 385 Mass. 281, 287 n.2, 431 N.E.2d 576, 580 n.2 (1982) (endorsing giving the jury a written copy of all or parts of charge). The appendix (Instruction 7.841) to this instruction may be used for that purpose.

If the Commonwealth has proved that the item constitutes drug paraphernalia, then the *Second* thing the Commonwealth must prove beyond a reasonable doubt is that the defendant (sold that item) (knowingly possessed that item with the intent to sell it).

***Thirdly:* The Commonwealth must prove beyond a reasonable doubt that when the defendant (sold that item, he [she] knew it to be drug paraphernalia) (possessed that item with the intent to sell it, he [she] knew or reasonably should have known that it would be used to [plant] [propagate] [cultivate] [grow] [harvest] [manufacture] [compound] [convert] [produce] [process] [prepare] [test] [analyze] [package] [repackage] [store] [contain] [conceal] [ingest] [inhale] or otherwise introduce into the human body a controlled substance in violation of the law).**

For a definition of "possession," see Instruction 3.220.

Where it is charged that the violation occurred within 1,000 feet of school property or within 100 feet of a public park or playground, here give Instruction 7.860.

NOTES:

1. **Hypodermic syringe or needle no longer drug paraphernalia.** Statute 2006, c. 172 (effective July 13, 2006) amended the definition of drug paraphernalia in G.L. c. 94C,§ 1 to eliminate the reference to equipment used to "inject" drugs, and to eliminate from the list of examples the prior reference to "hypodermic syringes, needles and other objects used, primarily intended for use or designed for use in parenterally injected controlled substances for the human body."

2. **Aggravated offense to sell to person under 18.** Selling drug paraphernalia to a person under eighteen years of age is an aggravated form of this offense. G.L. c. 94C, § 32*I*(b). Where the aggravated offense is charged, the model instruction must be adapted to include that additional element.

3. **Constitutionality**. A properly-drafted statute may ban drug paraphernalia without violating the First Amendment or being unconstitutionally vague on its face. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 102 S.Ct. 1186 (1982). Neither the statutory prohibition in G.L. c. 94C, § 32*I* nor the definition of drug paraphernalia in G.L. c. 94C, § 1are unconstitutionally vague. *Commonwealth v. Jasmin,* 396 Mass. 653, 656- 658, 487 N.E.2d 1383, 1386-1387 (1986).

4. **Manufacture or Purchase**. The model instruction may be appropriately adapted to cover a charge of purchase or manufacture "with intent to sell drug paraphernalia," which is also prohibited by G.L. c. 94C, § 32*I*.

7.841 DEFINITION OF "DRUG PARAPHERNALIA"; SALE OF DRUG PARAPHERNALIA; POSSESSION WITH INTENT TO SELL DRUG PARAPHERNALIA

G.L. c. 94C § 1
2009 Edition

Excerpt from General Laws chapter 94C, section 1, as amended by St. 1998, c. 50, § 1, and by St. 2006, c. 172, § 1

"'Drug paraphernalia' [includes] all equipment, products, devices and materials of any kind which are primarily intended or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, ingesting, inhaling or otherwise introducing into the human body a controlled substance in violation of [the law governing controlled substances]. It includes, but is not limited to:

(1) kits used, primarily intended for use or designed for use in planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;

(2) kits used, primarily intended for use or designed for use in manufacturing, compounding, converting, producing, processing or preparing controlled substances;

(3) isomerization devices used, primarily intended for use or designed for use in increasing the potency of any species of plant which is a controlled substance;

(4) testing equipment used, primarily intended for use or designed for use in identifying or in analyzing the strength, effectiveness or purity of controlled substances;

(5) scales and balances used, primarily intended for use or designed for use in weighing or measuring controlled substances;

(6) diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used, primarily intended for use or designed for use in cutting controlled substances;

(7) separation gins and sifters used, primarily intended for use or designed for use in removing twigs and seeds from or in otherwise cleaning or refining marihuana;

(8) blenders, bowls, containers, spoons and mixing devices used, primarily intended for use or designed for use in compounding controlled substances;

(9) capsules, balloons, envelopes and other containers used, primarily intended for use or designed for use in packaging small quantities of controlled substances;

(10) containers and other objects used, primarily intended for use or designed for use in storing or concealing controlled substances;

[There is no clause (11).]

(12) objects used, primarily intended for use or designed for use in ingesting, inhaling, or otherwise introducing marihuana, cocaine, hashish or hashish oil into the human body, such as:

(a) metal, wooden, acrylic, glass, stone, plastic or ceramic pipes, which pipes may or may not have screens, permanent screens, hashish heads or punctured metal bowls;

(b) water pipes;

(c) carburetion tubes and devices;

(d) smoking and carburetion masks;

(e) roach clips; meaning objects used to hold burning material, such as a marihuana cigarette that has become too small or too short to be held in the hand;

(f) miniature cocaine spoons and cocaine vials;

(g) chamber pipes;

(h) carburetor pipes;

(i) electric pipes;

(j) air-driven pipes;

(k) chillums;

(l) bongs;

(m) ice pipes or chillers;

(n) wired cigarette papers;

(o) cocaine freebase kits.

In determining whether an object is drug paraphernalia, a [jury] should consider, in addition to all other logically relevant factors, the following:

(a) the proximity of the object, in time and space, to a direct violation of [the law governing controlled substances];

(b) the proximity of the object to controlled substances;

(c) the existence of any residue of controlled substances on the object;

(d) instructions, oral or written, provided with the object concerning its use;

(e) descriptive materials accompanying the object which explain or depict its use;

(f) national and local advertising concerning its use;

(g) the manner in which the object is displayed for sale;

(h) whether the owner, or anyone in control of the object, is a supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(i) direct or circumstantial evidence of the ratio of sales of the object to the total sales of the business enterprise;

(j) the existence and scope of legitimate uses for the object in the community;

(k) expert testimony concerning its use.

For purposes of this definition, the phrase “primarily intended for use” shall mean the likely use which may be ascribed to an item by a reasonable person.

For purposes of this definition, the phrase “designed for use” shall mean the use a reasonable person would ascribe to an item based on the design and features of said item.

7.860 SCHOOL ZONE DRUG VIOLATION

G.L. c. 94C, § 32J
Revised January 2013

Effective August 2, 2012, St. 2012, c. 192, §§ 30-31 amended *G.L. c. 94C, § 32J* by reducing the size of the school zone area from 1,000 feet to 300 feet and by limiting the scope of the statute to offenses that occur between the hours of 5:00 AM and midnight. These changes apply to school zone drug violations committed on or after August 2, 2012.

For use with *Instruction 7.800* (Distribution of, or Possession with Intent to Distribute, a Controlled Substance) or *Instruction 7.840* (Sale of, or Possession with Intent to Sell, Drug Paraphernalia) where the complaint alleges that the violation occurred within 300 feet of school property.

First instruct on the underlying offense.

If you find the defendant guilty of the charge of _____ , you must go on to consider whether the Commonwealth has proven beyond a reasonable doubt:

First: **That the offense was committed within 300 feet of the real property comprising (a public preschool, headstart facility, elementary, vocational or secondary school) (a private accredited preschool or private accredited headstart facility) (a private elementary, vocational or secondary school); and**

Second: **That the offense was committed between five o'clock in the morning and twelve o'clock midnight.**

It does not matter whether or not the school, preschool or headstart facility was in session, but the Commonwealth must prove beyond a reasonable doubt that the offense occurred between five o'clock in the morning and twelve o'clock midnight.

It is not necessary for the Commonwealth to prove that the defendant knew that he (she) was within 300 feet of the real property of a school, preschool, or headstart facility.

Commonwealth v. Bell, 442 Mass. 118, 125-126, 810 N.E.2d 796, 801-802 (2004) ("secondary school" does not require Department of Education accreditation); *Commonwealth v. Roucoulet*, 413 Mass. 647, 601 N.E.2d 470 (1992) (defendant need not intend to distribute drugs within school zone; sufficient to have possessed drugs within school zone with intent to distribute them anywhere); *Commonwealth v. Taylor*, 413 Mass. 243, 596 N.E.2d 333 (1992) (§ 32J creates distinct offense which can be charged separately from underlying drug offense, although § 32J seems to contemplate that it will normally be tried together with underlying charge); *Commonwealth v. Labitue*, 49 Mass. App. Ct. 913, 914, 731 N.E.2d 114, 116 (2000) (same); *Commonwealth v. Gonzales*, 33 Mass. App. Ct. 728, 730, 604 N.E.2d 1317, 1319 (1992) (Commonwealth must prove that school is of type enumerated in statute; subject is not appropriate for judicial notice).

NOTES:

1. **Additional sentence.** General Laws c. 94C, § 32J provides a mandatory minimum term of imprisonment for violations of G.L. c. 94C, §§ 32, 32A-32F or *32I* committed within 300 feet of the grounds of a school, with the sentence to run from and after the expiration of the sentence for the predicate offense. For cases arising prior to August 2, 2012, the distance was 1000 feet.

2. **Constitutionality.** General Laws c. 94C, § 32J does not violate due process in providing that lack of knowledge that the defendant's drug-dealing was within 1000 feet (300 feet as of August 2, 2012) of a school is not a defense, and does not violate double jeopardy principles by requiring a separate mandatory sentence on and after that for the underlying drug offense.

3. **Measuring boundaries**. General Laws c. 94C, § 32J does not specify any particular method for establishing the boundaries of a school. See *Commonwealth v. Spano,* 414 Mass. 178, 181, 605 N.E.2d 1241, 1244 (1993) (under § 32J, distance from school should be measured in straight line from school's boundary line to site of illegal drug activity); *Commonwealth v. Johnson,* 53 Mass. App. Ct. 732, 762 N.E.2d 858 (2002) (Commonwealth need not establish exact point of school boundary, if measurement taken from point that is reasonably inferable to be located on property used for school purposes); *Commonwealth v. Cintron,* 59 Mass. App. Ct. 905, 907, 794 N.E.2d 639, 642 (2003) (under dictionary definitions of the word "site," front door of apartment building should suffice); *Commonwealth v. Rodriguez*, 40 Mass. App. Ct. 1117, 664 N.E.2d 485 (No. 94-P-1438, April 23, 1996) (unpublished opinion under Appeals Ct. Rule 1:28) ("just as a principal of a school or an arresting officer may testify as to the type of school specified in the school zone statute based on his or her personal knowledge, a principal of a school or a police officer . . . may testify as to the boundaries of the school from their personal knowledge"); *Commonwealth v. Wilson*, 49 Mass. App. Ct. 1114, 735 N.E.2d 1270 (No. 99-P-1482, June 26, 2000) (unpublished opinion under Appeals Ct. Rule 1:28) ("site" of illegal drug activity in a building is the building rather than any particular room).

4. **Surrounding land.** For purposes of G.L. c. 94C, § 32J, the "real property comprising a . . . school" may include undeveloped and unused land that is within the boundaries of the school's property and contiguous to the school's developed real estate. When "a boundary line circumscribes a public elementary school building together with adjacent school land areas which are contiguous, and not separated by intervening land under different jurisdiction, . . . § 32J is violated where the proscribed activity occurs within one thousand feet [300 feet as of August 2, 2012] of such boundary line." Section 32J does not require that the property be owned by the school department or used for school purposes. *Commonwealth v. Paige,* 54 Mass. App. Ct. 840, 768 N.E.2d 572 (2002).

5. **Preschool or headstart facilities.** Public preschools and public headstart facilities do not need to be accredited to fall within § 32J, but private preschools and headstart facilities fall within § 32J only if they are accredited. *Commonwealth v. Thomas*, 71 Mass. App. Ct. 323, 882 N.E.2d 353 (2008).

6. **Kindergarten.** A school consisting only of a kindergarten is not an "elementary school" for purposes of § 32J, since the dictionary definition of an elementary school is a school for the first six or eight grades. *Commonwealth v. Burke,* 44 Mass. App. Ct. 76, 687 N.E.2d 1279 (1997).

7.870 PARK ZONE DRUG VIOLATION

G.L. c. 94C, § 32J
Revised January 2013

For use with *Instruction 7.800* (Distribution of, or Possession with Intent to Distribute, a Controlled Substance) or *Instruction 7.840* (Sale of, or Possession with Intent to Sell, Drug Paraphernalia) where the complaint alleges that the violation occurred within 100 feet of a public park or playground.

First instruct on the underlying offense.

If you find the defendant guilty of the charge of _____ , you must go on to consider whether the Commonwealth has proven beyond a reasonable doubt that the offense was committed within 100 feet of a public park or playground.

It is not necessary for the Commonwealth to prove that the defendant knew that he (she) was within that distance from a public park or playground.

Commonwealth v. Taylor, 413 Mass. 243, 596 N.E.2d 333 (1992) (§ 32J creates distinct offense which can be charged separately from underlying drug offense, although § 32J seems to contemplate that it will normally be tried together with underlying charge); *Commonwealth v. Lawrence*, 69 Mass. App. Ct. 596, 600, 870 N.E.2d 636, 640 (2007) (defendant need not intend to distribute drugs within public park or playground); *Commonwealth v. Davie*, 46 Mass. App. Ct. 25, 703 N.E.2d 236, 238-239 (1998) (based on dictionary definitions, case law, and statutes, the word "park" as used in § 32J is sufficiently clear to permit a person of average intelligence to comprehend what conduct is made criminal); *Commonwealth v. Ramos*, 45 Mass. App. Ct. 1119, 708 N.E.2d 152 (1999) (No. 98-P-43, March 24, 1999) (unpublished opinion under Appeals Ct. Rule 1:28) (same as to "playground").

NOTES:

1. **Additional sentence.** General Laws c. 94C, § 32J provides a mandatory minimum term of imprisonment for violations of G.L. c. 94C, §§ 32, 32A-32F or *32I* committed within 100 feet of a public park or playground, with the sentence to run from and after the expiration of the sentence for the predicate offense.

2. **Constitutionality.** General Laws c. 94C, § 32J does not violate due process in providing that lack of knowledge that the defendant's drug-dealing was within 100 feet of a public park of playground is not a defense, and does not violate double jeopardy principles by requiring a separate mandatory sentence on and after that for the underlying drug offense.

3. **Measuring boundaries**. General Laws c. 94C, § 32J does not specify any particular method for establishing the boundaries of a school or public park or playground. See *Commonwealth v. Spano,* 414 Mass. 178, 181, 605 N.E.2d 1241, 1244 (1993) (under § 32J, "[a]bsent express provisions in the statute specifying the method of determining the extent of the school safety zone, there is no reason why the measurement should not be a straight line from the school's boundary line to the site of the illegal drug activity"); *Commonwealth v. Wilson*, 49 Mass. App. Ct. 1114, 735 N.E.2d 1270 (2000) (No. 99-P-1482, June 26, 2000) (unpublished opinion under Appeals Ct. Rule 1:28) (citing *Spano* in park-zone case; "site" of illegal drug activity in a building is the building rather than any particular room). See generally *Commonwealth v. Johnson,* 53 Mass. App. Ct. 732, 762 N.E.2d 858 (2002) (Commonwealth need not establish exact point of school boundary, if measurement taken from point that is reasonably inferable to be located on property used for school purposes); *Commonwealth v. Cintron,* 59 Mass. App. Ct. 905, 907, 794 N.E.2d 639, 642 (2003) (under dictionary definitions of the word "site," front door of apartment building should suffice); *Commonwealth v. Rodriguez*, 40 Mass. App. Ct. 1117, 664 N.E.2d 485 (No. 94-P-1438, April 23, 1996) (unpublished opinion under Appeals Ct. Rule 1:28) ("just as a principal of a school or an arresting officer may testify as to the type of school specified in the school zone statute based on his or her personal knowledge, a principal of a school or a police officer . . . may testify as to the boundaries of the school from their personal knowledge").

PROPERTY OFFENSES

8.100 BREAKING AND ENTERING

G.L. c. 266 § 16
2009 Edition

The defendant in this case is charged with breaking and entering a (building) (ship) (vessel) (vehicle) in the nighttime, with the intent to commit a felony, in violation of section 16 of chapter 266 of our General Laws.

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

First: **That the defendant broke into a (building) (ship) (vessel) (vehicle) belonging to another person;**

Second: **That the defendant entered that (building) (ship) (vessel) (vehicle);**

Third: **That the defendant did so with the intent to commit a felony in that (building) (ship) (vessel) (vehicle); and**

Fourth: **That this event took place during the nighttime.**

As to the first element of the offense, "breaking" has been defined as exerting physical force, even slight physical force, and thereby forcibly removing an obstruction and gaining entry. Another definition would be: moving in a significant manner anything that bars the way into the (building) (ship) (vessel) (vehicle). Some obvious examples would include breaking a window, or forcing open a door or window, or removing a plank from a wall. But there are some less obvious examples that also are considered to be "breakings." Opening a closed door or window is a breaking, even if they are unlocked. Going in through an open window that is not intended for use as an entrance is also a breaking, but going in through an unobstructed entrance — such as an open door — is not.

> *Commonwealth v. Burke*, 392 Mass. 688, 689-690, 467 N.E.2d 846, 848 (1984); *Commonwealth v. Tilley*, 355 Mass. 507, 508-509, 246 N.E.2d 176, 177-178 (1969); *Commonwealth v. Shedd*, 140 Mass. 451, 453, 5 N.E. 254, 256 (1886); *Commonwealth v. Hall*, 48 Mass. App. Ct. 727, 731, 725 N.E.2d 247, 250 (2000) (open window). See *Commonwealth v. Jeffrey Pearson*, 72 Mass. App. Ct. 1101, 888 N.E.2d 386 (No. 07-P-676, June 6, 2008) (unpublished opinion under Appeals Court Rule 1:28) (since a car window is not used or intended to enter a car, leaning torso and both arms through open window of parked car sufficient to support finding of breaking and entering).

The second element of this offense is that the defendant in fact entered the (building) (ship) (vessel) (vehicle). "Entry" is the unlawful making of one's way into a (building) (ship) (vessel) (vehicle). Entry occurs if any part of the defendant's body — even a hand or foot — or any instrument or weapon controlled by the defendant physically enters the (building) (ship) (vessel) (vehicle). Breaking an outer storm window and reaching inside between the outer and inner windows with one's hand is an entry.

> *Burke*, 392 Mass. at 691, 467 N.E.2d at 849 (reaching between outer and inner window with a tool, but not a hand, insufficient); *Commonwealth v. Lewis*, 346 Mass. 373, 377, 191 N.E.2d 753, 757 (1963).

The third element of the offense is that the defendant broke in with the intent to commit a felony. In this Commonwealth, offenses for which a person may be sentenced to state prison are called "felonies." Other, lesser offenses are called "misdemeanors."

If no specific felony was charged, or the evidence suggests a different felony. **The Commonwealth is not required to prove that the defendant intended any particular felony, but it must prove that the defendant intended to commit *some* felony.**

I instruct you that _____ (and)_____ (is a felony) (are felonies). The Commonwealth must prove that the defendant intended to commit a felony at the time he (she) broke and entered the (building) (ship) (vessel) (vehicle).

Rogan v. Commonwealth, 415 Mass. 376, 613 N.E.2d 920 (1993) (jury may find intent to commit an unspecified felony); *Commonwealth v. Poff*, 56 Mass. App. Ct. 201, 203, 775 N.E. 2d 1246 (2002) (felonious intent must be present at the time of the breaking and entering); *Commonwealth v. Clemente*, 25 Mass. App. Ct. 229, 235 n.10, 517 N.E.2d 479, 483 n.10 (1988) (statute apparently does not require an intent to commit a felony in the same building into which the break was made).

Finally, the Commonwealth must prove that the breaking and entering took place in the nighttime. The law is that the "nighttime" begins one hour after sunset and ends one hour before sunrise the next day, measured according to mean, or average, time at that time of the year in the place where the crime was committed.

The Commonwealth may prove that a crime occurred in the nighttime by (presenting evidence that it was completely dark outside at the time of the offense) (offering an almanac or other reference book to show the time of sunset or sunrise on that day) (asking you as jurors to rely on your common knowledge of approximately when the sun rises or sets on *[date]* in this area). Whatever method is used, you must be convinced beyond a reasonable doubt that the crime occurred sometime between one hour after sunset and one hour before sunrise.

Here instruct on "Intent" (Instruction 3.120).

G.L. c. 278, § 10. *Commonwealth v. Kingsbury*, 378 Mass. 751, 752-754, 393 N.E.2d 391, 392-393 (1979); *Commonwealth v. Bergstrom*, 10 Mass. App. Ct. 838, 838-839, 406 N.E.2d 1056, 1056-1057 (1980); *Commonwealth v. Servidori*, 6 Mass. App. Ct. 969, 384 N.E.2d 226 (1979).

SUPPLEMENTAL INSTRUCTIONS

1. Constructive breaking. **It is not always necessary that a person physically break into a (building) (ship) (vessel) (vehicle) to be found guilty of this offense. The defendant may be convicted if an accomplice let him (her) into the (building) (ship) (vessel) (vehicle), or if the defendant convinced an innocent person by trick or threat to allow him (her) to enter, if the defendant entered with the intent to commit a felony.**

Commonwealth v. Lowrey, 158 Mass. 18, 19-20, 32 N.E. 940, 941 (1893) (accomplice); *Commonwealth v. Labare*, 11 Mass. App. Ct. 370, 377, 416 N.E.2d 534, 538 (1981) (phony name).

2. Judicial notice of time of sunset or sunrise. **The law permits me to take notice of certain facts that are not subject to reasonable dispute. In this case, based upon *[reference book]* , I have decided to accept as proved the fact that on *[date]* the sun (set) (rose) at *[time]* . Therefore, you may accept this fact as true, even though no evidence has been introduced about it. You are not required to do so, but you may.**

See the notes to the supplemental instruction on "Judicial Notice" in Instruction 2.220 (What Is Evidence; Stipulations; Judicial Notice).

3. Breaking and entering in daytime as lesser included offense. **If it has not been proved to you beyond a reasonable doubt that the defendant committed this offense sometime between one hour after sunset and one hour before sunrise, but all the other elements of the offense have been proved to you beyond a reasonable doubt, you may find the defendant guilty of the lesser included offense of breaking and entering in the daytime.**

Commonwealth v. Sitko, 372 Mass. 305, 307-308, 361 N.E.2d 1258, 1259-1261 (1977) (breaking and entering in the daytime under G.L. c. 266, § 18 is the equivalent of a lesser included offense in breaking and entering in the nighttime).

4. Intent to steal. **When a person breaks and enters in the nighttime, it is ordinarily a fair inference, in the absence of contrary evidence, that he intends to steal. You are permitted to draw such an inference if you think it reasonable. You are not required to draw such a conclusion, but you may.**

Commonwealth v. McGovern, 397 Mass. 863, 868, 494 N.E.2d 1298, 1301 (1986); *Commonwealth v. Hughes*, 380 Mass. 596, 602-604, 404 N.E.2d 1246, 1250-1251 (1980) (dwelling); *Commonwealth v. Wygrzywalski*, 362 Mass. 790, 792, 291 N.E.2d 401, 402-403 (1973) (store); *Commonwealth v. Eppich*, 342 Mass. 487, 493, 174 N.E.2d 31, 34 (1961) (same); *Commonwealth v. Ronchetti*, 333 Mass. 78, 81, 128 N.E.2d 334, 336 (1955) (inference permissible even where defendant attacked homeowner, apparently spontaneously).

NOTES:

1. **"Another's" property.** The Commonwealth need not allege the building or vehicle owner's name in the complaint, G.L. c. 277, § 25, and if it does, at trial need only prove that the property was owned by someone other than the defendant, *Commonwealth v. Kalinowski,* 360 Mass. 682, 684-685, 277 N.E.2d 298, 299 (1971). At common law, one could not burglarize one's own dwelling, but the issue turned on rights of occupancy rather than ownership. *Commonwealth v. Ricardo*, 26 Mass. App. Ct. 345, 354-357, 526 N.E.2d 1340, 1346-1347 (1988) (charge of armed assault in dwelling). But see *Commonwealth v. Derome*, 6 Mass. App. Ct. 900, 901, 377 N.E.2d 707, 708 (1978) (directing verdict for defendant where Commonwealth charged the break of one premise but proved the break of another).

2. **"Breaking and entering and stealing therein."** At common law, a compound charge of "breaking and entering and stealing therein" was a variation on "breaking and entering with intent to steal." Since there is no better proof of intent to steal than actual larceny, the "averment of actual stealing is to be regarded as equivalent to alleging the intent to steal." When the offense was charged in such compound form, the actual larceny could not also be charged as a separate count, and no separate sentence could be imposed for the larceny. *Commonwealth v. Hope,* 22 Pick. 1, 5-7 (1839). When the breaking and entering and the larceny are charged in separate counts, rather than merged in a single count, separate convictions and sentences are permissible on both. *Commonwealth v. Ford,* 20 Mass. App. Ct. 575, 580, 481 N.E.2d 534, 537 (1985); *Josslyn v. Commonwealth,* 6 Met. 236, 240 (1843).

3. **One break or several?** As to whether multiple breaks into different units in a single building may be prosecuted and sentenced as separate crimes, see *Clemente,* 25 Mass. App. Ct. at 233-237, 517 N.E.2d at 482 484.

4. **Related offenses.** The model instruction is designed for the specific offenses of breaking and entering a building or a vehicle in the nighttime with the intent to commit a felony. That section also includes the offenses of breaking and entering a ship or vessel, which would require appropriate changes in the instruction. The instruction can also be used for violations of G.L. c. 266, §§ 16A, 17 and 18 with the following changes:

G.L. c. 266, § 16A (Breaking and entering with intent to commit a misdemeanor): Change the third element of the model instruction to require proof of a misdemeanor. Omit the fourth element, since the breaking and entering can occur at any time. This is a lesser included offense in G.L. c. 266, § 16. *Commonwealth v. Murphy,* 31 Mass. App. Ct. 901, 901 n.1, 574 N.E.2d 412, 413 n.1 (1991).

G.L. c. 266, § 17 (Entering in nighttime without breaking, or breaking and entering in daytime, owner put in fear): Entering in nighttime does not require breaking, but entering in the daytime does. In either case, the owner or any other person lawfully therein must be put in fear. Otherwise, the model instruction remains unchanged.

G.L. c. 266, § 18 (Entering dwelling house in nighttime, without breaking, or breaking and entering building in daytime, owner not put in fear): The first offense in § 18 requires a change to "dwelling house" in the first three elements of the model instruction. An unoccupied apartment is a "dwelling house" if the tenants have taken possession and have the right to move in, even if they have not in fact done so. *Commonwealth v. Kingsbury*, 378 Mass. 751, 755-757, 393 N.E.2d 391, 384-395 (1979). An occupied motel room is a "dwelling." *Commonwealth v. Correia*, 17 Mass. App. Ct. 233, 234-236, 457 N.E.2d 648, 650-651 (1983). The second offense in § 18 requires a change to "daytime" in the fourth element of the model instruction.

Breaking and entering (G.L. c. 266, § 16) is not duplicitous of larceny in a building (G.L. c. 266, § 20), *Ford, supra,* possessing burglarious instruments (G.L. c. 266, § 49), *Commonwealth v. Johnson,* 406 Mass. 533, 535, 548 N.E.2d 1251, 1253 (1990), or receiving stolen property (G.L. c. 266, § 60).

Commonwealth v. Cabrera, 449 Mass. 825, 874 N.E.2d 654 (2007). Trespass (G.L. c. 266, § 120) is not a lesser included offense of breaking and entering. *Commonwealth v. Vinnicombe,* 28 Mass. App. Ct. 934, 549 N.E.2d 1137 (1990).

5. **Variance in intended felony.** The complaint need not specify the intended felony. *Commonwealth v. Porcher*, 26 Mass. App. Ct. 517, 521, 529 N.E.2d 1348, 1351 (1988); *Commonwealth v. Wainio*, 1 Mass. App. Ct. 866, 867, 305 N.E.2d 867, 867 (1974). Since a complaint's specification of the intended felony is surplusage, proof of a different felony is permissible if the defendant is not misled or the jury confused. *Commonwealth v. Costello,* 392 Mass. 393, 402-404, 467 N.E.2d 811, 817-819 (1984); *Commonwealth v. Hobbs,* 385 Mass. 863, 869-871, 434 N.E.2d 633, 638-640 (1982); see also *Commonwealth v. Randolph*, 415 Mass. 364, 367, 613 N.E.2d 899, 901 (1993). See also *Rogan, supra* (jury may find intent to commit an unspecified misdemeanor on charge of breaking and entering in daytime with intent to commit felony).

6. **Evidence of Time.** The Commonwealth's failure to provide direct evidence of the time of the crime is not fatal to the Commonwealth's case because circumstantial evidence is competent evidence to establish guilt. *Commonwealth v. Bennett*, 424 Mass. 64, 67, 674 N.E.2d 237, 240 (1997). Nor is the Commonwealth compelled to provide any evidence of the time of sunrise. *Bennett*, 424 Mass. at 68, 674 N.E.2d at 240 ("The jury were entitled to rely on their general knowledge of matters commonly known within the community in determining what inferences may be drawn to establish a material fact not proved by direct evidence, such as the time of sunset or sunrise at a particular time of the year.").

8.120 BURNING INSURED PROPERTY

G.L. c. 266 § 10
2009 Edition

The defendant is charged with burning insured property in order to defraud its insurer. Section 10 of chapter 266 of our General Laws provides as follows:

"Whoever,

wilfully and with intent to defraud or injure the insurer,

(sets fire to) (attempts to set fire to) (causes to be burned) (aids, counsels or procures the burning of)

(a building) (any goods, wares, merchandise or other [personal property]),

belonging to himself or another,

and which are at the time insured against loss or damage by fire,

shall be punished . . . ."

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

***First:* That the defendant (set fire to) (attempted to set fire to) (caused to be burned) (aided, counseled or procured the burning of) (a building) (personal property) belonging to himself (herself) or someone else;**

***Second:* That at the time of the alleged incident, the property was insured against loss or damage by fire; and**

Third: **That the defendant acted with the specific intent to injure or defraud the insurer.**

See *Instruction 3.120* (Intent).

If the defendant is charged with attempting to burn insured property, the offense has a fourth element: that the defendant took some overt act toward carrying out such burning, and which came reasonably close to actually carrying it out. See Instruction 4.120 (Attempt).

Commonwealth v. Bader, 285 Mass. 574, 577, 189 N.E. 590, 591 (1934) (overinsurance and financial distress are relevant factors); *Commonwealth v. Vellucci*, 284 Mass. 443, 445-446, 187 N.E. 909, 910 (1934) (failure to report fire and false statements during investigation are relevant factors); *Commonwealth v. Kaplan*, 238 Mass. 250, 254, 130 N.E. 485, 486 (1921) (whether defendant was insurance beneficiary is relevant, but direct benefit to defendant is not a necessary element of offense); *Commonwealth v. Asherowski*, 196 Mass. 342, 346, 82 N.E. 13, 14 (1907) (relevant factors include that only defendant-owner had key where no forced entry, that store stock stacked at center of blaze, and that insurance claim was exaggerated); *Commonwealth v. Squire*86 Mass., 1 Metc. 258, 259 (1840) (jury question whether partially completed structure is a "building" or merely a collection of building materials); *Commonwealth v. Shuman*, 17 Mass. App. Ct. 441, 447, 459 N.E.2d 102, 106 (1984) (introduction of insurance policy not mandatory where there is testimony that property insured); *Commonwealth v. Walter*, 10 Mass. App. Ct. 255, 260, 406 N.E.2d 1304, 1308 (1980) (that defendant present near building shortly before fire was relevant factor).

NOTES:

1. **Failure to extinguish fire**. The intent to defraud need not precede the fire. A defendant can be convicted under § 10 who is able to extinguish a fire that has started accidentally, but intentionally fails to do so in order to injure the insurer. However, negligence is insufficient for conviction. *Commonwealth v. Cali,* 247 Mass. 20, 24-25, 141 N.E. 510, 511 (1923).

2. **Lesser included offenses.** Arson of a dwelling (G.L. c. 266, § 1) and burning a building (G.L. c. 266, § 2) are not lesser included offenses of burning a building to defraud an insurer (G.L. c. 266, § 10). *Commonwealth v. Jones,* 59 Mass. App. Ct. 157, 794 N.E.2d 1220 (2003); *Commonwealth v. Anolik,* 27 Mass. App. Ct. 701, 542 N.E.2d 327 (1989).

8.140 BURNING PERSONAL PROPERTY, MOTOR VEHICLE, ETC.

G.L. c. 266 § 5
2009 Edition

The defendant is charged with unlawfully burning a _____. Section 5 of chapter 266 of our General Laws provides as follows:

"Whoever wilfully and maliciously

(sets fire to) (burns) (destroys or injures by burning) (causes to be burned or otherwise so destroyed or injured) (aids, counsels or procures the burning of)

(any personal property [belonging to another person and] . . . exceeding a value of twenty-five dollars . . .)

(or) (any boat, motor vehicle . . . or other conveyance, whether [belonging to] himself or another . . .)

shall be punished . . . ."

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

***First:* That the property in question was (personal property belonging to another person with a value of more than $25) (a boat belonging to the defendant or another person) (a motor vehicle belonging to the defendant or another person) (a conveyance belonging to the defendant or another person);**

Second: **That the defendant (set fire to or burned the property) (caused the property to be burned) (aided, counseled, or procured the property to be burned);**

Third: **That the defendant did so wilfully — that is, intentionally and not by accident; and**

Fourth: **That the defendant did so maliciously — that is, it was done with some wrong and unlawful motive and without excuse.**

SUPPLEMENTAL INSTRUCTIONS

1. "Wilfully." **"Wilful" means intentionally and by design, and this eliminates accidental or negligent burnings. However, a person who negligently ignites a fire and then makes no attempt to extinguish or report it may be found to have acted wilfully.**

See *Commonwealth v. McKenzie*, 376 Mass. 148, 150, 379 N.E.2d 1100, 1101 (1978).

2. "Maliciously." **The "malice" that must be shown does not require any particular ill will against someone. A burning is malicious if it is done with a wrong and unlawful motive or purpose; if it is the wilful doing of a harmful act without lawful excuse.**

Commonwealth v. Niziolek, 380 Mass. 513, 527, 404 N.E.2d 643, 651 (1980), habeas corpus denied sub nom. *Niziolek v. Ashe*, 694 F.2d 282 (1st Cir. 1982); *Commonwealth v. Lamothe*, 343 Mass. 417, 419-420, 179 N.E.2d 245, 246 (1961).

8.160 FORGERY

G.L. c. 267 §§ 1-8
2009 Edition

The defendant is charged with forgery of a *[type of document]* . Section ___ of chapter 267 of our General Laws provides as follows:

"Whoever,

with intent to injure or defraud,

falsely makes, alters, forges or counterfeits a *[type of document]*

shall be punished . . . ."

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

***First:* That the defendant (falsified one or more significant parts of the document in question) (altered one or more significant parts of the document in question) (counterfeited the document in question to make it appear to be genuine); and**

***Second:* That the defendant did so with the intent to injure or to defraud someone.**

To have a forgery, something relating to a legal document *itself,* as distinguished from its contents, must be false. Making a false statement *in* a document is a separate crime under some circumstances, but it is not the offense of forgery, which is concerned with the genuineness of the document itself, rather than the truth of its contents.

Forgery can be committed in three ways: The *first* is to counterfeit or produce what appears to be a genuine legal document, but which is in fact a phony document. The *second* way is to falsely fill in one or more important parts of a genuine document — for example, by forging someone else's signature on a check or a bill of sale. The *third* way is closely related to the second: altering in a significant way one or more parts of a genuine document that has already been made out — for example, changing the amount on a check.

Besides proving that the defendant (counterfeited) (falsified) (altered) the document in question, the Commonwealth must also prove beyond a reasonable doubt that the defendant acted with the specific intention of defrauding someone.

See *Instruction 3.120* (Intent).

Commonwealth v. O'Connell, 438 Mass. 658, 664 n.9, 783 N.E.2d 417, 424 n.9 (2003) (elements of forgery); *Commonwealth v. Apalakis*, 396 Mass. 292, 486 N.E.2d 669 (1985); *Commonwealth v. Segee*, 218 Mass. 501, 504, 106 N.E. 173, 174 (1914); *Commonwealth v. Baldwin*, 11 Gray 197, 198 (1858).

NOTES:

1. **District Court jurisdiction over forgery offenses.** General Laws c. 218, § 26 gives the District Court final jurisdiction over "all felonies punishable by imprisonment in the state prison for not more than five years, . . . [and] forgery of a promissory note, or of an order for money or other property." That grant of jurisdiction encompasses some (but not all) of the documents listed in G.L. c. 267, §§ 1-8. It includes forgery of a "promissory note; or an order . . . for money or other property" (G.L c. 267, § 1), or an admission ticket (§ 2), a railroad ticket or pass (§ 2), a railroad stamp (§ 4), or "a bank bill or promissory note payable to the bearer thereof or to the order of any person, issued by any incorporated banking company" (§ 8). The District Court does not have final jurisdiction over forgery of the Land Court's seal (§ 3), a Commonwealth note (§ 7), or a bank bill or traveller's check (§ 8).

The District Court also has final jurisdiction over a number of forgery offenses found in other chapters of the General Laws, including forgery of historical objects (G.L. c. 9, § 27C), birth, marriage or death certificates (c. 46, § 30), motor vehicle licenses, permits, certificates or inspector stickers (c. 90, § 24B), motorboat number certificates (c. 90B, § 4A), firearms licenses (c. 140, § 131I), and hunting or fishing licenses (c. 131, § 33).

2. **Claim of authority.** Lack of authority is not an element of the offense of forgery, but if a claim of authority is properly raised, the Commonwealth must prove the absence of authority beyond a reasonable doubt in order to prove the element of fraudulent intent. Such a claim must by raised by timely written

notice pursuant to Mass. R. Crim. P. 14(b)(3) or is waived. Lack of authority and fraudulent intent may be proved by circumstantial evidence as well as by testimony from the purported maker. *O'Connell,* 438 Mass. at 664-665, 783 N.E.2d at 423-424. See Instruction 3.160 (License or Authority).

8.180 POSSESSION OF BURGLARIOUS TOOLS

G.L. c. 266 § 49
2009 Edition

The defendant is charged with an offense that is commonly referred to as "possessing burglarious tools." Section 49 of chapter 266 of our General Laws provides as follows:

"Whoever knowingly has in his possession . . .

[a] tool or implement [that is] adapted and designed for cutting through, forcing or breaking open a building, room, vault, safe or other depository,

in order to steal therefrom money or other property, or to commit any other crime,

knowing (the tool or implement) to be adapted and designed for (that) purpose . . .

shall be punished . . . ."

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

***First:* That the defendant knowingly possessed a tool or implement, specifically a _____ ;**

***Second:* That such tool or implement could reasonably be used to break into a (building) (room) (vault or safe) (place for keeping valuables);**

Third: **That the defendant knew that the tool or implement could reasonably be used for that purpose;**

Fourth**: That the defendant intended to use the tool or implement for that purpose;**

Fifth: **That the defendant had the specific intention of (stealing from) (committing a crime in) that place.**

Here the jury must be instructed on "Possession" (*Instruction 3.220*).

"The gist of the offense lies in the possession of the tools, the purpose for which they are possessed and, their suitability for that purpose." *Commonwealth v. Aleo*, 18 Mass. App. Ct. 916, 917, 464 N.E.2d 102, 103 (1984). The defendant must have intended to use the tool to effectuate the breaking and entering. *Commonwealth v. Redmond*, 53 Mass. App. Ct. 1, 6, 757 NE2d 249, 253 (2001).

The model instruction is structured to address the most common variety of the offense defined in G.L. c. 266, § 49, which also punishes "mak[ing] or mend[ing], or begin[ning] to make or mend" such items, and bans burglarious "engine[s]" and "machine[s]" as well as tools and instruments. The instruction may be adapted as necessary.

SUPPLEMENTAL INSTRUCTION

Licit implements. **To qualify as a "burglarious tool," it is not necessary that a tool or implement be designed or usable only for unlawful purposes. Items which are commonly used for lawful purposes, such as screwdrivers or chisels or kitchen knives, are considered to be "burglarious tools" if they can be used to break into a (building) (room) (vault or safe) (place for keeping valuables), and are possessed for that reason.**

> While burglarious intent can be inferred from mere possession of tools uniquely or very highly adapted to burglarious purposes, common items can be burglarious tools if they can be used and are possessed for burglarious purposes. *Commonwealth v. Dellinger*, 10 Mass. App. Ct. 549, 561, 409 N.E.2d 1337, 1346 (1980), aff'd in part and rev'd in part on other grounds, 383 Mass. 780, 422 N.E.2d 1346 (1981). See *Commonwealth v. Jones*, 355 Mass. 170, 176-177, 243 N.E.2d 172, 176 (1969) (screwdriver and kitchen knife); *Commonwealth v. Tivnon*, 8 Gray 375, 380-381 (1857) (chisel). But see *Commonwealth v. Purcell*, 19 Mass App.1031, 1031, 477 N.E.2d 190, 192 (1985) (even if worn to facilitate burglary, gloves cannot be burglarious instruments). A burglarious instrument does not lose its character as such because it needs repair. *Aleo*, supra. Innocent tools are admissible in evidence when mixed with burglarious tools. *Commonwealth v. Williams*, 2 Cush. 582, 586 (1849).

NOTES:

1. **Attempted break-in unnecessary**. An attempted break-in is not a required element of this offense, since the offense is complete when tools are procured with a burglarious intent. *Tivnon, supra.*

2. **Breaking and entering is distinct offense.** Possession of burglarious tools and breaking and entering (G.L. c. 266, § 18) are separate offenses, and neither is a lesser included offense of the other. *Commonwealth v. Johnson,* 406 Mass. 533, 535, 548 N.E.2d 1251, 1253 (1990).

3. **"Depository"**. It is not necessary to prove that a depository was located within a building, *Commonwealth v. Tilley,* 306 Mass. 412, 416, 28 N.E.2d 247, 247 (1940), or that the defendant intended to break into any particular depository, *Tivnon, supra.* A boat storage area open on one side is not a depository. *Commonwealth v. Schultz,* 17 Mass. App. Ct. 958, 458 N.E.2d 328 (1983). An auto trunk is a depository. *Tilley, supra.* A locked passenger automobile reasonably can be inferred to be a depository, even without proof that the particular vehicle was used to store valuables. *Commonwealth v. Dreyer,* 18 Mass. App. Ct. 562, 564-565, 468 N.E.2d 863, 865- 866 (1984). A bolt cutter used to cut through a bicycle chain attaching a bicycle to a bicycle rack is not a burglarious tool, since it is not "adapted and designed for cutting through, forcing or breaking open a . . . depository." The chain itself cannot be a depository "as it has no capacity to hold property for safekeeping." Even if the rack is considered a depository, it is "highly implausible that a small pair of bolt cutters could be used to cut open the metal frames of a bicycle rack" and therefore the cutters were probably not intended for use on the rack. And "because the bicyclist furnishes the chain, . . . it requires a strained interpretation of the statute to conclude that the chain and rack together" constitute a depository. *Commonwealth v. Antonio Ortiz,* 38 Mass. App. Ct. 1107, 646 N.E.2d 435 (No. 94-P-381, February 8, 1995) (unpublished opinion under Appeals Court Rule 1:28).

4. **Intended crimes**. It is not necessary that burglary or theft be the intended crime. *Commonwealth v. Krasner,* 358 Mass. 727, 729-731, 267 N.E.2d 208, 209-210, S.C. 360 Mass. 848, 274 N.E.2d 347 (1971) (trespass); *Tilley,* 306 Mass. at 414-415, 28 N.E.2d at 247 (stealing from auto trunk). However, if the complaint charges the defendant only with the first of the two intent alternatives in the statute ("to steal therefrom such money and other property as might be found therein") the Commonwealth is so limited in its proof, and may not convict upon proof of the second intent alternative ("to commit any other crime"). *Commonwealth v. Graud,* 8 Mass. App. Ct. 915, 915-916, 395 N.E.2d 466, 466 (1979); *Commonwealth v. Armenia,* 4 Mass. App. Ct. 33, 38, 340 N.E.2d 901, 904 (1976). See *Commonwealth v. Aldrich,* 23 Mass. App. Ct. 157, 165, 499 N.E.2d 856, 861 (1985). To satisfy the second intent alternative, the "any other crime" must be intended to be committed in the "building, room, vault, safe or other depository." *Krasner, supra; Schultz, supra.*

5. **Motor vehicle master keys.** Since the enactment of St. 1966, c. 269, the statute has also included a separate branch punishing possession of a motor vehicle master key, the effect of which is that possession of motor vehicle master keys can no longer be prosecuted under the generic branch of the statute. *Commonwealth v. Collardo,* 13 Mass. App. Ct. 1013, 1014, 433 N.E.2d 487, 489 (1982).

8.200 THEFT, PURCHASE, RECEIPT, POSSESSION OR CONCEALMENT OF STOLEN MOTOR VEHICLE; MALICIOUS DAMAGE TO MOTOR VEHICLE; STEALING PARTS FROM MOTOR VEHICLE TAKEN WITHOUT AUTHORITY; CONCEALING MOTOR VEHICLE THIEF

G.L. c. 266, § 28, May 2017

The defendant is charged with (stealing a motor vehicle) (malicious damage to a motor vehicle) (possessing a stolen motor vehicle) (receiving a stolen motor vehicle) (stealing motor vehicle parts) (concealing motor vehicle theft).

A. Stealing motor vehicle.

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

***First,* that the defendant took the motor vehicle;**

***Second*, that the motor vehicle was owned or possessed by someone other than the defendant; and**

***Third*, that the defendant did so with the intent to deprive that person of the motor vehicle permanently.**

This instruction is modeled after Instruction 8.520, Larceny by Stealing .

The value of the stolen vehicle is not an element of the offense. *Commonwealth. v. Casserly*, 23 Mass. App. Ct. 947, 948 (1986).

SUPPLEMENTAL INSTRUCTIONS

1. "Took". **To prove the first element, the Commonwealth must prove beyond a reasonable doubt that the defendant physically transferred the motor vehicle to his (her) own control. It does not matter if the transfer involved only slight movement, or if it lasted only for a short time.**

Commonwealth v. Fielding, 371 Mass. 97, 117 (1976) (any separation of property from victim's dominion, even if brief in space and time, sufficient); *Commonwealth v. Salerno*, 356 Mass. 642, 648, (1970) (taking can be proved by circumstantial evidence); *Commonwealth v. Bradley*, 2 Mass. App. Ct. 804, 805 (1974) (momentary transfer sufficient); *Commonwealth v. Flowers*, 1 Mass. App. Ct. 415, 418-19 (1973) (immaterial whether the transfer is done by the robber himself or by another person, even by the victim, acting at the robber's direction).

2. *"Of another."* **To prove the second element, the Commonwealth must prove beyond a reasonable doubt that the motor vehicle was owned or possessed by a person other than the defendant. This may be proved by direct evidence that someone else owned or possessed the motor vehicle. The Commonwealth is not required to prove who owned or possessed the motor vehicle as long as it proves that the defendant did not.**

G.L. c. 277, § 25 (identity of owner need not be alleged if property described with sufficient certainty); G.L. c. 278, § 9 ("owner" includes anyone in actual or constructive possession). *Commonwealth v. Souza*, 397 Mass. 236, 238-39 (1986) (identity of owner need not be proved, only that it was not defendant; because of G.L. c. 277, § 35, misnomer of owner is immaterial if defendant not misled); *Commonwealth v. Kiernan*, 348 Mass. 29, 50-51 (1964), cert. denied sub nom. *Gordon v. Mass.*, 380 U.S. 913 (1965) ("owner" includes anyone with a possessory or property interest); *Commonwealth v. Binkiewicz*, 342 Mass. 740, 748 (1961) (because of G.L. c. 278, § 9, complaint about "the property of *x*" in effect reads "the property of *x*, or of another but in *x*'s actual or constructive possession"; driver with shared dominion over auto registered in spouse's name is "owner"); *Commonwealth v. Finn*, 108 Mass. 466, 467 (1871) (one may steal from thief); *Commonwealth v. Sullivan*, 104 Mass. 552, 554-55 (1870) (person who orders goods is in constructive possession of them once delivered to a common carrier, absent a shipping agreement to the contrary); *Commonwealth v. Arrance*, 5 Allen 517, 517-518 (1862) (because of G.L. c. 278, § 9, permissible to allege and prove only one co-owner).

3. *Intent to deprive permanently.* **To prove the third element, the Commonwealth must prove beyond a reasonable doubt that the defendant intended to deprive the owner or possessor of (his) (her) (its) vehicle permanently. You may, but are not required, to find such intent if the defendant's conduct showed utter indifference as to whether the vehicle would be recovered.**

See Instruction 3.120 (Intent).

Commonwealth v. Salerno, 356 Mass. 642, 648, (1970); *Commonwealth v. Cabot*, 241 Mass. 131, 141-143 (1922); *Commonwealth v. Olivera*, 48 Mass. App. Ct. 907, 909 (1999) (difference between larceny of motor vehicle and use without authority is intent to deprive permanently; the latter assumes returning stolen vehicle to its owner or abandoning it where it might be recovered); *Commonwealth v. Moore*, 36 Mass. App. Ct. 455, 456-57 (1994); *Commonwealth v. Coyle*, 17 Mass. App. Ct. 982, 984 (1984); *Commonwealth v. Ellison*, 5 Mass. App. Ct. 862, 862-63 (1977) (intent to make restitution later is not a defense).

4. Claim of right. **If the defendant took another person's motor vehicle in an honest belief that (he) (she) (another person on whose behalf he (she) was acting) had a legal right to it, then you must find the defendant not guilty, even if that belief was in fact mistaken, because he (she) lacked the intent to steal.**

Commonwealth v. Liebenow, 470 Mass. 151, 157 (2014) (the specific intent to steal is negated by a finding that a defendant held an honest, albeit mistaken, belief that he was entitled to the property he took).

B. Malicious damage to motor vehicle.

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

***First*: That the defendant injured or destroyed a motor vehicle**

***Second*: That the vehicle belonged to another person, and**

***Third*: The defendant acted with malice.**

The term "malice" refers to a state of mind of cruelty, hostility or revenge. To prove that an act was malicious, the Commonwealth must prove beyond a reasonable doubt not only that it was done deliberately, but also that it was done out of cruelty, hostility or revenge toward another.

Commonwealth v. Chambers, 90 Mass. App. Ct. 137, 143-44 & n.7 (2016).

C. Stealing parts.

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

***First*: That the defendant intentionally took a motor vehicle**

***Second*: That he (she) did so without authority of the owner, and**

***Third*: That he (she) stole from it one or more of its parts or accessories.**

Here instruct on Intent (Instruction 3.120) and the definition of stealing from Larceny by Stealing (Instruction 8.520).

D. Possessing or Receiving stolen motor vehicle.

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

***First*: That the defendant (bought) (received) (possessed) (concealed) (obtained control of) a motor vehicle,**

***Second*: That the motor vehicle had been stolen, and**

***Third*: That the defendant knew or believed it had been stolen.**

See supplemental instruction on knowledge, below. Where applicable, see instruction on possession (Instruction 3.220)

A person "receives" property by knowingly taking custody or control of it. It is not necessary that the defendant personally possessed the stolen property, as long as it is proved that he (she) knowingly exerted control over it in some way.

Mere presence in a stolen car is insufficient to support an inference of knowledge that the car was stolen, but "presence supplemented by other incriminating evidence will serve to tip the scales." *Commonwealth v. Johnson*, 6 Mass. App. Ct. 956, 957 (1978). See *Commonwealth v. Boone*, 356 Mass. 85, 87 (1969); *Commonwealth v. Johnson*, 7 Mass. App. Ct. 191, 193 (1979). See also *Commonwealth v. Hunt*, 50 Mass. App. Ct. 565, 568-69 (2000).

If defendant learns property was stolen after receiving it

Even if the defendant did not know that the property was stolen at the time when he (she) received it, the defendant is still guilty of receiving stole property if he (she) subsequently learned that the property had been stolen, and at that point decided to keep it and to deprive the owner of its use.

Commonwealth v. *Sandler*, 368 Mass. 729, 740-41 (1975); *Commissioner of Pub. Safety v.Treadway*, 368 Mass. 155, 160 (1975); *Kirkpatrick*, 26 Mass.App. Ct. 595, 599 (1988).

E. *Concealing a motor vehicle thief.*

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

***First*: That a person stole a motor vehicle,**

***Second*: That the defendant knew or believed the person had stolen a motor vehicle, and**

***Third:* That the defendant intentionally concealed that person.**

A motor vehicle has been stolen if a person took it away from the person who owned or possessed it with the intent to deprive that person of the vehicle permanently.

See supplemental instruction on knowledge below. Where necessary, see instruction on Larceny by Stealing (Instruction 8.520).

SUPPLEMENTAL INSTRUCTION

Knowledge. **The Commonwealth must prove beyond a reasonable doubt that the defendant actually knew or believed that (the motor vehicle had been stolen) (the person concealed had stolen a motor vehicle). Mere negligence or failure to exercise a reasonable level of care is not enough. Personal knowledge or belief is required, and our law allows for no substitute.**

It is obviously impossible to look directly into a person's mind. But in our everyday affairs, we often look to the actions of others in order to decide what their state of mind is. In this case, you may examine the defendant's actions and words, and all of the surrounding circumstances, to help you determine the extent of the defendant's knowledge.

You should consider all of the evidence, and any reasonable inferences you draw from the evidence, in determining whether the Commonwealth has proved beyond a reasonable doubt, as it must, that the defendant acted with the knowledge that the person he (she) concealed had stolen the motor vehicle in question.

Commonwealth v. Dellamano, 393 Mass. 132, 138 (1984); *Commonwealth v. Boris*, 317 Mass. 309, 315-317 (1944).

NOTES:

1. **Altered vehicle identification number as prima facie evidence of knowledge.** "Evidence that an identifying number or numbers of a motor vehicle or trailer or part thereof has been intentionally and maliciously removed, defaced, altered, changed, destroyed, obliterated, or mutilated, shall be prima facie evidence that the

defendant knew or had reason to know that the motor vehicle, or trailer or part thereof had been stolen." G.L. c. 266, § 28(a), second par. See Instruction 3.260 (Prima Facie Evidence). See *Commonwealth v. Gonsalves*, 56 Mass. App. Ct. 506, 512 (2002) (emphasizing that "the use of prima facie evidence, sufficient to establish a presumption in favor of the scienter, carries no particular presumption of validity" and that "the presumed fact [scienter] must be proven beyond a reasonable doubt."

2. **Certificate of title as evidence of unauthorized use**. "[C]ertified copies of any motor vehicle or trailer ownership records, including computer records, in the possession of the registrar of motor vehicles, attested by the registrar or his designee or, if the motor vehicle or trailer is registered or titled in another state, such records similarly certified by the keeper of records of the appropriate motor vehicle department, shall be admissible as proof of ownership of a motor vehicle or trailer and shall be prima facie evidence that the use of the motor vehicle or trailer was unauthorized. If the defendant rebuts such evidence, the commonwealth may be granted a reasonable continuance to enable the owner of the vehicle to be brought into court to testify." G.L. c. 22C, § 42. This statutory provision should be presented to the jury only as a permissive inference. See Instruction 3.240 (Presumption). Since its language may imply that the effect of the provision disappears if "rebutt[ed]," it is not clear whether it rises to the level of prima facie evidence, which remains evidence even though contrary evidence is introduced. See the notes to Instruction 3.260 (Prima Facie Evidence).

A defendant's reliance on a title certificate in his or her name is not itself a defense to a charge of receiving a stolen motor vehicle, but merely one factor to be weighed in determining whether the Commonwealth has proven that the defendant knew that the vehicle was stolen. *Casserly,* 23 Mass App. Ct. at 948.

3. **Charging both theft and receiving**. A defendant may be charged both with theft of a motor vehicle and receiving that stolen motor vehicle, but may not be convicted of both. *Dellamano*, 393 Mass. at 134 n.4.

4. **Restitution is mandatory**. Upon conviction under this section, in addition to any other punishment, a restitution order is mandatory for any financial loss (including, but not limited to, loss of earnings, out-of-pocket expenses, and replacement costs) sustained by the victim, his dependents or insurer. G.L. c. 266, § 29; G.L. c. 276,§ 92A.

8.220 TRESPASS

G.L. c. 266 § 120
March 2017

The defendant is charged with trespass.

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

First: **That, without right, the defendant entered or remained (in a dwelling house) (in a building) (on a boat) (on improved or enclosed land) of another; and**

Second: **That the defendant was forbidden to enter or to remain there by the person in lawful control of the premises, either directly or by means of a posted notice.**

Commonwealth v. Richardson, 313 Mass. 632, 637 (1943) (the two forbidden acts are phrased disjunctively); *Commonwealth v. Einarson,* 6 Mass. App. Ct. 835, 835 (1978) (municipal ordinance or regulation forbidding trespass after dark must be introduced in evidence).

The first requirement is satisfied by proof that the defendant either entered on the premises without permission, or failed to leave after being requested to do so.

A. *If there was a posted notice.* **To satisfy the second element, the Commonwealth is not required to prove that the defendant actually saw a notice forbidding trespassing. The Commonwealth is only required to prove that there was a reasonably distinct notice forbidding trespass, and that it was posted in a reasonably suitable place so that a reasonably careful trespasser would see it.**

Fitzgerald v. Lewis, 164 Mass. 495, 500 (1895) (notice need not be signed or indicate the basis of its authority).

B. *If there was no posted notice.* **To satisfy the second element by proving that the owner "directly" forbade entry to the defendant, the law does not require a person having control of unposted premises to be on the premises at all times of the day or night to personally warn off intruders. Such a person may also bar entry by securing the premises with secure fences or walls and with locked gates or doors, and this is considered to be "directly" forbidding entry to the premises.**

Commonwealth v. A Juvenile (No. 1), 6 Mass. App. Ct. 106, 108 (1978).

NOTES:

1. **"Another's" property.**" Evidence supporting an inference that the property did not belong to the defendant is sufficient to establish that the property belonged to another. *Commonwealth v. Averill*, 12 Mass. App. Ct. 260, 263 (1981).

2. **Without right**. "A belief on the part of the person entering upon land not in his control that the land is his" is still an entry without right. *Fitzgerald v. Lewis*, 164 Mass. 495, 501 (1895).

3. **External deck, porch, steps**. An external deck or porch, or steps leading to the front door, are properly regarded as part of a building for purposes of the trespass statute. *Commonwealth v. Wolf*, 34 Mass. App. Ct. 949, 949 (1993).

4. **Holdover tenants**. A trespass charge may not be brought against holdover tenants; instead the owner must resort to civil proceedings. G.L. c. 266, § 120. As to foreclosing a mortgagee's rights, see *Attorney General v. Dime Savings Bank of New York, FSB*, 413 Mass. 284, 287-91 (1992).

5. **Implied license**. Under some circumstances, a person may be privileged to enter onto another's property to determine whether the person in control wishes to deal with him, and for passage off upon receiving a negative answer. See *Commonwealth v. Hood*, 389 Mass. 581, 589-590 (1983); *Commonwealth v. Krasner*, 360 Mass. 848, 848 (1971) (such implied license may extend to some parts of property but not others); *Richardson,* 313 Mass. at 639-40.

6. **Not lesser included offense of breaking and entering**. Trespass is not a lesser included offense of breaking and entering. *Commonwealth v. Vinnicombe*, 28 Mass. App. Ct. 934, 935 (1990).

7. **Public property**. General Laws c. 266, § 120 may be applied to state or municipal property as well as to privately-owned property. *Commonwealth v. Egleson*, 355 Mass. 259, 262 (1969). The model instruction may be adapted for a complaint brought under G.L. c. 266, § 123 (trespass on certain public property).

8. **Necessity defense**. In determining whether a defendant has satisfied the foundational requirements to claim necessity (see Instruction 9.240), the requirement that a defendant must present enough evidence to demonstrate at least a reasonable doubt that there were no effective legal alternatives available does not require a defendant "to rebut every alternative that is conceivable; rather, a defendant is required to rebut alternatives that likely would have been considered by a reasonable person in a similar situation." *Commonwealth v. Magadini*, 474 Mass. 593, 601 (2016) (defendant's testimony that he had been denied entry to the local homeless shelter, that he was unable to rent an apartment despite repeated attempts, and that he had no place else to stay was sufficient for the issue to go to the jury; whether it is an effective legal alternative for a homeless person to seek shelter outside of his or her home town is a question of fact for the jury to decide).

9. **Related statutes**. See G.L. c. 266, §§ 121 (trespass with firearms), 121A (trespass with vehicle); 120A (owner of trespassing parked vehicle is prima facie the trespasser), 120D (disposal of trespassing parked vehicle). See also G.L. c. 266, §§ 120B (abutter's privilege), 120C (surveyor's privilege).

8.240 UTTERING

G.L. c. 267 § 5-6
2009 Edition

The defendant is charged with the offense of uttering a false, forged or altered (check) (promissory note) (order for other property). "Uttering" means attempting to pass in circulation a worthless document as genuine.

Section 5 of chapter 267 of our General Laws provides:

"Whoever, with intent to injure or defraud, utters and publishes as true a false, forged or altered

[order for money, which is commonly called a "check"]

[or] [promissory note]

[or] [order for other property],

knowing the same to be false, forged or altered, shall be punished . . . ."

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

First: **That the defendant passed or attempted to pass as true and genuine (a check or other order for money) (a promissory note) (an order for other property);**

Second: **That the (check) (promissory note) (order for property) was (falsely made) (forged) (altered);**

Third: **That the defendant knew it was (falsely made) (forged) (altered); and**

Fourth: **That the defendant passed or attempted to pass it with the specific intent to injure or defraud someone.**

To prove the first element, the Commonwealth need not prove that the (check) (promissory note) (order for property) was successfully passed to someone. It is sufficient if the Commonwealth proves beyond a reasonable doubt that the defendant attempted to pass it to someone, even if (he) (she) was unsuccessful in doing so.

To establish the second element, the Commonwealth need not prove that the whole (check) (promissory note) (order for property) was (falsified) (forged) (altered), but only that one or more significant parts of it were (falsified) (forged) (altered).

To prove the fourth element — that the defendant intended to defraud someone — the Commonwealth need not prove the identity of the person whom the defendant intended to defraud, but it must prove that the defendant intended to defraud someone.

See Instructions 3.120 (Intent), 3.140 (Knowledge) and 8.160 (Forgery).
Commonwealth v. O'Connell, 438 Mass. 658, 664 n.9, 783 N.E.2d 417, 424 n.9 (2003) (elements of uttering); *Commonwealth v. Analetto*, 326 Mass. 115, 118, 93 N.E.2d 390 (1950) (defendant must have intended to defraud someone, but not necessarily any particular person); *Commonwealth v. Segee*, 218 Mass. 501, 504, 106 N.E. 173, 174 (1914) (forgery requires only some material change in document); *Commonwealth v. Bond*, 188 Mass. 91, 74 N.E. 293 (1905) (not necessary that intended victim have been misled by forgery). See *Commonwealth v. Crocker*, 384 Mass. 353, 358, 424 N.E.2d 524, 528 (1981) (uttering not a lesser included offense of larceny by false pretenses); *Commonwealth v. Russell*, 156 Mass. 196, 196-197 (1861) (prior acts of uttering admissible as to knowledge and intent); *Commonwealth v. Hill*, 11 Mass. 136, 136-137 (1814) (uttering may be accomplished through innocent agent).

NOTE:

1. **District Court jurisdiction over uttering offenses.** General Laws c. 267, § 5 is a 10-year felony that punishes anyone who "with intent to injure or defraud, utters and publishes as true a false, forged or altered record, deed, instrument or other writing mentioned in [G.L. c. 267, §§ 1-4], knowing the same to be false, forged or altered." The District Court does not have final jurisdiction over uttering most of the items referenced in § 5 and listed in §§ 1-4, but only over "uttering as true . . . a forged [promissory] note or order [for money or other property], knowing the same to be forged." G.L c. 218, § 26. The District Court also has final jurisdiction over the 3-year felony of uttering a false "railroad ticket, railroad mileage book or railroad pass, or a ticket, badge, pass or any written or printed license purporting to entitle the holder or owner thereof to admission to any exhibition, entertainment, performance, match or contest" (G.L. c. 271, § 6) and the 5-year felony of uttering a false "bank bill or promissory note payable to the bearer thereof or to the order of any person" or a traveler's check (G.L. c. 267, § 10). The instruction may be adapted appropriately to cover such items.

2. **Checks.** Uttering a false, forged or altered check may be prosecuted under G.L. c. 267, § 5 because a check is "an order . . . for money" (G.L. c. 267, § 1). See *O'Connell, supra, passim*; *Bond, supra*; G.L. c. 106, § 3-104 (a check is "a draft, other than a documentary draft, payable on demand and drawn on a bank" and is an order if, among other things, it is "an unconditional promise or order to pay a fixed amount of money"). Uttering a false check is not within the scope of G.L. c. 267, § 10 (uttering a false note) or 12 (possession with intent to utter a false note) because a check is not a "note," "promissory note," "bank bill" or "bank note" within the meaning of those sections. An attempt to negotiate a false check will support a conviction for attempted larceny (G.L. c. 266, § 30). *Commonwealth v. Green,* 66 Mass. App. Ct. 901, 845 N.E.2d 392 (2006).

3. **Claim of authority.** Lack of authority is not an element of the offense of uttering, but if a claim of authority is properly raised, the Commonwealth must prove the absence of authority beyond a reasonable doubt in order to prove the element of fraudulent intent. Such a claim must by raised by timely written notice pursuant to Mass. R. Crim. P. 14(b)(3) or is waived. Lack of authority and fraudulent intent may be proved by circumstantial evidence as well as by testimony from the purported maker. *O'Connell,* 438 Mass. at 664-665, 783 N.E.2d at 423-424. See Instruction 3.160 (License or Authority).

8.250 VANDALISM

G.L. c. 266, § 126A, May 2017

The defendant is charged with having committed vandalism. In order to prove that the defendant is guilty of having committed the offense of vandalism, the Commonwealth must prove four things beyond a reasonable doubt:

First: **That the defendant (painted) (marked) (scratched) (etched) (injured) (marred) (defaced) (or) (destroyed) property;**

Second: That the defendant did so intentionally;

Third**: That the defendant did so (wilfully with malice) (wantonly); and**

Fourth: **That the property was owned or possessed by someone other than the defendant.**

To prove the second element, the Commonwealth must prove the defendant acted consciously and deliberately, rather than by accident or as the result of negligence.

To prove the third element, the Commonwealth must prove that the defendant acted (wilfully with malice) (or) (wantonly).

If wilful and malicious conduct is alleged:

A person acts wilfully if (he) (she) intends both the conduct and its harmful consequences. The act must be done with the intent that it have harmful consequences.

An act is done with "malice" if it is done out of cruelty, hostility or revenge. To act with malice, one must act not only deliberately, but out of cruelty, hostility or revenge toward another.

Commonwealth v. Chambers, 90 Mass. App. Ct. 137, 144-45 (2016).

If wanton conduct is alleged:

A person acts wantonly by acting recklessly or with indifference to the fact that (his) (her) conduct would probably cause substantial injury to, or destruction of, another's property. The Commonwealth must prove that the defendant consciously disregarded, or was indifferent to this probability.

Conduct is wanton if (1) the defendant knew it would create a risk of substantial injury or destruction to another's property, or (2) a reasonable person – knowing what the defendant knew – would have realized the act posed a risk of substantial injury to or destruction of another's property.

It is not enough for the Commonwealth to prove that the defendant acted negligently — that is, acted in a way that a reasonably careful person would not. To prove the defendant acted wantonly, the Commonwealth must prove that the defendant's actions went beyond mere negligence and amounted to wanton conduct as I have defined that term.

The defendant must have intended his (her) act, in the sense that it did not happen accidentally.

If relevant to evidence. **If you find that the defendant's act occurred by accident, then you must find the defendant not guilty.**

SUPPLEMENTAL INSTRUCTION

Likelihood of substantial damage. **A person cannot be convicted of wanton injury to property unless it was likely that his actions would result in substantial damage to others or their property. It is not enough that some slight or insignificant injury was likely to result. A person acts "wantonly" only if it is likely that his actions will result in substantial harm.**

However, it is not necessary that the damage actually was substantial, only that such actions were likely to cause substantial damage. The actual

outcome of someone's actions is sometimes a matter of luck, and here the law measures the nature of the actions, not the outcome.

Commonwealth v. Ruddock, 25 Mass. App. Ct. 508, 512-14 (1988).

NOTES:

1. **Malicious act must be wilful; wanton act requires only general intent.** The offense in G.L. c. 266, § 126A, includes two distinct theories with distinct elements. In order to prove malicious conduct, a specific intent must be proved and the act must be wilful and the defendant must have a specific intent to engage in the conduct and to achieve its harmful consequences. In order to prove wanton conduct, a general intent is all that is required. *Commonwealth* v. *McDowell*, 62 Mass. App. Ct. 15, 18-24, *rev. denied*, 442 Mass. 1113 (2004).

Wilful and malicious property destruction is a specific intent crime requiring proof that the defendant intended both the conduct and its harmful consequences, while wanton property destruction requires only a showing that the actor's conduct was indifferent to, or in disregard of, the probable consequences. *Commonwealth v. Armand*, 411 Mass. 167, 170-71 (1991); *Commonwealth v. Redmond*, 53 Mass. App. Ct. 1, 5, *rev. denied*, 435 Mass. 1107 (2001). "The forcible entry into an office will, without doubt, result in some destruction of property, but a messy thief is not necessarily malicious within the meaning of the statute." *Redmond*, 53 Mass. App. Ct. at 5. "The essence of the distinction appears to lie in the fact that a wilful actor intends both his conduct and the resulting harm whereas a wanton or reckless actor intends his conduct but not necessarily the resulting harm." *Commonwealth v. Smith*, 17 Mass. App. Ct. 918, 920 (1983). As an example, if youths throw rocks from a bridge and one strikes a car passing below, the act is wanton if the rocks were thrown casually, without thought of striking any cars, but the act is wilful and malicious if the rocks were aimed at passing cars. *Commonwealth v. Cimino*, 34 Mass. App. Ct. 925, 927 (1993). "It is worth noting that destruction of property which accompanies even violent crime may not by that token alone qualify as wilful and malicious." *Id.*

8.260 WANTON DESTRUCTION OF PROPERTY

G.L. c. 266, § 127, May 2017

The defendant is charged with wanton destruction of property (of a value over $250). In order to prove the defendant guilty of this offense, the Commonwealth must prove (two) (three) things beyond a reasonable doubt:

First: **That the defendant injured or destroyed the (personal property) (dwelling house) (building) of another; (and)**

Second: **That the defendant did so wantonly.**

If value of property is alleged to be greater than $250, add third element. **(and)**

Third: **That the amount of damage inflicted to the property was more than $250.**

An act of destruction is "wanton" if the person was reckless or indifferent to the fact that his conduct would probably cause substantial damage. Someone acts "wantonly" when he consciously disregards, or is indifferent to this probability.

Conduct is wanton if (1) the defendant knew it would create a risk of substantial damage or destruction to another's property, or (2) a reasonable person – knowing what the defendant knew – would have realized the act posed a risk of substantial damage to or destruction of another's property.

It is not enough for the Commonwealth to prove that the defendant acted negligently — that is, acted in a way that a reasonably careful person would not. The Commonwealth must prove that the defendant's actions went beyond mere negligence and amounted to wanton conduct as I have defined that term.

The defendant must have intended his (her) act, in the sense that it did not happen accidentally.

If relevant to evidence. **If you find that the defendant's act**

occurred by accident, then you must find the defendant not guilty.

Commonwealth v. McGovern, 397 Mass. 863, 868 (1987); *Commonwealth v. Dellamano*, 393 Mass. 132, 137 (1984); *Commonwealth v. Welansky*, 316 Mass. 383, 398-99 (1944); *Commonwealth v. Ruddock*, 25 Mass. App. Ct. 508, 512-14 (1988); *Commonwealth v. Peruzzi*, 15 Mass. App. Ct. 437, 440-44 (1983).

If value of property is alleged to be greater than $250. **If you determine that the Commonwealth has proved beyond a reasonable doubt that the defendant is guilty of wanton destruction of property, you must go on to determine whether the Commonwealth also proved beyond a reasonable doubt that the reasonable cost of repair of the damaged property — or the reasonable cost of replacement if it cannot be repaired — was in excess of $250.**

See *Commonwealth v. Kirker*, 441 Mass. 226, 228-29 (2004); *Commonwealth v. Deberry*, 441 Mass. 211, 221-22 (2004).

SUPPLEMENTAL INSTRUCTION

Likelihood of substantial damage. **A person cannot be convicted of wanton damage to property unless it was likely that his actions would result in substantial damage to others or their property. It is not enough that some slight or insignificant damage was likely to result. A person acts "wantonly" only if it is likely that his actions will result in substantial harm.**

However, it is not necessary that the damage actually was substantial, only that such actions were likely to cause substantial damage. The actual outcome of someone's actions is sometimes a matter of luck, and here the law measures the nature of the actions, not the outcome.

Commonwealth v. Ruddock, 25 Mass. App. Ct. 508, 512-514 (1988).

NOTES:

1. **Distinction between "wilful and malicious" and "wanton" destruction.** Wilful and malicious property destruction is a specific intent crime requiring proof that the defendant intended both the conduct and its harmful consequences, while wanton property destruction requires only a showing that the actor's conduct was indifferent to, or in disregard of, the probable consequences. *Commonwealth v. Armand,* 411 Mass. 167, 170-171 (1991). The essence of the distinction "appears to lie in the fact that a wilful actor intends both his conduct and the resulting harm, whereas a wanton or reckless actor intends his conduct but not necessarily the resulting harm." *Commonwealth v. Smith*, 17 Mass. App. Ct. 918, 920 (1983). As an example, if youths throw rocks from a bridge and one strikes a car passing below, the act is wanton if the rocks were thrown casually, without thought of striking any cars, but the act is wilful and malicious if the rocks were aimed at passing cars. *Commonwealth v. Cimino,* 34 Mass. App. Ct. 925, 927 (1993).

2. **"Wanton" destruction is not lesser included offense of "wilful and malicious" destruction.** Wanton property destruction is *not* a lesser included offense of wilful and malicious property destruction (see Instruction 8.280), since wanton conduct requires proof that the likely effect of the defendant's conduct was substantial harm, but wilful and malicious conduct does not. *Commonwealth v. Schuchardt*, 408 Mass. 347, 352 (1990).

3. **Value.** The value of the property destroyed or injured is a question for the jury and must be established beyond a reasonable doubt before it may be relied on to increase the range of punishment. *Commonwealth* v. *Beale*, 434 Mass. 1024, 1025 (2001); *Commonwealth v. Lauzier,* 53 Mass. App. Ct. 626, 633 n.10 (2002). Where the damage is repairable, the value of the property is to be measured by the pecuniary loss (usually the reasonable repair or replacement cost), and not by the fair market value of the whole property or of the damaged portion. *Deberry,* 441 Mass. 211, 221-22 (2004), rev'g 57 Mass. App. Ct. 93 (2003). "Of course, in certain circumstances a seemingly minor type of damage may effectively destroy the value of an entire property, such as a tear in a valuable painting or a chip in an antique cup." *Id.* at 222 n.20.

8.280 WILFUL AND MALICIOUS DESTRUCTION OF PROPERTY

G.L. c. 266, § 127, May 2017

The defendant is charged with wilful and malicious destruction of property (of a value over $250).

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

First: That the defendant injured or destroyed the (personal property) (dwelling house) (building) of another;

Second: That the defendant did so wilfully; (and)

Third: That the defendant did so with malice;

If value of property is alleged to be greater than $250. **and Fourth: That the amount of damage inflicted to the property was more than $250.**

An act is "wilful" if it is done intentionally and by design, in contrast to an act which is done thoughtlessly or accidentally. A person acts wilfully if he (she) intends both the conduct and its harmful consequences.

An act is done with "malice" if it is done out of cruelty, hostility or revenge. To act with malice, one must act not only deliberately, but out of cruelty, hostility or revenge toward another.

If value of property is alleged to be greater than $250. **If you determine that the Commonwealth has proved beyond a reasonable doubt that the defendant is guilty of wilful and malicious destruction of property, you must go on to determine whether the Commonwealth also proved beyond a reasonable doubt that the reasonable cost of repair of the damaged property — or the reasonable cost of replacement if it cannot be repaired — was more than $250.**

Commonwealth v. Deberry, 441 Mass. 211, 215 n.7 (2004) (citing model instruction approvingly); *Commonwealth v. McGovern*, 397 Mass. 863, 868 (1986); *Commonwealth v. Hosman*, 257 Mass.379, 384, (1926); *Commonwealth v. Chambers*, 90 Mass. App. Ct. 137, 144 n.7 (2016) (malice need not be directed toward owner of the property, just toward someone); *Commonwealth v. O'Neil*, 67 Mass. App. Ct. 284, 291 (2006) (offense requires proof of cruel, hostile or vengeful intent in addition to intentional doing of the unlawful act); *Commonwealth v. Peruzzi*, 15 Mass. App. Ct. 437, 440-44 (1983) (malice requires a showing that defendant was motivated by "cruelty, hostility or revenge"). Destruction incidental to some other venture or purpose is insufficient. *Commonwealth v. Morris M*., 70 Mass. App. Ct. 688, 692-93 (2007) (it is not reasonably inferable that defendant purposefully destroyed the fence and turf motivated by hostility, cruelty, or vengeance as opposed to the resulting damage being occasioned by, or incidental to, his desire to escape his circumstances).

SUPPLEMENTAL INSTRUCTION

Where "wilful and malicious" and "wanton" destruction are both charged in separate counts. **If you find that it has been proved beyond a reasonable doubt that the defendant did commit the property damage as alleged, you must then go on to determine whether it was done "wilfully and maliciously" as alleged in Count ____, or "wantonly" as alleged in Count ____. As I have informed you, such conduct would be "wilful and malicious" if the defendant acted out of cruelty, hostility or revenge toward another, and intended both the conduct and the harmful consequences. Such conduct would instead be "wanton" if the defendant intended the conduct but not the harmful consequences, and was reckless or indifferent to the substantial damage that such conduct would probably cause. Since the required intent is different for the two counts, if you find the defendant guilty on one of those counts, you are to return a not guilty verdict on the other count.**

See Instruction 8.260, Wanton Destruction of Property.

NOTES:

1. Distinction between "wilful and malicious" and "wanton" destruction. Wilful and malicious property destruction is a specific intent crime requiring proof that the defendant intended both the conduct and its harmful consequences, while wanton property destruction requires only a showing that the actor's conduct was indifferent to, or in disregard of, the probable consequences. *Commonwealth v. Armand*, 411 Mass. 167, 170-171 (1991); *Commonwealth v. Redmond* 53 Mass. App. Ct. 1, 4-5 (2001). The essence of the distinction "appears to lie in the fact that a wilful actor intends both his conduct and the resulting harm, whereas a wanton or reckless actor intends his conduct but not necessarily the resulting harm." *Commonwealth v. Smith*, 17 Mass. App. Ct. 918, 920 (1983). As an example, if youths throw rocks from a bridge and one strikes a car passing below, the act is wanton if the rocks were thrown casually, without thought of striking any cars, but the act is wilful and malicious if the rocks were aimed at passing cars. *Commonwealth v. Cimino*, 34 Mass. App. Ct. 925, 927 (1993). "It is worth noting that destruction of property which accompanies even violent crime may not by that token alone qualify as wilful and malicious." Id.

2. "Wanton" destruction not lesser included offense of "wilful and malicious" destruction. Wanton property destruction (see Instruction 8.260) is not a lesser included offense of wilful and malicious property destruction, since wanton conduct requires proof that the likely effect of the defendant's conduct was substantial harm, but wilful and malicious conduct does not. *Commonwealth v. Schuchardt*, 408 Mass. 347, 352 (1990).

3. Value. To prove the felony branch of this offense, the Commonwealth must additionally prove that "the value of the property so destroyed or injured" is over $250. *Commonwealth v. Beale*, 434 Mass. 1024 (2001); *Commonwealth v. Lauzier*, 53 Mass. App. Ct. 626, 633 n.10 (2002). Where the damage is repairable, the value of the property is to be measured by the pecuniary loss (usually the reasonable repair or replacement cost), and not by the fair market value of the whole property or of the damaged portion. *Commonwealth v. Deberry*, 441 Mass. 211, 221-22 (2004), rev'g 57 Mass. App. Ct. 93 (2003); *Commonwealth v. Kirker*, 441 Mass. 226, 228-29 (2004). "Of course, in certain circumstances a seemingly minor type of damage may effectively destroy the value of an entire property, such as a tear in a valuable painting or a chip in an antique cup." Id. at 222 n.20.

8.300 WILFUL OR WANTON DESTRUCTION OF HOUSE OF WORSHIP, CEMETERY OR SCHOOL

G.L. c. 266 § 127A
2009 Edition

The defendant is charged with wilfully, intentionally and without right, or wantonly and without cause, destroying, defacing, marring or injuring (a church) (a synagogue) (a building, structure or place used for the purpose of burial or memorializing the dead) (a school or educational facility) (a community center) (the grounds adjacent to and owned or leased by *[one of the foregoing]*) (personal property contained in *[one of the foregoing]*), in violation of section 127A of chapter 266 of our General Laws.

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

First: **That the defendant destroyed, defaced, marred or injured (a church) (a synagogue) (a building, structure or place used for the purpose of burial or memorializing the dead) (a school or educational facility) (a community center) (the grounds adjacent to and owned or leased by *[one of the foregoing]*) (personal property contained in *[one of the foregoing]*);**

and

Second: **That the defendant's acts were *either* wilful, intentional and without right, *or* were wanton and without cause.**

See Instruction 8.260 (Wanton Destruction of Property) for the definition of "wanton" and Instruction 3.120 (Intent) for definitions of "intentional" and "wilful."

The language of the statute does not require permanent damage to the property in question. *Commonwealth v. DiPietro*, 33 Mass. App. Ct. 776, 604 N.E.2d 1344 (1992) (throwing eggs against outside wall of place of worship sufficient for conviction).

NOTE:

Threats. General Laws c. 266, § 127A, second par. also makes it a crime to threaten to burn, deface, mar, injure or in any way destroy a church, synagogue or other building or place of worship.

LARCENY OFFENSES

8.400 FRAUDULENT INSURANCE CLAIM

G.L. c. 266 § 111A
2009 Edition

The defendant is charged with having made a fraudulent insurance claim, in violation of section 111A of chapter 266 of our General Laws.

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

First: **That the defendant (presented to an insurance company) (aided in presenting to an insurance company) (procured the presentation to an insurance company of) a notice, statement, proof of loss, or other written document in connection with or in support of a claim under an insurance policy;**

Second: **That such written document contained a false statement about a matter that was significant to that claim;**

Third: **That the defendant knew that the statement was false; and**

Fourth: **That the defendant intended to injure, defraud or deceive the insurance company.**

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

NOTE:

Other insurance fraud. General Laws c. 266, § 111B covers misrepresentations made in connection with claims under a motor vehicle, theft, or comprehensive insurance policy, whereas § 111A covers fraudulent claims for *all* types of insurance. While § 111B also covers situations involving

fraudulent *applications* for the specified types of insurance, § 111A covers only fraudulent *claims.* The instruction should be modified as required. For example of a case brought under § 111B, see *Commonwealth v. Chery*, 36 Mass. App. Ct. 913, 628 N.E.2d 27 (1994).

8.420 IDENTITY FRAUD BY POSING AS ANOTHER

G.L. c. 266 § 37E[b]
2009 Edition

The defendant is charged with identity fraud by posing as another person. Section 37E(b) of chapter 266 of our General Laws provides as follows:

"Whoever,

with intent to defraud,

poses as another person

without the express authorization of that person

and uses such person's personal identifying information

(to obtain or to attempt to obtain [money] [credit] [goods] [services] [anything of value] [any identification card or other evidence of such person's identity],)

(or) (to harass another)

shall be punished . . . ."

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

First: **That the defendant posed as another person;**

Second: **That the defendant did so without that person's express authorization;**

Third: **That the defendant used that person's identifying information (to obtain or attempt to obtain [money] [credit] [goods] [services] [some other thing of value] [an identification card or other evidence of such person's identity]) (to harass another person); and**

Fourth: **That the defendant did so with the intent to defraud.**

Here the jury must be instructed on specific intent from Instruction 3.120 ("Intent").

To satisfy the first element, the Commonwealth must prove that the defendant falsely represented (himself) (herself), directly or indirectly, as another person or persons.

To prove the third element, the Commonwealth must prove that the defendant used another person's personal identifying information. Such information includes any name or number that may be used, alone or with any other information, to (assume the identity of an individual) (harass an individual).

SUPPLEMENTAL INSTRUCTIONS

1. "Pose." **The word "pose" is defined as falsely representing oneself, directly or indirectly, as another person or persons.**

2. "Harass." **To prove that the defendant intended to harass an individual, the Commonwealth must prove that (he) (she) willfully and maliciously intended to engage in an act directed at a specific person (or persons), which would seriously alarm or annoy that person (or persons) and would cause a reasonable person to suffer substantial emotional distress.**

An act is "willful" if it is done intentionally and by design, in contrast to an act which is done accidentally.

An act is done with "malice" if it is intentional and without justification or mitigation, and any reasonably prudent person would have foreseen the actual harm that resulted.

NOTES:

1. **Personal identifying information.** While the statute specifically identifies particular types of personal information that would fall within the definition of personal identifying information (specifically name, address, telephone number, driver's license number, social security number, place of employment, employee identification number, mother's maiden name, demand deposit account number, savings account number, credit card number, and computer password identification), the statute does not indicate that they are exclusive. G.L. c. 266, §37E(a).

2. **Malicious conduct**. In the criminal harassment statute (G.L. c. 265, §43A), the requirement of malice does not require a showing of cruelty, hostility or revenge, nor does it require an actual intent to cause the required harm, but merely that the conduct be "intentional and without justification or mitigation, and any reasonable prudent person would have foreseen the actual harm that resulted." *Commonwealth v. O'Neil,* 67 Mass. App. Ct. 284, 290-293, 853 N.E>2d 576, 582-584 (2006). Accord, *Commonwealth v. Paton,* 63 Mass. App. Ct. 215, 219, 824 N.E.2d 887, 891 (2005); *Commonwealth v. Giavazzi,* 60 Mass. App. Ct. 374, 375-376, 802 N.E.2d 589 (2004). Prior to the *O'Neil* decision, the second supplemental instruction included the following language: "An act is 'wilful' if it is done intentionally and by design, in contrast to an act which is done thoughtlessly or accidentally. The defendant acted wilfully if the defendant intended both the conduct and its harmful consequences. An act is done with 'malice' if it is done out of cruelty, hostility or revenge. To act with malice, one must act not only deliberately, but out of hostility toward *[the alleged victim].*"

8.440 IDENTITY FRAUD BY OBTAINING PERSONAL INFORMATION

G.L. c. 266 § 37E[c]
2009 Edition

The defendant is charged with identity fraud by obtaining another person's personal identifying information without authorization. Section 37E(c) of chapter 266 of our General Laws provides as follows:

"Whoever,

with intent to defraud,

obtains personal identifying information about another person without the express authorization of such person,

(with the intent to pose as such person), (or) (in order to assist another to pose as such person),

in order (to obtain [money] [credit] [goods] [services] [anything of value] [any identification card or other evidence of such person's identity])

(or) (to harass another)

shall be punished. . ."

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

First: **That the defendant obtained personal identifying information about another person with the intent (to pose as that person) (or) (to assist someone else to pose as that person);**

Second: **That the defendant did so without the express authorization of that person; and**

Third: **That the defendant did so with the specific intent (to obtain [money] [credit] [goods] [services] [something of value] [an identification card or other evidence of that person's identity]) (or) (to harass another person).**

Here the jury must be instructed on specific intent from Instruction 3.120 ("Intent").

To prove the offense, the Commonwealth must prove beyond a reasonable doubt that the defendant intended (to falsely represent himself [herself] directly or indirectly, as another person or persons) (or) (to assist someone else to falsely represent himself [herself] as another person or persons).

To prove the offense, the Commonwealth must also prove beyond a reasonable doubt that the defendant obtained another person's personal identifying information. Personal identifying information includes any name or number that may be used, alone or with any other information, to (assume the identity of an individual) (harass an individual).

SUPPLEMENTAL INSTRUCTIONS

1. "Pose." **The word "pose" is defined as falsely representing oneself, directly or indirectly, as another person or persons.**

2. "Harass." **To prove that the defendant intended to harass an individual, the Commonwealth must prove that (he) (she) willfully and maliciously intended to engage in an act directed at a specific person (or persons), which would seriously alarm or annoy that person (or persons) and would cause a reasonable person to suffer substantial emotional distress.**

An act is "willful" if it is done intentionally and by design, in contrast to an act which is done accidentally.

An act is done with "malice" if it is intentional and without justification or mitigation, and any reasonably prudent person would have foreseen the actual harm that resulted.

NOTES:

1. **Personal identifying information.** While the statute specifically identifies particular types of personal information that would fall within the definition of personal identifying information (specifically name, address, telephone number, driver's license number, social security number, place of employment, employee identification number, mother's maiden name, demand deposit account number, savings account number, credit card number, and computer password identification), the statute does not indicate that they are exclusive. G.L. c. 266, §37E(a).

2. **Malicious conduct**. In the criminal harassment statute (G.L. c. 265, §43A), the requirement of malice does not require a showing of cruelty, hostility or revenge, nor does it require an actual intent to cause the required harm, but merely that the conduct be "intentional and without justification or mitigation, and any reasonable prudent person would have foreseen the actual harm that resulted." *Commonwealth v. O'Neil,* 67 Mass. App. Ct. 284, 290-293, 853 N.E>2d 576, 582-584 (2006). Accord, *Commonwealth v. Paton,* 63 Mass. App. Ct. 215, 219, 824 N.E.2d 887, 891 (2005); *Commonwealth v. Giavazzi,* 60 Mass. App. Ct. 374, 375-376, 802 N.E.2d 589 (2004). Prior to the *O'Neil* decision, the second supplemental instruction included the following language: "An act is 'wilful' if it is done intentionally and by design, in contrast to an act which is done thoughtlessly or accidentally. The defendant acted wilfully if the defendant intended both the conduct and its harmful consequences. An

act is done with ‘malice’ if it is done out of cruelty, hostility or revenge. To act with malice, one must act not only deliberately, but out of hostility toward *[the alleged victim]*.”

8.460 LARCENY BY CHECK

G.L. c. 266 § 37
2009 Edition

The defendant is charged with larceny by check. Larceny by check involves obtaining goods or services by writing a check with knowledge of insufficient funds and with intent to defraud. Section 37 of chapter 266 of our General Laws provides as follows:

"Whoever, with intent to defraud,

makes, draws, utters or delivers

any check, draft or order for the payment of money

upon any bank or other depository,

with knowledge that the maker or drawer has not sufficient funds or credit at such bank or other depository for the payment of such instrument, although no express representation is made in reference thereto . . .

if money or property or services are obtained thereby shall be guilty of larceny."

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

First: **That the defendant (wrote a check) (cashed a check drawn) (passed a check drawn) (delivered a check drawn) upon an account at the _____ Bank;**

Second: **That by doing so the defendant obtained money, property or services;**

Third: **That when the defendant (wrote) (cashed) (passed) (delivered) the check, he (she) knew that he (she) (the person who wrote the check) did not have sufficient funds or credit at the bank on which the check was drawn to cover the check; and**

Fourth: **That the defendant did so with the intent to defraud the bank or someone who received the check.**

If relevant to the evidence. **The word "credit" means an arrangement or understanding with the bank to pay the check, such as a line of credit.**

General Laws c. 266, § 37 also applies to larceny by means of a "draft, or order for the payment of money," includes reference to "other depositor[ies]" as well as banks, and permits conviction of attempted larceny if no money, property or services are obtained. The model instruction may be adapted as appropriate.

Commonwealth v. Klein, 400 Mass. 309, 312-313, 509 N.E.2d 265, 267 (1987) (definition of offense; statute is not unconstitutionally vague or overbroad); *Commonwealth v. Dunnington*, 390 Mass. 472, 474-476, 457 N.E.2d 1109, 1111-1112 (1987) (defendant who ordered secretary to make out check was "drawer"; overdrawn account before and after check presented, and repeated unfulfilled promises to cover it, supported inference of fraudulent intent); *Commonwealth v. Solari*, 12 Mass. App. Ct. 993, 993, 429 N.E.2d 61, 61-62 (1981) (same); *Commonwealth v. Ohanian*, 373 Mass. 839, 842-843, 370 N.E.2d 695, 697 (1977) (defendant who signed depositor's name with his consent was "drawer"; intent to repay money later not a defense; statute refers to drawee bank, not bank at which cashed).

SUPPLEMENTAL INSTRUCTION

Failure to respond within two days to notice of dishonor. **There has been some evidence in this case suggesting that the defendant failed to make good on this check within two days after he (she) was notified that the bank had refused payment because of insufficient funds. If you find that to have been proved, it may be relevant to the issues of the defendant's knowledge and intent.**

If the defendant failed to make good on a check within two days after being notified that it had bounced, you are permitted to infer two other things: that at the time when the defendant originally wrote the check, he (she) knew that there were insufficient funds or a line of credit to cover it at the bank, and also that he (she) wrote the check with the intent to defraud.

You are not required to draw such an inference of knowledge and intent, but you may.

Even if there has been contrary evidence, you may still consider a failure to make good on the check within two days of notice as some evidence on the questions of knowledge and intent, and you may weigh it in your deliberations along with all the rest of the evidence on those two issues.

See *Instruction 3.260* (Prima Facie Evidence).

"As against the maker or drawer thereof, the making, drawing, uttering or delivery of such a check, draft or order, payment of which is refused by the drawee, shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in, or credit with, such bank or other depository, unless the maker or drawer shall have paid the holder thereof the amount due thereon, together with all costs and protest fees, within two days after receiving notice that such check, draft or order has not been paid by the drawee." G.L. c. 266, § 37.

Failure to pay within two days after notice of dishonor is not an element of the offense, but only a trigger for the statutory prima facie effect. *Klein*, 400 Mass. at 312-313, 509 N.E.2d at 267. Note that the prima facie provision is available only against the "maker or drawer" of a check. Oral notice of dishonor is sufficient, including notice communicated through the other depositor to a joint account. Ohanian, supra.

Two justices of the Supreme Judicial Court have indicated their opinion that the statutory prima facie provision is constitutionally invalid as a sole basis for finding scienter, on the grounds that failure to make good on a check within two days could not satisfy a rational trier of fact that the check had been issued dishonestly. *Klein,* 400 Mass. at 316-320, 509 N.E.2d at 269-271 (O'Connor and Liacos, JJ., dissenting). In the *Klein* case, the majority did not reach that issue, since the trial judge had instructed that the permissive inference of scienter lasted only until opposing evidence was introduced, despite the traditional rule that a prima facie effect is "the kind of inference that does not disappear on the introduction of evidence to the contrary; it remains evidence throughout the trial." *Klein,* 400 Mass. at 314, 509 N.E.2d at 268.

Each judge faced with this issue must consider whether it is appropriate, in order to avoid the constitutional issue, to modify the last paragraph of the model instruction so as to limit application of the prima facie provision to situations where there is no competing evidence about scienter, like the charge given in *Klein*.

NOTE:

Civil penalties. General Laws c. 93, § 40A permits, "in addition to any criminal penalties," a civil suit to recover the face amount of a bounced check "and for additional damages, as determined by the court, but in no event . . . less than one hundred nor more than five hundred dollars" if a specified form of written demand goes unanswered for 30 days.

8.480 LARCENY BY EMBEZZLEMENT

G.L. c. 266 § 30
2009 Edition

The defendant is charged with larceny by embezzlement. Section 30 of chapter 266 of our General Laws provides as follows:

"[W]hoever unlawfully,

and with intent to steal or embezzle,

converts, or secretes with intent to convert,

the property of another . . . ,

whether such property is or is not in his possession at the time of such conversion or secreting,

shall be guilty of larceny . . . ."

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

***First:* That the defendant, while in a position of trust or confidence, was entrusted with possession of personal property belonging to another person or entity;**

***Second:* That the defendant took that property, or hid it, or converted it to his (her) own use, without the consent of the owner; and**

***Third:* That the defendant did so with the intent to deprive the owner of the property permanently.**

See the definitions of "property," "of another," and "intent to deprive permanently," and the instructions on larceny over $250, single scheme and claim of right that may be found in the supplemental instructions to Instruction 8.520 (Larceny by Stealing). See also Instruction 3.120 (Intent).

Third Nat'l Bank of Hampden County v. Continental Ins. Co., 388 Mass. 240, 244, 446 N.E.2d 380, 383 (1983) (definition of "conversion"); *Seelig v. Harvard Coop. Soc*., 355 Mass. 532, 543, 246 N.E.2d 642, 649 (1969) (demand and refusal is evidence, but not an element, of larceny); *Commonwealth v. Carson*, 349 Mass. 430, 437, 208 N.E.2d 792, 796 (1965) (honest and reasonable claim of right negates criminal intent); *Commonwealth v. Anthony*, 306 Mass. 470, 475-477, 28 N.E.2d 542, 545 (1940) (comingling of clients' and own funds so as to incur risk of loss to former is embezzlement if done with criminal intent); *Commonwealth v. Hull*, 296 Mass. 327, 330, 5 N.E.2d 565, 567 (1937) (not necessary that defendant personally benefitted); *Commonwealth v. Snow*, 284 Mass. 426, 430-437, 187 N.E. 852, 853-856 (1933) (embezzlement requires trust, as distinguished from debtor-creditor, relationship; diversion of funds received for collection on another's behalf is embezzlement); *Commonwealth v. O'Connell*, 274 Mass. 315, 319-320, 174 N.E. 665, 667 (1931) (not a defense that defendant intended to repay misappropriated money); *Commonwealth v. Tuckerman*, 76 Mass. 173, 187, 205-207 (1857) (same); *Commonwealth v. Este*, 140 Mass. 279, 284, 2 N.E. 769, 770 (1886) (offense requires adverse holding or use of property); *Commonwealth v. Cooper*, 130 Mass. 285, 288 (1881) (not a defense that money was entrusted to defendant for illegal purpose); *Commonwealth v. Barry*, 124 Mass. 325, 327 (1878) (embezzlement involves honest receipt of funds later fraudulently converted); *Commonwealth v. Hays*, 80 Mass. 62, 64-65 (1859) (unlike larceny, embezzlement does not require asportation, but does require that property be received in relationship of trust or confidence); *Commonwealth v. Kenneally*, 10 Mass. App. Ct. 162, 176-177, 406 N.E.2d 714, 724-725 (1980) (defendant who obtains money legally and then forms intent to keep it is embezzler), aff'd on other grounds, 383 Mass. 269, 418 N.E.2d 1224, cert. denied, 454 U.S. 849 (1981); *Slater v. United States Fidelity & Guar. Co*., 7 Mass. App. Ct. 281, 285, 386 N.E.2d 1058, 1061 (systematic course of embezzlement by single scheme constitutes one offense), S.C., 379 Mass. 801, 400 N.E.2d 1256 (1979).

NOTES:

1. **Merger of offenses of stealing, false pretenses, and embezzlement**. See note to Larceny by Stealing (Instruction 8.520).

2. **Embezzlement by fiduciary.** Fiduciary embezzlement requires a showing that the defendant: (1) was a fiduciary during the relevant time period; (2) had in his possession money, goods, or property for the use or benefit either in whole or in part of some other person; (3) converted or appropriated the money or property to his own use or benefit or the benefit of a third person without the consent of the beneficiaries and without the legal right or legal authority to do so; and (4) took such action with fraudulent intent. *Commonwealth v. Garrity*, 43 Mass. App. Ct. 349, 353-354, 682 N.E.2d 937, 941 (1997).

3. **Embezzlement by municipal official.** Embezzlement by a municipal or county officer (G.L. c. 266, § 51) has the same essential elements as embezzlement under G.L. c. 266, § 30, with two additional elements: (1) the status of the perpetrator (i.e., a municipal or county officer) and (2) the identity of the owner whose property is embezzled (i.e., the municipality or county). *Commonwealth v. Mahoney*, 68 Mass. App. Ct. 561, 564, 863 N.E.2d 951, 955 (2007).

8.500 LARCENY BY FALSE PRETENSES

G.L. c. 266 § 30
2009 Edition

The defendant is charged with larceny by false pretenses. Section 30 of chapter 266 of our General Laws provides as follows:

"Whoever . . .

with intent to defraud

obtains by a false pretence . . .

the property of another . . .

shall be guilty of larceny . . . ."

Obtaining property by false pretenses is a form of larceny which consists in knowingly making false representations of fact, with the intent that another person will rely on those false representations, and by means of which the personal property of another is obtained.

In order to prove the defendant guilty of larceny by false pretenses, the Commonwealth must prove five things beyond a reasonable doubt:

***First:* That the defendant made a false statement of fact;**

***Second:* That the defendant knew or believed that the statement was false when he (she) made it;**

Third: **That the defendant made the statement with the intent that the person to whom it was made should rely on it as true;**

Fourth: **That such person did in fact rely on the defendant's statement as true; and**

Fifth: **That such person parted with personal property as a result.**

See also Instructions 3.140 (Knowledge) and 3.120 (Intent). For the definition of "property," see supplemental instruction 2 to Instruction 8.520 (Larceny by Stealing). If the property may be worth more than $250, see supplemental instruction 5 to Instruction 8.520. If the crime is charged as a single scheme, see supplemental instruction 6 to Instruction 8.520.

G.L. c. 277, § 39 (false pretenses means "[f]alse representations made by word or act of such a character, or made under such circumstances and in such a way, with the intention of influencing the action of another, as to be punishable"). *Commonwealth v. Schackenberg*, 356 Mass. 65, 73, 248 N.E.2d 273, 278 (1969) (definition of false pretenses); *Commonwealth v. Leonard*, 352 Mass. 636, 644-645, 227 N.E.2d 721, 727-728 (1967) (same); *Commonwealth v. Kenneally*, 10 Mass. App. Ct. 162, 164, 406 N.E.2d 714, 718 (1980), aff'd, 383 Mass. 269, 418 N.E.2d 1224, cert. denied, 454 U.S. 849 (1981) (same). See *Commonwealth v. Crocker*, 384 Mass. 353, 359-363, 424 N.E.2d 524, 527-530 (1981) (uttering is not a lesser included offense in larceny by false pretenses); *Commonwealth v. Hamblen*, 352 Mass. 438, 443, 225 N.E.2d 911, 914 (1967) (intent to defraud a particular individual not required); *Commonwealth v. Lewis*, 48 Mass. App. Ct. 343, 350, 720 N.E.2d 818, 825 (1999) (repeating elements); *Commonwealth v. Camelio*, 1 Mass. App. Ct. 296, 299, 295 N.E.2d 902, 905 (1973) (misrepresentation can be communicated through agent); *Commonwealth v. Louis Constr. Co*., 343 Mass. 600, 605, 180 N.E.2d 83, 86-87 (1962) (absurd, irrational or incredible misrepresentation may not suffice; submission of invoice is implied representation that charges are correct; scienter and fraudulent intent distinguish offense from civil deceit action); *Commonwealth v. Anthony*, 306 Mass. 470, 474-475, 28 N.E.2d 542, 544 (1940) (opinions and beliefs are not false representations unless speaker creates impression that he is asserting knowledge of fact rather than opinion or judgment); *Commonwealth v. Quinn*, 222 Mass. 504, 511-514, 111 N.E. 405, 407 (1916) (same); *Commonwealth v. Morrison*, 252 Mass. 116, 122, 147 N.E. 588, 590 (1925) (misrepresentation can be made by expressive acts as well as words; person entering sales contract impliedly represents that he intends to make a genuine contract); *Commonwealth v. Hildreth*, 30 Mass. App. Ct. 963, 965, 572 N.E.2d 18, 20-21 (1991) (intent to permanently deprive of property not an element of offense; intent to repay not a defense); *Commonwealth v. Stovall*, 22 Mass. App. Ct. 737, 741-745, 498 N.E.2d 126, 129-131 (1986) (charge can be based on obtaining of loan rather than transfer of ownership; false statement must be material, but need not be sole, cause of victim's parting with property; intent to permanently deprive of property not an element of offense; intent to restore property not a defense); *Commonwealth v. True*, 16 Mass. App. Ct. 709, 711, 455 N.E.2d 453, 454 (1983) (misrepresentation as to present intent to perform a promise will support a conviction, but deceptive intent cannot be inferred solely from nonperformance); *Commonwealth v. Edgerly*, 6 Mass. App. Ct. 241, 261-264, 375 N.E.2d 1, 14-16 (1978) (deceptive intent can be inferred from evidence that nonperformance was intended, e.g. that defendant knew that performance was impossible); *Kenneally*, 10 Mass. App. Ct. at 176-177, 406 N.E.2d at 724-725 (deceptive intent must exist at time of statement); *Commonwealth v. Wright*, 5 Mass. App. Ct. 860, 861, 365 N.E.2d 836, 837 (1977) (same; entering contract with intent not to fulfill it constitutes false representation).

NOTES:

1. **Merger of offenses of stealing, false pretenses, and embezzlement**. See note to Instruction 8.520 (Larceny by Stealing).

2. **Obtaining signature on written instrument by false pretenses.** The separate offense of obtaining a signature on a written instrument by false pretenses (G.L. c. 266, § 31) has four elements: "(1) obtaining the signature of a person to a written instrument (2) the false making whereof would be a forgery (3) by a false pretense (4) with intent to defraud." *Commonwealth v. Levin,* 11 Mass. App. Ct. 482, 495, 417 N.E.2d 440, 447 (1981).

3. **Venue.** Larceny by false pretenses may be prosecuted wherever "the false pretence was made, written or used, or in or through which any of the property obtained was carried, sent, transported or received by the defendant." G.L. c. 277, § 59. There is no requirement that it be prosecuted where the false representation was relied on. *Commonwealth v. Abbott Eng'g, Inc.,* 351 Mass. 568, 579, 222 N.E.2d 862, 870 (1967). Where the defendant made phone calls from Suffolk County to the homes of Norfolk County residents, who then delivered money to the defendant in Suffolk County, the offense could properly be prosecuted in Norfolk County. *Commonwealth v. Price,* 72 Mass. App. Ct. 280, 891 N.E.2d 242 (2008).

8.520 LARCENY BY STEALING

G.L. c. 266 § 30
2009 Edition

The defendant is charged with larceny. Section 30 of chapter 266 of our General Laws provides as follows:

"Whoever steals . . .

the property of another . . .

shall be guilty of larceny . . . ."

Stealing is the wrongful taking of the personal property of another person, with the intent to deprive that person of such property permanently.

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

***First:* That the defendant took and carried away property;**

***Second:* That the property was owned or possessed by someone other than the defendant; and**

***Third:* That the defendant did so with the intent to deprive that person of the property permanently.**

G.L. c. 277, § 39. *Commonwealth v. Donovan*, 395 Mass. 20, 25-26, 478 N.E.2d 727, 732 (1985); *Commonwealth v. Johnson*, 379 Mass. 177, 181, 396 N.E.2d 974, 977 (1979).

SUPPLEMENTAL INSTRUCTIONS

1. "Took and carried away". **"Taking and carrying away" was accomplished if the defendant physically transferred the property from the other person's control to his (her) own. It does not matter if the transfer involved only slight movement, or if it lasted only for a short time.**

Commonwealth v. Fielding, 371 Mass. 97, 117, 353 N.E.2d 719, 731-732 (1976) (any separation of property from victim's dominion, even if brief in space and time, sufficient); *Commonwealth v. Salerno*, 356 Mass. 642, 648, 255 N.E.2d 318, 321 (1970) (taking can be proved by circumstantial evidence); *Commonwealth v. Luckis*, 99 Mass. 431, 433 (1868) (wallet need not be removed from victim's pocket, but defendant "must for an instant at least have had perfect control of the property"); *Commonwealth v. Stephens*, 14 Mass. App. Ct. 994, 994-995, 440 N.E.2d 777, 777 (1982) (sufficient that victim put property in bag at defendant's orders, though defendant never touched it); *Commonwealth v. Bradley*, 2 Mass. App. Ct. 804, 805, 308 N.E.2d 772, 772 (1974) (momentary transfer sufficient); *Commonwealth v. Flowers,* 1 Mass. App. Ct. 415, 418-419, 298 N.E.2d 898, 900-901 (1973) (transfer of property from victim's control to thief's sufficient, since literal "carrying away" not required; transfer may be through agent or victim).

2. "Property." **The term "property" includes (money) (movable items of personal property) (bank notes) (public records) (anything that is part of or attached to real estate) (apartment security deposits) (electronically processed or stored data, either tangible or intangible) (domesticated animals, including dogs, birds and other animals ordinarily kept in confinement).**

This is only a partial list. See G.L. c. 266, § 30(2) for the complete list of items, in addition to those at common law, that may be the subject of larceny. See also *Commonwealth v. Youraski*, 384 Mass. 386, 388, 425 N.E.2d 298, 299 (1981) (intellectual property, such as taped performance, not subject to larceny statute); *Commonwealth v. Beckett*, 373 Mass. 329, 341-343, 366 N.E.2d 1252, 1259-1261 (1977) (intent to commit larceny from welfare department inferable from circumstances).

3. "Of another." **The Commonwealth must prove that the property was owned or possessed by a person other than the defendant. This can be proved by direct evidence that someone else owned or possessed the property. Or, in some cases, it may be reasonable for you to infer this from the surrounding circumstances. The Commonwealth is not required to prove *who* owned or held the property, as long as it proves that the defendant did *not*.**

G.L. c. 277, § 25 (identity of owner need not be alleged if property described with sufficient certainty); G.L. c. 278, § 9 ("owner" includes anyone in actual or constructive possession). *Commonwealth v. Souza*, 397 Mass. 236, 238-239, 490 N.E.2d 1173, 1175 (1986) (identity of owner need not be proved, only that it was not defendant; because of G.L. c. 277, § 35, misnomer of owner is immaterial if defendant not misled); *Commonwealth v. Kiernan*, 348 Mass. 29, 50-51, 201 N.E.2d 504, 516 (1964), cert. denied sub nom. *Gordon v. Mass*., 380 U.S. 913 (1965) ("owner" includes anyone with a possessory or property interest); *Commonwealth v. Binkiewicz*, 342 Mass. 740, 748, 175 N.E.2d 473, 479-480 (1961) (because of G.L. c. 278, § 9, complaint about "the property of x" in effect reads "the property of x, or of another but in x's actual or constructive possession"; driver with shared dominion over auto registered in spouse's name is "owner"); *Commonwealth v. Finn*, 108 Mass. 466, 467 (1871) (one may steal from thief); *Commonwealth v. Sullivan*, 104 Mass. 552, 554-555 (1870) (person who orders goods is in constructive possession of them once delivered to a common carrier, absent a shipping agreement to the contrary); *Commonwealth v. Arrance*, 5 Allen 517, 517-518 (1862) (because of G.L. c. 278, § 9, permissible to allege and prove only one co-owner); *Commonwealth v. Pimental*, 54 Mass. App. Ct. 325, 328, 764 N.E.2d 940, 945 (2002) ("Direct proof of ownership, although preferable, is not essential . . . .").

4. Intent to deprive permanently. **The Commonwealth must prove that the defendant intended to deprive the owner of the property permanently. This may be proved by direct evidence or by inference from the surrounding circumstances. For example, if a person takes the property of another and disposes of it with utter indifference to whether the owner recovers its possession, you might infer from that an intent to deprive the owner of it permanently.**

See *Instruction 3.120* (Intent).

Salerno, supra; *Commonwealth v. Cabot*, 241 Mass. 131, 141-143, 135 N.E.2d 465, 469 (1922); *Commonwealth v. Olivera*, 48 Mass. App. Ct. 907, 909, 719 N.E. 2d 515, 517 (1999) (difference between larceny of motor vehicle and use without authority is intent to deprive permanently; the latter assumes returning stolen vehicle to its owner or abandoning it where it might be recovered); *Commonwealth v. Moore*, 36 Mass. App. Ct. 455, 456-457, 632 N.E.2d 1234, 1236 (1994); *Commonwealth v. Coyle*, 17 Mass. App. Ct. 982, 984, 459 N.E.2d 119, 121 (1984); *Commonwealth v. Ellison*, 5 Mass. App. Ct. 862, 862-863, 365 N.E.2d 1253, 1254 (1977) (intent to make restitution later is not a defense).

5. Larceny over $250. **If you determine that the Commonwealth has proved beyond a reasonable doubt that the defendant is guilty of larceny, you must also go on to determine whether (*if more than one item stolen:* all) the property that was stolen was worth more than $250 or less than $250. You need to consider that question only if you find the defendant guilty, so that I will know which range of sentences the law permits in this case.**

So if your verdict is guilty, you must also indicate on your verdict slip whether or not the Commonwealth has also proved beyond a reasonable doubt that the property was worth more than $250.

You may use your general knowledge in evaluating the value of a piece of property; it is not required that you have any expert evidence of its value.

For a sample verdict slip, see the appendix (Instruction 8.521).

General Laws c. 266, § 30(1) makes the offense a felony "if the property stolen is a firearm . . . or if the value of the property stolen exceeds two hundred and fifty dollars. . . ." The supplemental instruction may be appropriately adapted if the theft is of a firearm.

Commonwealth v. Kelly, 24 Mass. App. Ct. 181, 183-186 & n.4, 507 N.E.2d 777, 778-780 & n.4 (1987), held that, whether or not the value of the property stolen is alleged in the complaint, "the judge should instruct the jury that if they convict, they must determine by their verdict whether the value did or did not exceed [$250] so that the judge will know what range of punishments is available. Otherwise the judge will be required to sentence as if the value did not exceed" $250. Kelly also indicated that the value of the stolen property need not be alleged in the complaint, since "the value of the property . . . is an element of the punishment but not an element of the offense of larceny . . . ." Compare *Commonwealth v. Pyburn*, 26 Mass. App. Ct. 967, 968-970, 527 N.E.2d 1174, 1175-1176 (1988) (in prosecution for wanton destruction of property under G.L. c. 266, § 127, "if there is an allegation in a complaint . . . that the value of the property so destroyed or injured exceeded" $250 then jury must determine that issue, but instruction need not present that factor as an essential element of the offense since it is not such) with *Commonwealth v. Beale*, 434 Mass. 1024, 1025 & n.2, 751 N.E.2d 845, 847 & n.2 (2001) ("the value of the property must be treated as an element of the felony of malicious destruction of property" but "the focus of the constitutional inquiry is not a formalistic examination of whether a finding is labeled an 'element' or a 'sentencing factor,' but whether the finding is made by a jury on proof beyond a reasonable doubt"). See also *Commonwealth v. Harrington*, 130 Mass. 35, 36 (1880) (statutory attempt to dispense with need to charge that crime is subsequent offense, where an element of enhanced sentencing, violated art. 12 of Massachusetts Declaration of Rights).

The jury may use its common knowledge, and does not require expert evidence, in evaluating value. *Commonwealth v. Hosman*, 257 Mass. 379, 386, 154 N.E. 76, 78 (1926); *Commonwealth v. McCann*, 16 Mass. App. Ct. 990, 991, 454 N.E.2d 497, 498 (1983).

6. Single scheme. **The complaint in this case charges the defendant with stealing property between two dates pursuant to a single scheme. Therefore, in addition to the three elements of larceny that I have just instructed you about, the Commonwealth must also prove beyond a reasonable doubt that during that period of time the defendant acted out of a single, continuing intent to steal; that even though time elapsed between incidents, they were not separately motivated but were part of one general scheme or plan to steal.**

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Commonwealth v. John G. Grant & Sons Co., 403 Mass. 151, 157, 526 N.E.2d 768, 772 (1988) (statutory language making each day of a continuing violation a separate offense prevents charging as single, continuous offense); *Commonwealth v. Murray*, 401 Mass. 771, 519 N.E.2d 1293 (1988) (where several acts of a defendant are involved, successive takings in a single, continuing larcenous scheme may, but need not, be charged as a single scheme); *Commonwealth v. England*, 350 Mass. 83, 86- 87, 213 N.E.2d 222, 224-225 (1966) (value of successive larcenies in single scheme may aggregate to grand larceny); *Commonwealth v. Stasiun*, 349 Mass. 38, 45, 206 N.E.2d 672, 677 (1965) (same); *Commonwealth v. Peretz*, 212 Mass. 253, 254, 98 N.E. 1054, 1055 (1912) (same); *Pimental*, 54 Mass. App. Ct. at 329, 764 N.E.2d at 946 (same); *Slater v. United States Fidelity & Guar. Co*., 7 Mass. App. Ct. 281, 285, 386 N.E.2d 1058, 1061 (1979), rev'd on other grounds, 379 Mass. 801, 400 N.E.2d 1256 (1980) (same); *Donovan*, 395 Mass. at 27-31, 478 N.E.2d at 733-735 (where a single act of a defendant is involved, successive takings in a single, continuing larcenous scheme must be charged as a single offense); *Commonwealth v. Pina*, 1 Mass. App. Ct. 411, 412 n.2, 298 N.E.2d 895, 895 n.2 (1973). Compare G.L. c. 277, § 32 (charging a continuing offense); *Sullivan*, 104 Mass. at 553 (distinct larcenies may be presented in multiple counts; stealing at one time of articles belonging to several owners may be charged either as one larceny or as distinct larcenies). But see *Commonwealth v. Donovan*, 395 Mass. 20, 29, 478 N.E.2d 727, 734 (1985) (only one count of larceny, not seven, where defendant mounted imitation deposit lock box over the real one at a bank, obtaining seven bank deposits from different depositors). See also *Commonwealth v. Baldwin*, 52 Mass. App. Ct. 404, 407, 754 N.E.2d 121, 124 (2001) (*Donovan* inapplicable where circumstances involve more than one discrete offense, such that different property is taken at different times and from different locations).

7. Claim of right. **If the defendant took another person's property in an honest and reasonable belief that (he) (she) (another person on whose behalf he [she] was acting) had a legal right to it, then you must find the defendant not guilty, even if that belief was in fact mistaken, because he (she) lacked the intent to steal.**

Commonwealth v. Garrity, 43 Mass. App. Ct. 349, 358 n.7, 682 N.E.2d 937, 943 n.7 (1997); *Commonwealth v. Larmey*, 14 Mass. App. Ct. 281, 283-285, 438 N.E.2d 382, 384-385 (1982); *Commonwealth v. Anslono*, 9 Mass. App. Ct. 867, 868, 401 N.E.2d 156, 157 (1980); Ellison, supra; *Commonwealth v. White*, 5 Mass. App. Ct. 483, 485-488, 363 N.E.2d 1365, 1367-1368 (1977).

NOTES:

1. **"Breaking and entering and stealing therein."** See the notes to Instruction 8.100 (Breaking and Entering).

2. **Merger of offenses**. "In a [complaint] for criminal dealing with personal property with intent to steal, an allegation that the defendant stole said property shall be sufficient; and such [complaint] may be supported by proof that the defendant committed larceny of the property, or embezzled it, or obtained it by false pretences." G.L. c. 277, § 41. "Stealing. Larceny.—The criminal taking, obtaining or converting of personal property, with intent to defraud or deprive the owner permanently of the use of it; including all forms of larceny, criminal embezzlement and obtaining by criminal false pretences." G.L. c. 277, § 39.

"[T]he purpose of the assimilation of offenses was to reduce, if not eliminate, the opportunities for a fatal variance which existed whenever an indictment charged one offence and the proof disclosed a different one." *Kelly*, 24 Mass. App. Ct. at 184, 507 N.E.2d at 779. Proof of any one of the three alternatives will support a conviction for larceny. *Commonwealth v. Leland*, 311 Mass. 447, 448, 42

N.E.2d 249, 250 (1942); *Commonwealth v. Kelley*, 184 Mass. 320, 324, 68 N.E. 346, 347 (1883). The Commonwealth cannot be required to elect which of the three alternatives it intends to prove. *Commonwealth v. Corcoran*, 348 Mass. 437, 440-442, 204 N.E.2d 289, 292-293 (1965); *Commonwealth v. King*, 202 Mass. 379, 386-389, 88 N.E. 454, 457-458 (1909). A bill of particulars is a limitation only as to the proof to be offered; the judge may charge on any of the three alternatives warranted by the evidence. *Corcoran*, *supra*; *Commonwealth v. Kenneally*, 10 Mass. App. Ct. 162, 176, 406 N.E.2d 714, 724 (1980), aff'd on other grounds, 383 Mass. 269, 418 N.E.2d 1224, cert. denied, 454 U.S. 849 (1981). Precise instructions to the jury on the Commonwealth's theory of how the defendant stole are critical because traditional larceny, embezzlement, and larceny by false pretenses have different required elements. *Commonwealth v. Mills*, 436 Mass. 387, 399, 764 N.E.2d 854, 865 (2002).

3. **Related offenses.** For instructions for other larceny offenses, see:

Instruction 8.200 (Theft, etc. of Motor Vehicle, G.L. c. 266, § 28)

Instruction 8.400 (Fraudulent Insurance Claim, G.L. c. 266, § 111A)

Instruction 8.420 (Identity Fraud by Posing as Another, G.L. c. 266, § 37E [b])

Instruction 8.440 (Identity Fraud by Obtaining Personal Information, G.L. c. 266, § 37E [c])

Instruction 8.460 (Larceny by Check, G.L. c. 266, § 37)

Instruction 8.480 (Larceny by Embezzlement, G.L. c. 266, § 30)

Instruction 8.500 (Larceny by False Pretenses, G.L. c. 266, § 30)

Instruction 8.540 (Larceny by Stealing in a Building, G.L. c. 266, § 20)

Instruction 8.560 (Larceny from the Person, G.L. c. 266, § 25 [b])

Instruction 8.580 (Larceny of Leased or Rented Personal Property, G.L. c. 266, § 87)

Instruction 8.600 (Receiving Stolen Property, G.L. c. 266, § 60)

Instruction 8.620 (Shoplifting, G.L. c. 266, § 30A)

Instruction 8.640 (Unauthorized Transfer of Sound Recordings, G.L. c. 266, § 143A).

For other specialized larceny offenses, see also G.L. c. 266, §§ 37B-37C (Credit Card Fraud), 33A (Larceny of Commercial Computer Service) and 120F (Unauthorized Access to Computer System).

4. **Stealing and receiving same property**. A defendant cannot be convicted both of stealing and receiving the same goods. *Commonwealth v. Dellamano*, 393 Mass. 132, 134, 469 N.E.2d 1254, 1255 (1984); *Commonwealth v. Haskins*, 128 Mass. 60, 61 (1880). A defendant may be charged with both crimes; if the evidence would support either, it is for the jury to decide "under clear and precise instructions" of which to convict. *Commonwealth v. Ross*, 339 Mass. 428, 430-432, 159 N.E.2d 330, 332-334 (1959); *Kelley*, 333 Mass. at 195, 129 N.E.2d at 903; *Commonwealth v. Obshatkin*, 2 Mass. App. Ct. 1, 4-5, 307 N.E.2d 341, 343-344 (1974). See Instruction 8.520 (Larceny by Stealing). Each crime should be charged in a separate count or complaint. *Dellamano*, 393 Mass. at 134 n.7, 469 N.E.2d at 1255 n.7. If the jury incorrectly convicts on both charges, the judge should reinstruct the jury and send them out again. If the jury persists, the charge of receiving stolen property should be dismissed. *Commonwealth v. Nascimento*, 421 Mass. 677, 684-685, 659 N.E.2d 745, 750 (1996).

8.521 LARCENY BY STEALING (SAMPLE JURY VERDICT FORM)

January 2013

COMMONWEALTH OF MASSACHUSETTS
DISTRICT COURT DEPARTMENT OF THE TRIAL COURT
_____ Division
Complaint No. _____
)
COMMONWEALTH)
)
vs.) **JURY VERDICT**
)
_____)

We, the jury, unanimously return the following verdict:

1. On this complaint, charging the defendant with larceny, we find the defendant:

___ **NOT GUILTY**

___ **GUILTY**

If you have found the defendant GUILTY, please go on to consider No. 2, below.

If you have found the defendant NOT GUILTY, do not proceed further except to date and sign this verdict form and return to the courtroom.

2. We also find that the Commonwealth:

___ **HAS NOT**

___ **HAS**

proved beyond a reasonable doubt that the value of the stolen property was more than $250.

Date: _____
Signature:_____
Foreperson of the Jury

8.540 LARCENY BY STEALING IN A BUILDING

G.L. c. 266 § 20
2009 Edition

The defendant is charged with stealing in a building. Section 20 of chapter 266 of our General Laws provides as follows:

"Whoever steals in a building

shall be punished . . . ."

Stealing is the wrongful taking of personal property which belongs to someone else with the intent to deprive that person of the property permanently.

In order to prove the defendant guilty of stealing in a building, the Commonwealth must prove four things beyond a reasonable doubt:

***First:* That the defendant took and carried away property;**

***Second:* That at the time the property was being kept safe by virtue of being in a building;**

Third:* That the property belonged to someone other than the defendant; *and

***Fourth:* That the defendant took the property with the intent to deprive the owner of it permanently.**

Commonwealth v. Sollivan, 40 Mass. App. Ct. 284, 287, 663 N.E.2d 580, 582-583 (1996) (approving model instruction).

"Taking and carrying away" was accomplished if the property was physically transferred from the place where it was being kept. It does not matter if the transfer involved only slight movement, or if it lasted for only a short time.

Commonwealth v. Fielding, 371 Mass. 97, 117, 353 N.E.2d 719, 731-732 (1976) (any separation of property from victim's dominion, even if brief in space and time, sufficient); *Commonwealth v. Salerno*, 356 Mass. 642, 648, 255 N.E.2d 318, 321 (1970) (taking can be proved by circumstantial evidence); *Commonwealth v. Luckis*, 99 Mass. 431, 433 (1868) (wallet need not be removed from victim's pocket, but defendant "must for an instant at least have had perfect control of the property"); *Commonwealth v. Stephens*, 14 Mass. App. Ct. 994, 994-995, 440 N.E.2d 777, 777 (1982) (sufficient that victim put property in bag at defendant's orders, though defendant never touched it); *Commonwealth v. Bradley*, 2 Mass. App. Ct. 804, 805, 308 N.E.2d 772, 772 (1974) (momentary transfer sufficient); *Commonwealth v. Flowers*, 1 Mass. App. Ct. 415, 418-419, 298 N.E.2d 898, 900-901 (1973) (transfer of property from victim's control to thief's sufficient, since literal "carrying away" not required; transfer may be through agent or victim).

The Commonwealth must prove that the property was being protected and kept safe by virtue of being in the building rather than being under the watchful eye or personal care of someone in the building.

The Commonwealth must prove that the property was owned or possessed by a person other than the defendant. This can be proved by direct evidence that someone else owned or possessed the property. Or, in some cases, it may be reasonable for you to infer this from the surrounding circumstances. The Commonwealth is not required to prove who owned or held the property, as long as it proves that the defendant did not.

G.L. c. 277, § 25 (identity of owner need not be alleged if property described with sufficient certainty); G.L. c. 278, § 9 ("owner" includes anyone in actual or constructive possession). *Commonwealth v. Souza*, 397 Mass. 236, 238-239, 490 N.E.2d 1173, 1175 (1986) (identity of owner need not be proved, only that it was not defendant; because of G.L. c. 277, § 35, misnomer of owner is immaterial if defendant not misled); *Commonwealth v. Kiernan*, 348 Mass. 29, 50-51, 201 N.E.2d 504, 516 (1964), cert. denied sub nom. *Gordon v. Mass*., 380 U.S. 913 (1965) ("owner" includes anyone with a possessory or property interest); *Commonwealth v. Binkiewicz*, 342 Mass. 740, 748, 175 N.E.2d 473, 479-480 (1961) (because of G.L. c. 278, § 9, complaint about "the property of x" in effect reads "the property of x, or of another but in x's actual or constructive possession"; driver with shared dominion over auto registered in spouse's name is "owner"); *Commonwealth v. Finn*, 108 Mass. 466, 467 (1871) (one may steal from thief); *Commonwealth v. Sullivan*, 104 Mass. 552, 554-555 (1870) (person who orders goods is in constructive possession of them once delivered to a common carrier, absent a shipping agreement to the contrary); *Commonwealth v. Arrance* 517-518 (1862) (because of G.L. c. 278, § 9, permissible to allege and prove only one co-owner).

SUPPLEMENTAL INSTRUCTIONS

1. "Property." **The term "property" includes (money) (movable items of personal property) (bank notes) (public records) (anything that is part of or attached to real estate) (apartment security deposits) (electronically processed or stored data, either tangible or intangible) (domesticated animals, including dogs, birds and other animals ordinarily kept in confinement).**

This is only a partial list. See G.L. c. 266, § 30(2) for the complete list of items, in addition to those at common law, that may be the subject of larceny. See also *Commonwealth v. Youraski*, 384 Mass. 386, 388, 425 N.E.2d 298, 299 (1981) (intellectual property, such as taped performance, not subject to larceny statute); *Commonwealth v. Beckett*, 373 Mass. 329, 341-343, 366 N.E.2d 1252, 1259-1261 (1977) (intent to commit larceny from welfare department inferable from circumstances).

2. Intent to deprive permanently. **The Commonwealth must prove that the defendant intended to deprive the owner of the property permanently. This may be proved by direct evidence or by inference from the surrounding circumstances. For example, if a person takes the property of another and disposes of it with utter indifference to whether the owner recovers its possession, you might infer from that an intent to deprive the owner of it permanently.**

See Instruction 3.120 (Intent) and the supplemental instructions and note to Instruction 8.520 (Larceny by Stealing).

Salerno, supra; Commonwealth v. Cabot, 241 Mass. 131, 141-143, 135 N.E.2d 465, 469 (1922); *Commonwealth v. Moore*, 36 Mass. App. Ct. 455, 456-457, 632 N.E.2d 1234, 1236 (1994); *Commonwealth v. Coyle*, 17 Mass. App. Ct. 982, 984, 459 N.E.2d 119, 121 (1984); *Commonwealth v. Ellison*, 5 Mass. App. Ct. 862, 862-863, 365 N.E.2d 1253, 1254 (1977) (intent to make restitution later is not a defense). It is not enough that the theft be committed within a building. The building – rather than a particular person – must be protecting the property. See *Commonwealth v. Willard*, 53 Mass. App. Ct. 650, 761 N.E.2d 961 (2002).

General Laws c. 266, § 20 also applies to stealing in a ship, vessel or railroad car. The model instruction may be adapted as necessary.

NOTE:

1.Value of property stolen immaterial . Larceny in a building is a felony regardless of the value of the property stolen. *Commonwealth v. Graham*, 62 Mass. App. Ct. 642, 647, 818 N.E.2d 1069, 1074 (2004).

8.560 LARCENY FROM THE PERSON

G.L. c. 266 § 25[b]
2009 Edition

The defendant is charged with larceny from the person. Section 25(b) of chapter 266 of our General Laws provides as follows:

"Whoever commits larceny by stealing from the person of another

shall be punished . . . ."

Larceny from the person is the wrongful taking of personal property from the person of another, or from the immediate area of control of another, with the intent to deprive that person of such property permanently.

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

First: **That the defendant took and carried away property;**

Second: **That the property was owned or possessed by someone other than the defendant;**

Third: **That the defendant took the property from the person of someone who owned or possessed it**

If relevant: **or from such a person's area of control in his or her presence;**

and *Fourth:* That the defendant did so with the intent to deprive that person of the property permanently.

See the definitions of "took and carried away," "property," "of another," and "intent to deprive permanently" in the supplemental instructions to Instruction 8.520 (Larceny by Stealing). See also Instruction 3.120 (Intent).

Commonwealth v. Glowacki, 398 Mass. 507, 514, 499 N.E.2d 290, 294 (1986) (larceny from the person is lesser included offense of robbery); *Commonwealth v. Stewart*, 365 Mass. 99, 108, 309 N.E.2d 470, 476 (1974) (in robbery prosecution, element of larceny "from the person" includes the common law concept of larceny in the victim's presence); *Commonwealth v. Jones*, 362 Mass. 83, 86-87, 283 N.E.2d 840, 843-844 (1972) (same; offense distinguished from robbery by absence of use or threat of force); *Commonwealth v. Subilosky*, 352 Mass. 153, 166, 224 N.E.2d 197, 206 (1967) (property need only be taken from victim's area of control in his presence; here, theft from cash drawers supervised by bank manager); *Commonwealth v. Cline*, 213 Mass. 225, 225-226, 100 N.E. 358, 359 (1913) (unnecessary to allege victim's name or to allege description or value of property); *Commonwealth v. Luckis*, 99 Mass. 431, 433 (1868) (wallet need not be removed from victim's pocket, but defendant "must for an instant at least have had perfect control of the property"); *Commonwealth v. Burke*, 12 Allen 182, 183 (1866) (value of property is not an element); *Commonwealth v. McDonald*, 5 Cush. 365, 367 (1850) (putting hand into empty pocket will support conviction for attempted larceny from person); *Commonwealth v. Diamond*, 5 Cush. 235, 237-238 (1849) (offense may be committed by fraud rather than stealth). See *Commonwealth v. Acevedo*, 25 Mass. App. Ct. 1114, 519 N.E.2d 1371 (No. 87-628, March 2, 1988) (unpublished opinion under Appeals Court Rule 1:28) (theft of package set on ground while victim opened auto trunk is "from the person").

NOTES:

1. **Pickpocketing and purse snatching**. An ordinary pickpocketing usually is a larceny from the person rather than an unarmed robbery, even if the victim realizes what is happening, because no intimidation is involved and the "force" utilized is not the kind of violence necessary for robbery. *Commonwealth v. Davis,* 7 Mass. App. Ct. 9, 11, 385 N.E.2d 278, 279-280 (1979). But a purse snatching of which the victim is aware involves sufficient force to constitute robbery, even if done so quickly as to deny the victim any opportunity to resist. *Jones,* 362 Mass. at 88-89, 283 N.E.2d at 844-845. The same is true of rolling a drunk. *Commonwealth v. Smith,* 21 Mass. App. Ct. 619, 623-624, 489 N.E.2d 203, 205-206 (1986), aff'd, 400 Mass. 1002, 508 N.E.2d 598 (1987).

2. **Value of property**. Note that, unlike larceny offenses prosecuted under G.L. c. 266, § 30, whether the stolen property is worth more or less than $250 is irrelevant to punishment in a prosecution under G.L. c. 266, § 25.

3. **Victim 65 years or older**. Larceny from the person of a victim who is 65 years or older (G.L. c. 266, § 25[a]) is an aggravated form of this offense. The model instruction may be adapted by adding as a fifth element that the victim was 65 years of age or older. The jury may consider the victim's physical appearance as one factor in determining age, but appearance alone is not sufficient evidence of age unless the victim is of "a marked extreme" age, since "[e]xcept at the poles, judging age on physical appearance is a guess . . . ." *Commonwealth v. Pittman,* 25 Mass. App. Ct. 25, 28, 514 N.E.2d 857, 859 (1987).

8.580 LARCENY OF LEASED OR RENTED PERSONAL PROPERTY

G.L. c. 266 § 87
2009 Edition

The defendant is charged with larceny of leased or rented personal property, in violation of section 87 of chapter 266 of our General Laws.

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

First: **That the defendant leased or rented some personal property;**

Second: **That the defendant (concealed some or all of that property) (aided or abetted in concealing some or all of that property) (failed or refused to return such property to its owner within 10 days after the lease or rental agreement had expired) (sold, conveyed or pledged some or all of that property without the written consent of its owner); and**

Third: **That the defendant did so with the intention to place such property beyond the control of its owner.**

The words "aid and abet" comprehend all assistance rendered by acts, words of encouragement or support, or presence, actual or constructive, or the readiness to render assistance, should it become necessary, and no particular acts are necessary. See Instructions 4.100 (Accessory Before the Fact) and 4.200 (Joint Venture).

SUPPLEMENTAL INSTRUCTIONS

1. *Failure to return after notice.* There has been some evidence in this case suggesting that the defendant failed to return the property within 10 days after being notified to do so. If you find that this has been proved, it may be relevant to the issue of the defendant's intent.

The law provides that (if the owner demanded the return of the property in a letter sent by certified or registered mail to the defendant at the address he [she] gave when he [she] entered into the lease or rental agreement) (or) (if the defendant was otherwise aware that the owner had demanded the return of the property), and failed to return the property within 10 days, you are permitted to infer that the defendant intended to place such property beyond the control of the owner. You are not required to draw such an inference of intent, but you may.

Even if there has been contrary evidence, you may still consider a failure to return the property within 10 days of notice as some evidence about the defendant's intent, and you may weigh it in your deliberations along with all the rest of the evidence on that issue.

***2. Providing false information.* There has been some evidence in this case suggesting that when the defendant obtained this property, he (she) gave certain erroneous information. If you find that this has been proved, it may be relevant to the issue of the defendant's intent.**

The law provides that if the defendant gave identification or information about his (her) name, address, employer, or some other significant item that was false, misleading or outdated in some significant way, you are permitted to infer that the defendant intended to place the property beyond the control of the owner. You are not required to draw such an inference of intent, but you may.

Even if there has been contrary evidence, you may still consider the giving of such erroneous information or identification as some evidence about the defendant's intent, and you may weigh it in your deliberations along with all the rest of the evidence on that issue.

NOTES:

1. **Bona fide purchasers**. In order to protect bona fide purchasers, G.L. c. 266, §87 provides that "[i]t shall be a defense to prosecution for conversion of leased or rented property that the defendant was unaware the property belonged to another or that he had a right to acquire or dispose of the property as he did."

2. **Restitution mandatory**. Upon the defendant's conviction under § 87, the statute requires the judge, in addition to any sentence imposed, to order restitution to the owner for any financial loss.

8.600 RECEIVING STOLEN PROPERTY

G.L. c. 266 § 60
2009 Edition

The defendant is charged with receiving stolen property, knowing it to have been stolen. Section 60 of chapter 266 of our General Laws provides as follows:

"Whoever buys, receives or aids in the concealment

of stolen . . . property,

knowing it to have been stolen . . .

shall . . . be punished . . . ."

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

***First:* That the property in question was stolen;**

***Second:* That the defendant knew that the property had been stolen;**

and

***Third:* That the defendant knowingly (had the stolen property in his [her] possession) (bought the stolen property) (aided in concealing the stolen property).**

The Commonwealth must establish that the property was stolen — that is, that someone had taken and carried it away without right and without the consent of the owner, while intending to deprive the owner of it permanently. The Commonwealth is not required to prove who it was who stole the property.

The Commonwealth must also prove that the defendant knew or believed that the property was stolen. This is a question of the defendant's actual knowledge or belief at the time. Even if you find that, under the circumstances, a prudent person would have known or believed that the property was stolen, the defendant cannot be found guilty unless the Commonwealth has proved that he (she) actually knew that the property was stolen, or at least believed that it was stolen.

A person's knowledge is a question of fact. Because you cannot look directly into someone's mind, a person's knowledge is normally shown by inferences from all the facts and circumstances surrounding the event. You may infer that the defendant knew that the goods were stolen if the Commonwealth has proved beyond a reasonable doubt that the defendant (possessed) (bought) (helped to conceal) recently stolen goods, and if the facts and circumstances in this case support an inference that the defendant knew that those goods were stolen. You should consider all the facts and circumstances surrounding the defendant's alleged (possession) (purchase) (concealment) of stolen goods in deciding whether or not it is reasonable for you to draw such an inference, and in determining whether the Commonwealth has proved beyond a reasonable doubt that the defendant knew that the goods he (she) allegedly (possessed) (bought) (concealed) were stolen. Remember: under such circumstances you may, but you are not required to, draw an inference that the defendant knew that the goods were stolen.

Commonwealth v. Burns, 388 Mass. 178, 183 n.11, 445 N.E.2d 613, 616 n.11 (1983).

If the case involves receipt rather than purchase or concealment: **Finally, the Commonwealth must show that the defendant knowingly "received" the property. A person "receives" property by knowingly taking custody or control of it. It is not necessary that the defendant personally possessed the stolen property, as long as it is proved that he (she) knowingly exerted control over it in some way.**

The Commonwealth does not have to show that the defendant made any personal profit from receiving or disposing of the stolen property.

SUPPLEMENTAL INSTRUCTIONS

1. "Recently" stolen goods. **The term "recently" is a relative term, and has no fixed meaning. Whether property should be considered to be recently stolen depends on the type of property it is, its size and appearance, its marketability, the circumstances of its recovery, and all the other circumstances of the situation. The longer the period of time since the theft, the less likely it is that you can draw any reasonable inference simply from the defendant's possession of stolen goods.**

Commonwealth v. Kirkpatrick, 26 Mass. App. Ct. 595, 600-601, 530 N.E.2d 362, 366 (1988); *United States v. Redd*, 438 F.2d 335, 336 (9th Cir. 1971). A judge must initially determine as a matter of law whether the facts would warrant the jury in inferring that the theft was recent. Kirkpatrick, supra (collecting cases). Whether or not it was recent then becomes a fact issue for the jury unless the theft was so remote or so recent as to render it a question of law. *Commonwealth v. Sandler*, 368 Mass. 729, 744, 335 N.E.2d 903, 913 (1975).

2. Stolen property worth more than $250. **If you determine that the Commonwealth has proved beyond a reasonable doubt that the defendant is guilty of receiving stolen property, you must also go on to determine whether the stolen property (was) (*If there were multiple items:* all together were) worth more than $250. You need to consider that question only if you find the defendant guilty, so that I will know what range of sentences the law permits in this case.**

So if your verdict is guilty, you must also indicate on your verdict slip whether or not the Commonwealth has also proved beyond a reasonable doubt that the stolen property (was) (all together were) worth more than $250.

Effective February 1, 1988, St. 1987, c. 468 increased from $100 to $250 the felony threshold for the offenses of receiving stolen property (G.L. c. 266, § 60), larceny (§ 30) and wilful or wanton destruction of property (§ 127).

Commonwealth v. Kelly, 24 Mass. App. Ct. 181, 183-186 & n.4, 507 N.E.2d 777, 778-780 & n.4 (1987), held that, whether or not the value of the property stolen is alleged in the complaint, in a prosecution for larceny (G.L. c. 266, § 30) "the judge should instruct the jury that if they convict, they must determine by their verdict whether the value did or did not exceed [$250] so that the judge will know what range of punishments is available. Otherwise the judge will be required to sentence as if the value did not exceed" $250. *Kelly* also indicated that the value of the stolen property need not be alleged in the complaint, since "the value of the property . . . is an element of the punishment but not an element of the offense of larceny . . . ." *Commonwealth v. Tracy*, 27 Mass. App. Ct. 455, 467, 539 N.E.2d 1043, 1050 (1989), cited Kelly approvingly in seemingly applying the same rule to receiving stolen property cases. Since the language of G.L. c. 266, § 60 is similar to that of § 30, it appears that a similar approach to instructing the jury should be utilized in prosecutions for receiving stolen property when the evidence indicates a possible value of more than $250 but the complaint does not so allege. The sample verdict slip for Larceny by Stealing (Instruction 8.521) may be adapted for such cases.

Compare *Commonwealth v. Pyburn*, 26 Mass. App. Ct. 967, 968-970, 527 N.E.2d 1174, 1175-1176 (1988) (in prosecution for wanton destruction of property under G.L. c. 266, § 127, "if there is an allegation in a complaint . . . that the value of the property so destroyed or injured exceeded" $250 then jury must determine that issue, but instruction need not present that factor as an essential element of the offense since it is not such) with *Commonwealth v. Beale*, 434 Mass. 1024, 1025 & n.2, 751 N.E.2d 845, 847 & n.2 (2001) ("the value of the property must be treated as an element of the felony of malicious destruction of property" but "the focus of the constitutional inquiry is not a formalistic examination of whether a finding is labeled an 'element' or a 'sentencing factor,' but whether the finding is made by a jury on proof beyond a reasonable doubt").

3. Subsequently learning that property stolen. **Even if the defendant did not know that the property was stolen at the time when he (she) received it, the defendant is still guilty of receiving stolen property if he (she) subsequently learned that the property had been stolen, and at that point decided to keep it and to deprive the owner of its use.**

Sandler, 368 Mass. at 740-741, 335 N.E.2d at 911; *Commissioner of Pub. Safety v. Treadway*, 368 Mass. 155, 160, 330 N.E.2d 468, 472 (1975); *Kirkpatrick*, 26 Mass. App. Ct. at 599, 530 N.E.2d at 365.

NOTES:

1. **Model instruction**. The model instruction has been prepared for instructing a jury relative to a charge of receiving stolen property under G.L. c. 266, § 60. The fact patterns of particular cases may require additional definitions of the three main elements (stolen property, knowledge and possession). See Instructions 3.140 (Knowledge) and 3.220 (Possession).

2. **Inference of knowledge from possession of recently stolen goods**. The jury may draw a permissive inference that the defendant knew the property was stolen from his or her possession of recently stolen property where the facts of the case do not show that the possession was innocent. Such an inference is constitutionally permissible. *Barnes v. United States*, 412 U.S. 837, 841-847, 93 S.Ct. 2357, 2360-2364 (1973). See *Sandler*, 368 Mass. at 741-742, 335 N.E.2d at 911. Such an inference may itself support a finding of knowledge beyond a reasonable doubt. See *Commonwealth v. Saia*, 18 Mass. App. Ct. 762, 766, 470 N.E.2d 807, 810 (1984); *Commonwealth v. Taylor*, 10 Mass. App. Ct. 452, 458 n.8, 409 N.E.2d 212, 216 n.8, aff'd on other grounds, 383 Mass. 272, 418 N.E.2d 1226 (1981). "However, '[c]autious vigilance must be maintained against the employment of a naked legal principle in a factual setting which provides no reasonable basis for the principle's application'" (citation omitted). *Kirkpatrick*, 26 Mass. App. Ct. at 600, 530 N.E.2d at 366.

It is reversible error for the judge to suggest that there is some "burden of explanation" on the defendant with regard to possession of recently stolen property, since the jury is likely to confuse this "burden of explanation" with the burden of proof. *Burns*, 388 Mass. at 180-183, 445 N.E.2d at 614-616. If the defendant does offer an innocent explanation, the Commonwealth is not required to disprove that explanation beyond a reasonable doubt; evidence rebutting a permissible inference is to be weighed by the jury. *Id.*, 388 Mass. at 182 n.8, 445 N.E.2d at 616 n.8.

3. **Knowledge**. The defendant's subjective knowledge that the property was stolen is required; a negligent or reckless failure to inquire is not enough. *Commonwealth v. Boris*, 317 Mass. 309, 315-317, 58 N.E.2d 8, 12-13 (1944); *Commonwealth v. May*, 26 Mass. App. Ct. 801, 806-808, 533 N.E.2d 216, 220-221 (1989). The knowledge requirement is satisfied if the defendant either knew or believed that the property was stolen, or later discovered that it was stolen and undertook to deprive the owner of its use. *Commonwealth v. Dellamano*, 393 Mass. 132, 138, 469 N.E.2d 1254, 1257-1258 (1984); *Sandler*, supra; *Treadway*, supra; *Kirkpatrick*, supra.

The defendant's knowledge can be inferred from circumstantial evidence. See, e.g., *Commonwealth v. Imbruglia*, 377 Mass. 682, 693-694, 387 N.E.2d 559, 566-568 (1979) (recent fencing of similar goods); *Commonwealth v. Kelley*, 333 Mass. 191, 194, 129 N.E.2d 900, 902 (1955) (improbable explanation); *Commonwealth v. Matheson*, 328 Mass. 371, 373-374, 103 N.E.2d 714, 715

(1952) (joint occupancy of apartment where goods trafficked openly); *Boris*, 317 Mass. at 316, 58 N.E.2d at 11 (suspicious circumstances of sale which would satisfy a reasonable person that goods were stolen); *Commonwealth v. Billings*, 167 Mass. 283, 285-286, 45 N.E. 910, 910-911 (1897) (possession of unusually large quantity of goods in defendant's home); *Commonwealth v. Leonard*, 140 Mass. 473, 4 N.E. 96, 101-102 (1886) (failure to keep records in ordinary course of business); *Commonwealth v. Dias*, 14 Mass. App. Ct. 560, 562, 441 N.E.2d 266, 267-268 (1982) (same); *Commonwealth v. McGann*, 20 Mass. App. Ct. 59, 66-67, 477 N.E.2d 1075, 1081 (1985) (price; circumstances of receipt; type of seller; location and circumstances of storage); *Commonwealth v. Santucci*, 13 Mass. 933, 934, 430 N.E.2d 1239, 1241 (1982) (improbable explanation; steeply discounted price; cash payment required); *Commonwealth v. Segal*, 3 Mass. App. Ct. 732, 733, 325 N.E.2d 291, 292 (1975) (prior course of dealings with thief); *Commonwealth v. Smith*, 3 Mass. App. Ct. 144, 147, 324 N.E.2d 924, 927 (1975) (possession of many stolen items, whether recently stolen or not). Compare *Commonwealth v. Scarborough*, 5 Mass. App. Ct. 302, 362 N.E.2d 546 (1977) (merely riding as passenger in auto with stolen goods in trunk is insufficient to infer possession and knowledge). For the same reason, the defendant may introduce evidence of his reputation as an honest merchant to disprove his knowledge that the goods were stolen. *Commonwealth v. Gazzolo*, 123 Mass. 220, 221 (1877).

It is irrelevant whether the defendant intended to derive personal benefit from receiving the goods, *Commonwealth v. Bean*, 117 Mass. 141, 142 (1875) (receiver doing personal favor for another equally guilty), or thought the actions justified, *Commonwealth v. Cabot*, 241 Mass. 131, 143-144, 135 N.E. 465, 469 (1922) (knowing use of stolen papers in bar discipline investigation).

4. **Possession**. Buying, receiving, or aiding in the concealment of stolen property are disjunctive, alternate ways of violating the statute. *Commonwealth v. Ciesla*, 380 Mass. 346, 347, 403 N.E.2d 381, 382 (1980). A complaint drawn in the language of G.L. c. 277, § 79 (that the defendant did "buy, receive, and aid in the concealment of" stolen property) is sufficient, even though G.L. c. 266, § 60 is phrased in the disjunctive, and the defendant may be convicted upon proof of any one of the three branches. *Commonwealth v. Valleca*, 358 Mass. 242, 244-245, 263 N.E.2d 468, 469 (1970). The Commonwealth is not required to elect among them before trial. *Commonwealth v. Colella*, 2 Mass. App. Ct. 706, 708, 319 N.E.2d 923, 925 (1974). Constructive possession is enough. *Commonwealth v. Carroll*, 360 Mass. 580, 586, 276 N.E.2d 705, 710 (1971) (items held by others in a joint criminal enterprise); *Commonwealth v. Settipane*, 5 Mass. App. Ct. 648, 652, 368 N.E.2d 1213, 1216 (1977) (same); *Commonwealth v. Kuperstein*, 207 Mass. 25, 27, 92 N.E. 1008, 1009 (1910) (offering to sell goods to undercover agent); *Smith*, 3 Mass. App. Ct. at 146, 324 N.E.2d at 926 (dominion and control is equivalent of possession). A prosecution based upon concealment can be made out by any purposeful action to withhold the property from its owner or to make it more difficult for the owner to discover. *Ciesla*, 380 Mass. at 349, 403 N.E.2d at 383; *Commissioner of Pub. Safety*, supra; *Matheson*, supra.

5. **Severance of multiple charges**. As to whether severance of multiple charges of receiving stolen property is required, see *McGann*, 20 Mass. App. Ct. at 63, 477 N.E.2d at 1079.

6. **"Stolen" property**. The Commonwealth must prove that the property was in fact stolen. *Commonwealth v. Budreau*, 372 Mass. 641, 643-644, 363 N.E.2d 506, 508-509 (1977). The stolen property must either be such as could be the subject of larceny at common law, or be listed in G.L. c. 266, § 30(2). *Commonwealth v. Yourawski*, 384 Mass. 386, 387, 425 N.E.2d 298, 299 (1981). It is not necessary to prove who the thief was, or that the defendant received the goods directly from the thief. *Commonwealth v. Grossman*, 261 Mass. 68, 70-71, 158 N.E. 338, 339 (1927).

Circumstantial evidence can suffice to demonstrate that the goods were stolen. *Commonwealth v. Ryan*, 11 Mass. App. Ct. 906, 414 N.E.2d 1020 (1981) . It is insufficient merely to prove that the defendant was found with common, fungible goods without identifying marks, which are similar to goods previously stolen. *Budreau, supra*; *Billings*, 167 Mass. at 286, 45 N.E. at 911. However, "[t]he law does not require the impossible. Not every exemplar of every kind of property can be individually recognized, and the closer to fungibility the property comes the less possible is accuracy of

identification. Likelihood plays a part . . . . Time is a factor too . . .” (citation omitted). Often this is a jury issue. *Commonwealth v. Rossi*, 15 Mass. App. Ct. 950, 952, 445 N.E.2d 1090, 1092 (1983).

7. **Statute of limitations**. Concealing stolen property is not a continuing offense if the defendant took no further actions after the initial concealment, and the statute of limitations runs from the initial concealment date. However the limitations period begins to run anew from the date of any specific, subsequent affirmative act in aid of the continued purposeful concealment. *Ciesla, supra.*

8. **Stealing and receiving same property**. A defendant cannot be convicted both of stealing and receiving the same goods, since receipt of stolen property requires that the property already be stolen at the time of receipt. *Dellamano*, 393 Mass. at 134, 469 N.E.2d at 1255; *Commonwealth v. Haskins*, 128 Mass. 60, 61 (1880); *Commonwealth v. Corcoran,* 69 Mass. App. Ct. 123, 127 n.6, 866 N.E.2d 948, 952 n.6 (2007). A defendant may be charged with both crimes; if the evidence would support either, it is for the jury to decide “under clear and precise instructions” of which to convict. *Commonwealth v. Ross*, 339 Mass. 428, 430-432, 159 N.E.2d 330, 332-334 (1959); *Kelley*, 333 Mass. at 195, 129 N.E.2d at 903; *Commonwealth v. Obshatkin*, 2 Mass. App. Ct. 1, 4-5, 307 N.E.2d 341, 343-344 (1974). See Instruction 8.520 (Larceny by Stealing). Each crime should be charged in a separate count or complaint. *Dellamano*, 393 Mass. at 134 n.7, 469 N.E.2d at 1255 n.7. If the jury incorrectly convicts on both charges, the judge should reinstruct the jury and send them out again. If the jury persists, the charge of receiving stolen property should be dismissed. *Commonwealth v. Nascimento*, 421 Mass. 677, 684-685, 659 N.E.2d 745, 750 (1996).

However, a conviction for receipt of stolen property does not require the Commonwealth to preclude the possibility that the defendant was the thief. If there is sufficient evidence to support a conviction for receipt of stolen property, such a conviction may stand even if there is also evidence that the defendant may be, or is in fact, the thief, since the jury is free to reject the evidence tending to prove theft and to infer receipt from the fact of possession. *Corcoran,* 69 Mass. App. Ct. at 127, 866 N.E.2d at 951 (defendant charged only with receipt of stolen property), overruling *Commonwealth v. Janvrin,* 44 Mass. App. Ct. 917, 690 N.E.2d 828 (1998).

9. **Receiving stolen property not duplicative of breaking and entering**. While a defendant cannot be convicted both of larceny and of receiving the same stolen property, a defendant may be convicted both of breaking and entering in the nighttime to commit larceny (G.L. c. 266, § 16) and of receiving (G.L. c. 266, § 60) the same stolen property. *Commonwealth v. Cabrera*, 449 Mass. 825, 874 N.E.2d 654 (2007).

10. **Venue**. Venue lies either where the goods were stolen or where they were received. G.L. c. 277, § 58A. The place of receipt can be established by circumstantial evidence. *Obshatkin*, 2 Mass. App. Ct. at 3, 307 N.E.2d at 343. The Commonwealth is not required to allege or prove either the place of the theft or the place of receipt. *Commonwealth v. Parrotta*, 316 Mass. 307, 308-309, 55 N.E.2d 456, 457 (1944).

8.620 SHOPLIFTING

G.L. c. 266 § 30A
2009 Edition

General Laws c. 266, § 30A provides for aggravated punishment when the retail value of shoplifted goods is $100 or more. When the aggravated form of the statute is charged and supported by the evidence, the jury should additionally be asked to determine whether the Commonwealth has proved beyond a reasonable doubt that the retail value of the shoplifted goods is $100 or more. The statute also provides for aggravated punishment for subsequent offenses.

The defendant is charged with (shoplifting) (shoplifting by concealing merchandise) (shoplifting by switching a price tag) (shoplifting by switching containers) (shoplifting by ringing up a false price) (removing a shopping cart). Section 30A of chapter 266 of our General Laws provides in substance:

Instruct on one or more of the following alternatives, as applicable:

A. *Shoplifting*.

"Any person who intentionally (takes possession of, carries away, transfers) (or) (causes to be carried away or transferred)

any merchandise displayed, held, stored or offered for sale by a store or other retail merchant,

with the intention of depriving the merchant of its possession, use or benefit or converting it to his (her) use without having paid the merchant its value,

shall be punished."

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

First: **That the defendant intentionally (took possession of, carried away, or transferred) (or) (caused to be carried away or transferred) retail merchandise;**

Second: **That the merchandise was owned or possessed by someone other than the defendant; and**

Third: **That the defendant (took possession of, carried away, or transferred) (or) (caused to be carried away or transferred) that merchandise and did so (with an intent to deprive the merchant of its possession, use or benefit) (or) (with an intent to convert it to his [her] own use without having paid full value for it).**

B. *Shoplifting by concealing merchandise.*

"Any person who intentionally conceals on his person or elsewhere any retail merchandise, with the intention of depriving the merchant of the proceeds, use or benefit of that merchandise or converting it to his (her) use without paying the merchant its value, shall be punished."

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

First: **That the defendant concealed retail merchandise on his (her) person or elsewhere under his (her) control;**

Second: **That the merchandise was owned or possessed by someone other than the defendant; and**

Third: **That the defendant concealed that merchandise (with an intent to deprive the merchant of its possession, use or benefit) (or) (with an intent of converting it to his [her] own use without having paid full value for it).**

C. *Shoplifting by switching a price tag.*

"Any person who intentionally alters, transfers or removes any label, price tag or other marking for determining the price of retail merchandise which is being displayed, held, stored or offered for sale, and attempts to purchase such merchandise personally or in collaboration with another person at less than its full retail price,

with the intention of depriving the merchant of all or some part of its retail value,

shall be punished."

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

First: **That the price of retail merchandise owned or possessed by someone other than the defendant was contained on a label, price tag or other marking;**

Second: **That the defendant intentionally (altered) (transferred) (removed) that label, price tag or marking from the merchandise;**

Third: **That the defendant, personally or by agreement with another person, then attempted to purchase that merchandise at less than the full retail price; and**

Fourth: **That the defendant did so with the intent to deprive the merchant of all or some part of its retail value.**

D. *Shoplifting by switching containers.*

"Any person who intentionally transfers merchandise displayed, held, stored or offered for sale,

from the container in or on which it is being displayed to some other container,

with the intention of depriving the merchant of all or some of its retail value,

shall be punished."

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

First: **That retail merchandise was displayed in or on a container;**

Second: **That the merchandise was owned or possessed by someone other than the defendant;**

Third: **That the defendant intentionally transferred the merchandise to some other container; and**

Fourth: **That the defendant did so with an intent to deprive the merchant of its full price.**

E. *Shoplifting by ringing up a false price.*

"Any person who intentionally records a value for retail merchandise which is less than its actual retail value, with the intention of depriving the merchant of its full retail value, shall be punished."

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

First: **That the defendant intentionally rang up or recorded a price for merchandise;**

Second: **That the price rung up was less than the actual retail price;**

Third: **That the defendant knew that the price rung up was less than the actual retail price; and**

Fourth: **That the defendant acted with the intent to deprive the merchant of the full price.**

F. *Removing a shopping cart.*

"Any person who intentionally removes a shopping cart from the premises of a retail merchant without the consent of the merchant at the time of the removal, with the intention of permanently depriving the merchant of the possession, use or benefit of the shopping cart, shall be punished."

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

First: **That the defendant intentionally removed a shopping cart from the premises of a retail merchant;**

Second: **That the cart was owned by someone other than the defendant;**

Third: **That the defendant removed the cart without the consent of that merchant; and**

Fourth: **That the defendant did so with an intent to deprive the merchant of the possession or use of the cart permanently.**

SUPPLEMENTAL INSTRUCTIONS

1. "Retail merchandise." **"Retail merchandise" means products or goods that are offered for sale in relatively small quantities directly to consumers. It refers to the type of merchandise sold in an ordinary store open to the public, as opposed to goods sold in bulk to merchants but not directly to the public.**

2. "Conceal." **To "conceal" means to cover an object to keep it from being seen or to withdraw an object from view to prevent its discovery. To conceal is to take an action that makes it more difficult for the owner to discover the property or that makes discovery or identification of the property more difficult.**

Commonwealth v. Balboni, 26 Mass. App. Ct. 750, 532 N.E.2d 706 (1989).

NOTES:

1. **Larceny prosecution is alternative only for goods with value of $100 or over.** *Commonwealth v. Hudson,* 404 Mass. 282, 285-289, 535 N.E.2d 208, 210-212 (1989), held that theft of retail merchandise may be prosecuted either under the shoplifting statute (G.L. c. 266, § 30A) or under the general larceny statute (G.L. c. 266, § 30). However, § 30A was amended by St. 1996, c. 430 (effective December 9, 1996) to provide that "[i]f the retail value of the goods obtained is less than one hundred dollars, this section shall apply to the exclusion of section thirty." This appears to provide that shoplifting goods worth less than $100 may now be prosecuted *only* under § 30A and may not be prosecuted under § 30.

2. See generally Cleary, "The Crime of Shoplifting: Some Constitutional and Other Problems," 69 Mass. L. Rev. 20 (1984).

8.640 UNAUTHORIZED TRANSFER OF SOUND RECORDINGS

G.L. c 266 § 143A
2009 Edition

The defendant is charged with the unauthorized reproduction and transfer of sound recordings in violation of section 143A of chapter 266 of our General Laws. In order to prove the defendant guilty of this offense, the Commonwealth must prove four things beyond a reasonable doubt:

First: **That the defendant directly or indirectly transferred or caused to be transferred sounds that had been recorded on a (phonograph record) (disc) (wire) (tape) (film) (video cassette) (sound recording);**

Second: **That the defendant knew he (she) was transferring such sounds;**

Third: **That the defendant did so without the consent of the owner of the master recording from which the transferred sounds were derived; and**

Fourth: **That the defendant intended to sell or to rent or to transport the recorded copy, or to play it in a public performance for profit, or intended to cause one of those things to happen.**

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

General Laws c. 266, § 143A also punishes selling such a recording with knowledge that the sound transfer was made without the consent of the owner. The model instruction may be appropriately adapted in such cases.

SUPPLEMENTAL INSTRUCTION

If the evidence suggests at least 100 sound recordings or 7 audiovisual recordings. **If the Commonwealth has proved to you beyond a reasonable doubt that the defendant is guilty of this offense, you must then go on to determine how many unlawful recordings were made. You need to consider that question only if you find the defendant guilty, so that I will know which range of sentences the law permits in this case.**

So if your verdict is guilty, you must also indicate on your verdict slip which of three possible ranges the number of unlawful recordings falls into: the first range is between (1 and 99 sound recordings) (1 and 6 audiovisual recordings), the second range is between (100 and 999 sound recordings) (7 and 64 audiovisual recordings), and the third range is between (1000 or more sound recordings) (65 or more audiovisual recordings). Your selection of the appropriate range must be based on facts that the Commonwealth has proved to you beyond a reasonable doubt.

G.L. c. 266, § 143D.

DEFENSE AND JUSTIFICATION

9.100 ACCIDENT

2009 Edition

Evidence has been introduced in this case which you may consider in determining whether the defendant intentionally committed an act that was a criminal offense, or whether what occurred was a pure and simple accident.

In considering such evidence, please keep in mind that the Commonwealth must prove beyond a reasonable doubt that what occurred was not an accident. If the Commonwealth has failed to prove to you beyond a reasonable doubt that what occurred was not an accident, then you must find the defendant not guilty.

An "accident" is defined as an unexpected happening that occurs without intention or design on the defendant's part. It means a sudden, unexpected event that takes place without the defendant's intending it.

The term "accident" is used in two senses: unintended conduct or unintended consequences. Accident in the first, broad sense focuses on the nature of the conduct that produced the result and not simply on the result, and is a defense to the extent that it negates the crime's scienter element. In the second sense it means the unintended consequences of a defendant's act, and is a defense only if the Commonwealth is required to prove that the defendant intended the consequence of his act. *Commonwealth v. Figueroa*, 56 Mass. App. Ct. 641, 647-650, 779 N.E.2d 669, 673-676 (2002); *Commonwealth v. Palmariello*, 392 Mass. 126, 145, 466 N.E.2d 805, 817 (1984); *Commonwealth v. Hakala*, 22 Mass. App. Ct. 921, 923, 492 N.E.2d 376, 377 (1986).

Where the evidence raises an issue of accident, as a matter of due process the defendant is entitled on request to a jury instruction that the Commonwealth has the burden of proving beyond a reasonable doubt that the act was not accidental. *Palmariello*, supra; *Commonwealth v. Zezima*, 387 Mass. 748, 756, 443 N.E.2d 1282, 1287 (1978); *Lannon v. Commonwealth*, 379 Mass. 786, 790, 400 N.E.2d 862, 865 (1980). This issue can be raised even by the Commonwealth's case in chief. *Commonwealth v. Lowe*, 15 Mass. App. Ct. 262, 264-265, 444 N.E.2d 1314, 1316-1318 (1983), cert. denied, 469 U.S. 840 (1984). In assessing the evidence, all reasonable inferences must be resolved in favor of the defendant. *Commonwealth v. Campbell*, 352 Mass. 387, 398, 226 N.E.2d 211, 219 (1967). An accident instruction is not required sua sponte where the case is defended solely on a self-defense theory. *Commonwealth v. Olson*, 24 Mass. App. Ct. 539, 544, 510 N.E.2d 787, 790 (1987).

The issue of accident goes to whether a defendant who committed the underlying act did so accidentally. Therefore, if the defendant denies causing the underlying act and asserts it was caused by another, then the defendant's theory of causality is not an affirmative defense requiring a separate instruction, and the usual charge on the Commonwealth's general burden of proof as to each element is adequate. *Commonwealth v. Hutchinson*, 395 Mass. 568, 578-579, 481 N.E.2d 188, 195 (1985).

The definition of "accident" in the model instruction is drawn from *Quincy Mut. Fire Ins. Co. v. Abernathy*, 393 Mass. 81, 83-84, 469 N.E.2d 797, 799 (1984), and *Shapiro v. Public Serv. Mut. Ins. Co*., 19 Mass. App. Ct. 648, 651-652, 477 N.E.2d 146, 149-150 (1985), and was cited favorably in *Commonwealth v. Ferguson*, 30 Mass. App. Ct. 580, 582 n.1, 571 N.E.2d 411, 413 n.1 (1991).

NOTE:

Abusive relationship evidence. Where there is a claim of accidental injury to another, "a defendant shall be permitted to introduce either or both of the following in establishing the reasonableness of the defendant's apprehension that death or serious bodily injury was imminent, the reasonableness of the defendant's belief that he or she had availed him or herself of all available means to avoid physical combat and/or the reasonableness of a defendant's perception of the amount of force necessary to deal with the perceived threat: (a) evidence that the defendant is or has been the victim of acts of physical, sexual or psychological harm or abuse; (b) evidence by expert testimony regarding the common pattern in abusive relationships; the nature and effects of physical, sexual or psychological abuse and typical responses thereto, including how those effects relate to the perception of the imminent nature of the threat of death or serious bodily harm; the relevant facts and circumstances which form the basis for such opinion; and evidence whether the defendant displayed characteristics common to victims of abuse." G.L. c. 233, § 23E.

9.120 ALIBI

2009 Edition

You have heard testimony suggesting that the defendant was not present at the place and time when the offense charged in the complaint is alleged to have occurred.

Such testimony is commonly referred to as alibi evidence. Now I caution you not to give the word "alibi" any sinister connotation. It is only a shorthand phrase for a very important issue in this case: did the defendant commit the crime as charged, or was he (she) elsewhere at the time and therefore necessarily innocent?

In considering this matter, please remember that the Commonwealth has the burden of proving beyond a reasonable doubt that the defendant committed the offense charged, and of course that includes proving that the defendant was present at the scene and not somewhere else at the time. The defendant has no duty to call witnesses or produce evidence on this or any other element of the crime.

If there was evidence of a complete alibi. **In this case you have heard evidence suggesting that the defendant was *[where]* at the time when this offense was committed. You will have to decide whether or not you believe that evidence. Obviously, if you believe it, then the Commonwealth has failed to prove the defendant's guilt beyond a reasonable doubt and you must find him (her) not guilty. But even if you disbelieve some or all of that evidence, that doesn't mean that the defendant is automatically guilty. You still have to find, on all the evidence, that the Commonwealth has proved the defendant's guilt beyond a reasonable doubt.**

Please give this issue your careful consideration, since in some cases an alibi may be the only refuge of an innocent person. After you consider all the evidence, if the Commonwealth has proved beyond a reasonable doubt that the defendant was present and committed the crime as charged, you should find the defendant guilty. On the other hand, if you have a reasonable doubt about whether the defendant was present at the time and place of the offense, or about any other element of the crime, then you must find him (her) not guilty.

The model instruction is based on the recommended instruction in *Commonwealth v. McLeod*, 367 Mass. 500, 502 n.1, 326 N.E.2d 906, 906 n.1 (1975), quoting from E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 11.31 (2d ed. 1970), on the recommended instruction in *Commonwealth v. Bowden*, 379 Mass. 472, 480 n.3, 399 N.E.2d 482, 488 n.3 (1980), and on Federal Judicial Center, Pattern Criminal Jury Instructions § 53 (1983 ed.).

It is preferable to charge on alibi upon request, but it is not error to refuse to do so if the jury is clearly instructed that the burden is on the Commonwealth to prove every element of the offense. *Commonwealth v. Medina*, 380 Mass. 565, 579-580, 404 N.E.2d 1228, 1236-1237 (1980); *Commonwealth v. Keaton*, 36 Mass. App. Ct. 81, 88 89, 628 N.E.2d 1286, 1290 (1994). On request, a judge should give such an instruction. *Commonwealth v. Dreyer*, 18 Mass. App. Ct. 562, 567, 468 N.E.2d 863, 867 (1984).

It is reversible error to put the burden of proof as to alibi on the defendant. It is "not ordinarily helpful" to single out alibi evidence for "rigid scrutiny" and the like in a charge, but if this is done it must be balanced with an instruction that an alibi may be the only refuge of the innocent. *McLeod*, 367 Mass. at 502, 326 N.E.2d at 905. See also *Bowden*, 379 Mass. at 480-482, 399 N.E.2d at 488-489; *Commonwealth v. Palmarin,* 378 Mass. 474, 478-479, 392 N.E.2d 534, 537 (1979); *Commonwealth v. Garrett*, 8 Mass. App. Ct. 894, 393 N.E.2d 954 (1979); *Commonwealth v. Cobb*, 5 Mass. App. Ct. 421, 423-424, 363 N.E.2d 1123, 1124-1125 (1977), S.C. 6 Mass. App. Ct. 921, 380 N.E.2d 142 (1978). A charge should not suggest that the defendant has some burden to "substantiate" his or her alibi or to "create" a reasonable doubt. Id.

NOTES:

1. **Alibi witness's pretrial silence**. The Commonwealth may impeach a defense witness other than the defendant with his or her pretrial silence only upon establishing the following foundation: (1) the witness knew of the pending charges in sufficient detail to realize that he or she possessed exculpatory information; (2) the witness had reason to make such information available; (3) the witness was familiar with the way to report it to the proper authorities; and (4) neither the defendant nor defense counsel asked the witness to refrain from doing so. *Commonwealth v. Gregory*, 401 Mass. 437, 445, 517 N.E.2d 454, 459 (1988); *Commonwealth v. Edgerton*, 396 Mass. 499, 506-507, 487 N.E.2d 481, 486-487 (1986); *Commonwealth v. Berth*, 385 Mass. 784, 790, 434 N.E.2d 192, 196 (1982); *Commonwealth v. Enos*, 26 Mass. App. Ct. 1006, 1007, 530 N.E.2d 805, 807 (1988); *Commonwealth v. Bassett*, 21 Mass. App. Ct. 713, 716-717, 490 N.E.2d 459, 461-462 (1986); *Commonwealth v. Brown*, 11 Mass. App. Ct. 288, 296-297, 416 N.E.2d 218, 224 (1981). See also *Commonwealth v. Nickerson*, 386 Mass. 54, 58 n.4, 434 N.E.2d 992, 995 n.4 (1982) (inference impermissible if witness had other reasons for not wanting to deal with police); *Commonwealth v. Barros*, 24 Mass. App. Ct. 964, 964, 511 N.E.2d 362, 363-364 (1987) (inferable from witness's explanation that fourth foundation requirement satisfied). The Commonwealth is entitled to pose such foundation questions in the presence of the jury, *Enos, supra,* but it is error to permit such impeachment unless the proper foundation has been laid, *Commonwealth v. Rivers*, 21 Mass. App. Ct. 645, 648, 489 N.E.2d 206, 208 (1986).

2. **Disbelief of alibi witnesses.** Since generally only a defendant's own statements or actions can indicate consciousness of guilt, the jury may not be instructed that their disbelief of defense alibi witnesses may support an inference of the defendant's consciousness of guilt. *Commonwealth v. Ciampa,* 406 Mass. 257, 267, 547 N.E.2d 314, 321 (1989).

3. **Notice of alibi**. Motions for advance notice of alibi are governed by Mass. R. Crim. P. 14(b)(1). The seminal case is *Commonwealth v. Edgerly*, 372 Mass. 337, 361 N.E.2d 1289 (1977). See also *Commonwealth v. Hanger*, 377 Mass. 503, 508-510, 386 N.E.2d 1262, 1265-1266 (1979); *Commonwealth v. Blodgett*, 377 Mass. 494, 498-502, 386 N.E.2d 1042, 1045-1046 (1979); *Commonwealth v. LaFrennie*, 13 Mass. App. Ct. 977, 978-979, 432 N.E.2d 535, 537-538 (1982); *Commonwealth v. Delaney*, 11 Mass. App. Ct. 398, 416 N.E.2d 972 (1981) (discovery of Commonwealth's rebuttal witnesses).

Where a notice of alibi has been ordered, both the Sixth Amendment and art. 12 of the Massachusetts Declaration of Rights will, under some circumstances, permit a judge to exclude a late-disclosed alibi witness. Faced with a previously undisclosed alibi witness, the judge either may declare a continuance to give the Commonwealth time to investigate, or may conduct a voir dire to determine whether an asserted surprise discovery of the witness is genuine or contrived. The judge must balance the fair and efficient administration of justice against getting all material evidence before the jury. If the defense explanation suggests desultory preparation or an intentional ambush of the prosecution,

exclusion is warranted. If the explanation is cogent, the judge may consider the materiality of the testimony in determining how to rule. *Commonwealth v. Porcher*, 26 Mass. App. Ct. 517, 518-520, 529 N.E.2d 1348, 1349-1350 (1988). See *Taylor v. Illinois*, 484 U.S. 400, 108 S.Ct. 646 (1988); *Commonwealth v. Chappee*, 397 Mass. 508, 492 N.E.2d 719 (1986), grant of habeas corpus rev'd sub nom. *Chappee v. Vose*, 843 F.2d 25 (1st Cir. 1988).

9.140 ENTRAPMENT

2009 Edition

The defendant asserts that if he (she) committed this crime, he (she) did so only because he (she) was entrapped into committing it.

Entrapment occurs when a person who had no previous intention to violate the law is persuaded to commit a crime by an officer of the government. As a matter of public policy, you must find the defendant not guilty if you find that he (she) was entrapped into committing this crime.

The rule against entrapment is part of our law because the function of law enforcement is to prevent crime and to apprehend criminals. The state cannot tolerate having its officers instigating crime by implanting criminal ideas in innocent minds and thereby bringing about offenses that otherwise would never occur.

However, please notice that the rule against entrapment comes into play only when a government officer implants the idea of committing a crime in an *innocent* mind, the mind of a person who was not already predisposed to commit such a crime. It is not entrapment if a person is already ready and willing to commit such a crime if the opportunity presents itself, and the officer merely provides the opportunity or facilities to do so.

The issue is not whether the police brought about this particular offense, but whether the police brought about the defendant's disposition to commit such a crime. For that reason, there is nothing improper about the police setting traps to catch those who are already disposed toward committing a crime. The police may validly use undercover methods — for example, decoys or false identities — in order to trap unwary criminals. What they may not do is to entrap unwary *innocent* persons.

It is up to you as the jury to determine whether or not the actions of the police in this case amounted to entrapment. You must ask yourselves:

Did the criminal intent in this case originate with the defendant or with the police? Was the defendant an innocent person who initially was not ready or willing to break the law, but was enticed or ensnared into committing a crime by the police? Or, on the other hand, was the defendant already ready and willing to commit a crime such as this if the opportunity presented itself, and the police merely provided that opportunity?

See Instruction 3.120 (Intent).

The burden is on the Commonwealth to prove beyond a reasonable doubt that the defendant was *not* entrapped by a government agent. The Commonwealth may do this *either* by proving that there was no inducement by a government agent or someone acting at the request of a government agent, *or* by proving that the defendant was predisposed to commit the crime. If it is clear beyond a reasonable doubt that the defendant was not entrapped, then you may find the defendant guilty, provided that all the elements of the crime have also been proved beyond a reasonable doubt. On the other hand, if you are left with a reasonable doubt as to whether the defendant was willing to commit the crime apart from any persuasion by the police, then you must find the defendant not guilty.

In order to raise an entrapment defense, evidence of inducement (beyond mere solicitation) by a government agent must be presented at trial. The prosecution is then required to prove beyond a reasonable doubt that the defendant was already predisposed to commit the crime, i.e., "ready and willing to commit the crime whenever the opportunity might be afforded." *Commonwealth v. Doyle*, 67 Mass. App. Ct. 846, 859, 858 N.E.2d 1098, 1108 (2006).

Commonwealth v. Vargas, 417 Mass. 792, 632 N.E.2d 1223 (1994) (where entrapment defense offered to drug distribution charge, evidence of prior distribution or possession to distribute, but not of simple possession, is relevant to predisposition); *Commonwealth v. Tracey*, 416 Mass. 528, 537 n.10, 624 N.E.2d 84, 89 n.10 (1993) (whether inducer was government agent or acting at government request is jury question); *Commonwealth v. Shuman*, 391 Mass. 345, 350-353, 462 N.E.2d 80, 83-84 (1984); *Commonwealth v. Thompson*, 382 Mass. 379, 381-386, 416 N.E.2d 497, 499-501 (1981); *Commonwealth v. Miller*, 361 Mass. 644, 650-653, 282 N.E.2d 394, 399-400 (1972); *Commonwealth v. Harvard*, 356 Mass. 452, 458-461, 253 N.E.2d 346, 350-351 (1969); *Doyle, supra* (affirming instruction which largely tracks language of model instruction); *Commonwealth v. Coyne*, 44 Mass. App. Ct. 1, 6, 686 N.E.2d 1321, 1324 (1997) (Vargas rule applicable to prior distribution of different Class B drugs); *Commonwealth v. Penta*, 32 Mass. App. Ct. 36, 47, 586 N.E.2d 996, 1002 (1992) (there are two elements to an entrapment defense: inducement by a government agent, and defendant's lack of predisposition); *Commonwealth v. Quirk*, 27 Mass. App. Ct. 258, 263, 537 N.E.2d 597, 600 (1989) (reserving decision on whether defendant's drug addiction has any place in jury charge on entrapment); *Commonwealth v. LaBonte*, 25 Mass. App. Ct. 190, 194, 516 N.E.2d 1193, 1196 (1987); *Commonwealth v. Silva*, 21 Mass. App. Ct. 536, 547-550, 488 N.E.2d 34, 41-42 (1986). While entrapment is not a defense of constitutional magnitude, *United States v. Russell*, 411 U.S. 423, 93 S.Ct. 1637 (1973), relevant Federal decisions include Russell; *Jacobson v. United States*, 503 U.S. 540, 112 S.Ct. 1535 (1992) (prosecution must prove that defendant's willingness was independent of and not product of government's attention); *Osborn v. United States*, 385 U.S. 323, 87 S.Ct. 429 (1966); *Sherman v. United States*, 356 U.S. 369, 372, 78 S.Ct. 819 (1958); *Sorrells v. United States*, 287 U.S. 435, 451, 53 S.Ct. 210, 212 (1932); *United States v. Murphy*, 852 F.2d 1 (1st Cir. 1988); *Kadis v. United States*, 373 F.2d 370 (1st Cir. 1967). Entrapment is a defense to be raised at trial, not by a pretrial motion to dismiss. To raise an entrapment issue, the defendant must introduce "some evidence of inducement by a government agent or one acting at his direction." Mere evidence of a request or solicitation is not itself sufficient to show inducement, but only a little more is required, e.g., pleading or arguing, lengthy negotiations, aggressive persuasion, coercive encouragement, or repeated or persistent solicitation, importuning, and playing on sympathy or other emotion. See, e.g., *Commonwealth v. Remedor*, 52 Mass. App. Ct. 694, 703, 756 N.E.2d 606, 613 (2001). In determining whether the defendant has met this burden, the judge should not consider the credibility of the evidence. Once the defendant has presented evidence of inducement (even solely through the defendant's own testimony), the Commonwealth must prove beyond a reasonable doubt that the defendant was predisposed to commit the crime. *Tracey*, 416 Mass. at 536, 624 N.E.2d at 89; *Shuman*, 391 Mass. at 351-352, 462 N.E.2d at 83-84.

Commonwealth v. Harding, 53 Mass. App. Ct. 378, 383 n.3, 759 N.E.2d 1203, 1207 n.3 (2001), cites with apparent approval a five-factor test for determining predisposition from *United States v. Thickstun*, 110 F.3d 1394, 1396 (9th Cir. 1997): "(1) the defendant's character and reputation; (2) whether the government initially suggested the criminal activity; (3) whether the defendant engaged in the activity for profit; (4) whether the defendant showed any reluctance; and (5) the nature of the government's inducement."

SUPPLEMENTAL INSTRUCTION

Prior convictions or reputation for similar crimes. **In this case, the Commonwealth has introduced evidence (that in the past the defendant was convicted of *[e.g. the same offense as is charged here]*) (about the defendant's reputation for). You may consider that evidence solely for whatever light it sheds on the issue of whether the defendant was predisposed and ready to commit the offense with which he (she) is charged. You are not to consider it for any other purpose.**

If relevant, see Instruction 3.800 (Reputation of Defendant).

Miller, 361 Mass. at 652, 282 N.E.2d at 400; *Commonwealth v. DeCastro*, 24 Mass. App. Ct. 937, 938, 509 N.E.2d 25, 26-27 (1987); *Commonwealth v. DiCato*, 19 Mass. App. Ct. 40, 43, 471 N.E.2d 755, 758 (1984).

NOTES:

1. **Defendant's testimony as to police statements and as to his state of mind not hearsay**. The defendant's testimony as to what government agents said to him is offered to show inducement, rather than for the truth of the statements, and therefore is not hearsay. The defendant must be permitted to testify as to what his intent and motives were prior to any government inducement. *Thompson,* 382 Mass. at 383-384, 416 N.E.2d at 500.

2. **Entrapment claim while denying commission of crime**. A defendant may request a jury charge on entrapment, if supported by the evidence, without having admitted to committing the crime. *Mathews v. United States,* 485 U.S. 58, 108 S.Ct. 883 (1988); *Tracey,* 416 Mass. at 533-535, 624 N.E.2d at 87-89.

3. **Indirect entrapment through middleman**. A third party is a government agent only if he or she has been offered or asked for something; "[c]ooperation with the government in hope of favor is not sufficient." *Commonwealth v. Colon,* 33 Mass. App. Ct. 304, 305, 598 N.E.2d 1143, 1144 (1992). An entrapment defense is available if government agents intentionally recruit a middleman to entrap the defendant, or if the middleman communicates to the defendant the government's inducement to him, but not if the middleman takes it upon himself to induce the defendant to commit the crime. *Silva, supra.*

4. **Outrageous governmental conduct.** A claim of egregious government conduct is not a jury question, and is to be determined on due process grounds by the judge alone on a pretrial motion to dismiss or, in cases of delayed disclosure, on a motion for a required finding. *Commonwealth v. Monteagudo*, 427 Mass. 484, 485- 487, 693 N.E.2d 1381, 1382-1284 (1998).

9.160 MODEL EYEWITNESS IDENTIFICATION INSTRUCTION

November 2015

This instruction should be given in any case in which the jury heard eyewitness evidence that positively identified the defendant and in which the identification of the defendant as the person who committed or participated in the alleged crime(s) is contested. Where there is no positive identification but a partial identification of the defendant, as discussed in *Commonwealth v. Franklin*, 465 Mass. 895, 910-12 (2013), this instruction or "some variation" of it should be given upon request. The instruction is set forth at 473 Mass. 1051 (2015).

The Commonwealth has the burden of proving beyond a reasonable doubt that the defendant is the person who committed (or participated in) the alleged crime(s). If you are not convinced beyond a reasonable doubt that the defendant is the person who committed (or participated in) the alleged crime(s), you must find the defendant not guilty.

Where a witness has identified the defendant as the person who committed (or participated in) the alleged crime(s), you should examine the identification with care. As with any witness, you must determine the witness's credibility, that is, do you believe the witness is being honest? Even if you are convinced that the witness believes his or her identification is correct, you still must consider the possibility that the witness made a mistake in the identification. A witness may honestly believe he or she saw a person, but perceive or remember the event inaccurately. You must decide whether the witness's identification is not only truthful, but accurate.

People have the ability to recognize others they have seen and to accurately identify them at a later time, but research and experience have shown that people sometimes make mistakes in identification.

The mind does not work like a video recorder. A person cannot just replay a mental recording to remember what happened. Memory and perception are much more complicated.[i] Remembering something requires three steps. First, a person sees an event. Second, the person's mind stores information about the event. Third, the person recalls stored information. At each of these stages, a variety of factors may affect — or even alter — someone's memory of what happened and thereby affect the accuracy of identification testimony.[ii] This can happen without the witness being aware of it.

I am going to list some factors that you should consider in determining whether identification testimony is accurate.

<u>1. Opportunity to view the event.</u> You should consider the opportunity the witness had to observe the alleged offender at the time of the event. For example, how good a look did the witness get of the person and for how long? How much attention was the witness paying to the person at that time? How far apart were the witness and the person? How good were the lighting conditions? You should evaluate a witness's testimony about his or her opportunity to observe the event with care.[iii]

a. *If there was evidence that a disguise was involved or the alleged offender's face was obscured.*

You should consider whether the person was disguised or had his or her facial features obscured. For example, if the person wore a hat, mask, or sunglasses, it may affect the witness's ability to accurately identify the person.[iv]

b. If there was evidence that the alleged offender had a distinctive face or feature.

You should consider whether the person had a distinctive face or feature.[v]

c. If there was evidence that a weapon was involved. **You should consider whether the witness saw a weapon during the event. If the event is of short duration, the visible presence of a weapon may distract the witness's attention away from the person's face. But the longer the event, the more time the witness may have to get used to the presence of a weapon and focus on the person's face.**[vi]

2. Characteristics of the witness. **You should consider the physical and mental characteristics of the witness when the observation was made. For example, how good was the witness's eyesight? Was the witness experiencing illness, injury, or fatigue? Was the witness under a high level of stress? High levels of stress may reduce a person's ability to make an accurate identification.**[vii]

a. If there was evidence that the witness and the person identified are family members, friends, or longtime acquaintances.

If the person identified is a witness's family member, friend, or longtime acquaintance, you should consider the witness's prior familiarity with the person.[viii]

b. If there was evidence that drugs or alcohol were involved.

You should consider whether, at the time of the observation, the witness was under the influence of alcohol or drugs and, if so, to what degree.

Omit the following instruction only if all parties agree that there was no cross-racial identification. The trial judge has the discretion to add the references to ethnicity to the instruction. *See Commonwealth v. Bastaldo*, 472 Mass. 16, 29-30 (2015).

3. Cross-racial identification. **If the witness and the person identified appear to be of different races (or ethnicities), you should consider that people may have greater difficulty in accurately identifying someone of a different race (or ethnicity) than someone of their own race (or ethnicity).**[ix]

4. Passage of time. **You should consider how much time passed between the event observed and the identification. Generally, memory is most accurate immediately after the event and begins to fade soon thereafter.**[x]

5. Expressed certainty. **You may consider a witness's identification even where the witness is not free from doubt regarding its accuracy. But you also should consider that a witness's expressed certainty in an identification, standing alone, may not be a reliable indicator of the accuracy of the identification,[xi] especially where the witness did not describe that level of certainty when the witness first made the identification.[xii]**

6. Exposure to outside information. **You should consider that the accuracy of identification testimony may be affected by information that the witness received between the event and the identification,[xiii] or received after the identification.[xiv] Such information may include identifications made by other witnesses, physical descriptions given by other witnesses, photographs or media accounts, or any other information that may affect the independence or accuracy of a witness's identification.[xv] Exposure to such information not only may affect the accuracy of an identification, but also may affect the witness's certainty in the identification and the witness's memory about the quality of his or her opportunity to view the event.[xvi] The witness may not realize that his or her memory has been affected by this information.[xvii]**

An identification made after suggestive conduct by the police or others should be scrutinized with great care. Suggestive conduct may include anything that a person says or does that might influence the witness to identify a particular individual.[xviii] Suggestive conduct need not be intentional, and the person doing the "suggesting" may not realize that he or she is doing anything suggestive.[xix]

7. Identification procedures.

a. If there was evidence of a photographic array or a lineup. **An identification may occur through an identification procedure conducted by police, which involves showing the witness a (set of photographs) (lineup of individuals). Where a witness identified the defendant from a (set of photographs) (lineup), you should consider all of the factors I have already described about a witness's perception and memory. You also should consider the number of (photographs shown) (individuals in the lineup), whether anything about the defendant's (photograph) (physical appearance in the lineup) made the defendant stand out from the others,[xx] whether the person (showing the photographs) (presenting the lineup) knew who was the suspect and could have, even inadvertently, influenced the identification,[xxi] and whether anything was said to the witness that may have influenced the identification.[xxii] You should consider that an identification made by picking a defendant out of a group of similar individuals is generally less suggestive than one that results from the presentation of a defendant alone to a witness.**

b. Upon request, the judge should also give an instruction about the source of the defendant's photograph within the array.

You have heard that the police showed the witness a number of photographs. The police have photographs of people from a variety of sources, including the Registry of Motor Vehicles. You should not make any negative inference from the fact that the police had a photograph of the defendant.

c. If there was evidence of a showup.

An identification may occur through an identification procedure conducted by police known as a showup, in which only one person is shown to a witness. A showup is more suggestive than asking a witness to select a person from a group of similar individuals, because in a showup only one individual is shown and the witness may believe that the police consider that individual to be a potential suspect.[xxiii] You should consider how much time has passed between the event and the showup because the risk of an inaccurate identification arising from the inherently suggestive nature of a showup generally increases as time passes.[xxiv]

d. If there was evidence of a phographic array, lineup or showup. **You should consider whether the police, in showing the witness (a set of photographs) (a lineup) (a showup), followed protocols established or recommended by the Supreme Judicial Court or the law enforcement agency conducting the identification procedure that are designed to diminish the risk of suggestion. If any of those protocols were not followed, you should evaluate the identification with particular care.**

The trial judge may take judicial notice of police protocols regarding eyewitness identification that have been established or recommended by the Supreme Judicial Court, and include in the instruction those established or recommended protocols that are relevant to the evidence in the case. *See Commonwealth v. Walker*, 460 Mass. 590, 604 (2011) ("Unless there are exigent or extraordinary circumstances, the police should not show an eyewitness a photographic array . . . that contains fewer than five fillers for every suspect photograph. . . . We expect police to follow our guidance to avoid this needless risk"); *Commonwealth v. Silva-Santiago*, 453 Mass. 782, 797-98 (2009) ("What is practicable in nearly all circumstances is a protocol to be employed before a photographic array is provided to an eyewitness, making clear to the eyewitness, at a minimum that: he will be asked to view a set of photographs; the alleged wrongdoer may or may not be in the photographs depicted in the array; it is just as important to clear a person from suspicion as to identify a person as the wrongdoer; individuals depicted in the photographs may not appear exactly as they did on the date of the incident because features such as weight and head and facial hair are subject to change; regardless of whether an identification is made, the investigation will continue; and the procedure requires the administrator to ask the witness to state, in his or her own words, how certain he or she is of any identification"); *id.* at 798 ("We decline at this time to hold that the absence of any protocol or comparable warnings to the eyewitnesses requires that the identifications be found inadmissible, but we expect such protocols to be used in the future"); *id.* at 797 ("We have yet to conclude that an identification procedure is unnecessarily suggestive unless it is administered by a law enforcement officer who does not know the identity of the suspect [double-blind procedure], recognizing that it may not be practicable in all situations. At the same time, we acknowledge that it is the better practice [compared to a non-blind procedure] because it eliminates the risk of conscious or unconscious suggestion"). If the Legislature were to establish police protocols by statute, the judge should instruct the jury that they may consider protocols established by the Legislature. The judge also may take judicial notice of those protocols and include them in the instruction.

The trial judge also may include established or recommended procedures where the evidence shows that they were established or recommended by the law enforcement agency conducting the investigation at the time of the identification procedure.

e. If there was evidence of a multiple viewings of the defendant by the same witness.

You should consider whether the witness viewed the defendant in multiple identification procedures or events. When a witness views the same person in more than one identification procedure or event, it may be difficult to know whether a later identification comes from the witness's memory of the original event, or from the witness's observation of the person at an earlier identification procedure or event.[xxv]

8. Failure to identify or inconsistent identification. You should consider whether a witness ever failed to identify the defendant, or made an identification that was inconsistent with the identification that the witness made at the trial.

9. Totality of the evidence. In evaluating the accuracy of a witness's identification, you should consider all of the relevant factors that I have discussed, in the context of the totality of the evidence in this case. Specifically, you should consider whether there was other evidence in the case that tends to support or to cast doubt upon the accuracy of an identification. If you are not convinced beyond a reasonable doubt that the defendant is the person who committed (or participated in) the alleged crime(s), you must find the defendant not guilty.

NOTES:

1. **Expert testimony**. Whether to permit expert testimony on the general reliability of eyewitness identifications generally rests in the judge's discretion. The weight of authority is against the general admissibility of such expert testimony, but some jurisdictions favor its admission if special factors are present (typically, lack of corroboration, or discrepancies, concerning the identification). At least where there is other evidence corroborating the identification, the admissibility of such evidence is consigned to the judge's discretion. Before admitting such evidence the judge must, at minimum, find that it meets the general requirements for expert testimony: that it is relevant to the circumstances of the identification; that it will help, rather than confuse or mislead, the jury; that the underlying basis of the opinion, and any tests or assumptions, are reliable; and that the opinion is sufficiently tied to the facts of the case so that it will aid the jury in resolving the matter. General acceptance by other experts is a factor, but is not controlling. *Commonwealth v. Santoli*, 424 Mass. 837, 841-45 (1997); *Commonwealth v. Hyatt*, 419 Mass. 815, 818 (1995); *Commonwealth v. Francis*, 390 Mass. 89, 95-102 (1983); *Commonwealth v. Weichell*, 390 Mass. 62, 77-78 (1983), *cert. denied*, 465 U.S. 1032 (1984); *Commonwealth v. Jones*, 362 Mass. 497, 501-02 (1972) (psychological characteristics and dangers of recall are probably "well within the experience of" ordinary jurors). Expert testimony on a particular witness's visual acuity is proper. *Commonwealth v. Sowers*, 388 Mass. 207, 215-16 (1983).

2. **Other potential perpetrators**. A defendant is entitled to introduce evidence tending to show that someone else committed the crime or had motive, opportunity, and intent to do so, provided such evidence is not too remote in time, probatively weak, or irrelevant. Doubtful cases should be resolved in favor of admissibility. *Commonwealth v. Lawrence*, 404 Mass. 378, 387-88 (1989); *Commonwealth v. Murphy*, 282 Mass. 593, 597-98 (1933); *Commonwealth v. Walker*, 14 Mass. App. Ct. 544, 552 (1982); *Commonwealth v. Magnasco*, 4 Mass. App. Ct. 144, 147-48 (1976). This may include evidence of other recent, similar crimes by similar methods. *Commonwealth v. Rosario*, 21 Mass. App. Ct. 286, 291 (1985). A judge, however, should exclude evidence of other, allegedly similar crimes by another perpetrator where they are insufficiently proximate in time and location, or where they do not share similar features. *Commonwealth v. Brown*, 27 Mass. App. Ct. 72, 75-76 (1989).

3. **Evidence of prior identifications**. A witness's testimony as to his own prior identification is admissible to corroborate his in-court identification, and is not hearsay. *Commonwealth v. Nassar*, 351 Mass. 37, 42 (1966) (photograph); *Commonwealth v. Locke*, 335 Mass. 106, 112 (1956) (lineup). A third party may testify as to another witness's prior identification even in the absence of any in-court identification and even when the witness denies having made an identification. *Commonwealth v. Le,* 444 Mass. 431, 438 (2005). A third party's testimony is also admissible to impeach an identification witness who now denies having made the prior identification. *Commonwealth* v. *Daye*, 393 Mass. 55, 60 (1984); *Commonwealth v. Swenson*, 368 Mass. 268, 274 (1975). Where a witness is unavailable after a good faith, unsuccessful effort to obtain his or her testimony, evidence of his prior in-court identification is admissible if it was made under oath and subject to cross-examination; it may be admitted by means of a transcript or by the testimony of someone who was present. *Commonwealth v. Furtick*, 386 Mass. 477, 480 (1982); *Commonwealth v. Bohannon*, 385 Mass. 733, 740-49 (1982). The Supreme Judicial Court has held that this doctrine is consistent with *Crawford v. Washington,* 541 U.S. 36 (2004), where "a reasonable person in the [witness's] position would not have anticipated this his statement would be used against the defendant in prosecuting the crime." *Commonwealth v. Robinson*, 451 Mass. 672, 680 (2008).

4. **Reliability**. If the defendant proves by a preponderance of evidence that a prior identification was unnecessarily suggestive in all the circumstances, the identification may not be admitted at trial. Article 12 of the Massachusetts Declaration of Rights requires this rule of per se exclusion of out-of-court identification evidence, without regard to reliability, whenever the identification has been obtained through unnecessarily suggestive confrontation procedures. *Commonwealth* v. *Johnson*, 420 Mass. 458, 461-64 (1995). Massachusetts thus follows the former *Wade-Gilbert-Stovall* Federal rule instead of the current reliable-in-the-totality-of-circumstances rule

adopted in *Manson v. Brathwaite,* 432 U.S. 98, 114 (1977). Any subsequent identifications may be admitted only if the prosecution proves by clear and convincing evidence that they have an independent source, considering (1) the extent of the witness's opportunity to observe the perpetrator at the time of the crime (the "most important [factor] because the firmer the contemporaneous impression, the less the witness is subject to the influence of subsequent events," *Commonwealth v. Bodden*, 391 Mass. 356, 361 (1984)); (2) any prior errors in description; (3) any prior errors in identifying another person; (4) any prior failures to identify the defendant; (5) any other suggestions; and (6) the lapse of time between the crime and the identification. *Commonwealth v. Johnson*, 420 Mass. 458, 464 (1995); *Commonwealth v. Botelho*, 369 Mass. 860, 869 (1976).

As to other reliability issues, see *Commonwealth v. Collins*, 470 Mass. 255, 261-67 (2014) (in-court identification against an equivocal out-of-court identification); *Commonwealth v. Crayton*, 470 Mass. 228, 233-45 (2014) (in-court identification in the absence of an out-of-court identification); *Commonwealth v. Harris*, 395 Mass. 296, 299-300 (1985) (one-on-one confrontations); *Commonwealth v. Weichell,* 390 Mass. 62, 68-73 (1983) (composite drawings); *Commonwealth v. Porter*, 384 Mass. 647, 657-58 (1981) (showing single photo); *Commonwealth v. Simmons*, 383 Mass. 46, 49-53 (1981) (identification of inanimate object); *Commonwealth v. Venios*, 378 Mass. 24, 29 (1979) (showing single photo); *Commonwealth v. Moynihan*, 376 Mass. 468, 476 (1978) (identification in presence of other witnesses); *Commonwealth v. Marini*, 375 Mass. 510, 516-17 (1978) (voice identification); *Commonwealth v. Dickerson*, 372 Mass. 783, 787-88 (1977) (initial failure to identify does not bar later positive identification), *overruled on other grounds*, *Commonwealth v. Paulding*, 438 Mass. 1, 6-11 (2002); *Commonwealth v. Chase,* 372 Mass. 736, 741-45 (1977) (one-on-one confrontations); *Commonwealth v. Lacy*, 371 Mass. 363, 368-69 (1976) (same); *Commonwealth v. Wilson*, 360 Mass. 557, 562 (1971) (weight of identification testimony is for jury); *Commonwealth v. Cunningham*, 104 Mass. 545, 547 (1870) (several non-positive identifications can provide proof beyond reasonable doubt); *Commonwealth v. Amorin*, 14 Mass. App. Ct. 553, 555 (1982) (one-on-one confrontations); *Commonwealth v. Walker,* 14 Mass. App. Ct. 544, 550-51 (1982) (same); *Commonwealth v. Marks*, 12 Mass. App. Ct. 511, 515-16 (1981) (same); *Commonwealth v. Bishop*, 9 Mass. App. Ct. 468, 471-73 (1980) (weight of uncertain identification is for jury); *Commonwealth v. Jones*, 9 Mass. App. Ct. 83, 92-93 (1980) (same); *Commonwealth v. Cincotta*, 6 Mass. App. Ct. 812, 817 (doubts as to reliability not of constitutional dimension are matters of weight for jury), *aff'd*, 379 Mass. 391 (1979).

Endnotes to Model Instruction:

[i] *See* *Commonwealth v. Gomes*, 470 Mass. 352, 369 (2015); Supreme Judicial Court Study Group on Eyewitness Evidence: Report and Recommendations to the Justices 15 (July 25, 2013), available at http://www.mass.gov/courts/docs/sjc/docs/eyewitness-evidence-report-2013.pdf [http://perma.cc/WY4M-YNZN] (Study Group Report), quoting Report of the Special Master, *State v. Henderson*, N.J. Supreme Ct., No. A-8-08, at 9 (June 10, 2010) (Special Master's Report) ("The central precept is that memory does not function like a videotape, accurately and thoroughly capturing and reproducing a person, scene or event. . . . Memory is, rather[,] a constructive, dynamic and selective process"); *State v. Henderson*, 208 N.J. 208, 245 (2011); *State v. Lawson*, 352 Or. 724, 771 (2012) (Appendix); *see also* E.F. Loftus, J.M. Doyle, & J.E. Dysart, Eyewitness Testimony: Civil and Criminal § 2-2, at 14 (5th ed. 2013) (Loftus et al.).

[ii] *See* Study Group Report, *supra* note i, at 16, quoting *Henderson*, 208 N.J. at 245 (three stages involved in forming memory: acquisition — "the perception of the original event"; retention — "the period of time that passes between the event and the eventual recollection of a particular piece of information"; and retrieval — "the stage during which a person recalls stored information").

For a detailed discussion of the three stages of memory and how those stages may be affected, see Study Group Report, *supra* note i, at 15-17; National Research Council of the National Academies, Identifying the Culprit: Assessing Eyewitness Identification 59-69 (2014) (National Academies) ("Encoding, storage, and remembering are not passive, static processes that record,

retain, and divulge their contents in an informational vacuum, unaffected by outside influences"); *see also* State v. Guilbert, 306 Conn. 218, 235-36 (2012); *Henderson*, 208 N.J. at 247; Loftus et al., *supra* note i, at § 2-2, at 15 ("Numerous factors at each stage affect the accuracy and completeness of an eyewitness account").

[iii] *See* D. Reisberg, The Science of Perception and Memory: A Pragmatic Guide for the Justice System 51-52 (2014) (witnesses may not accurately remember details, such as length of time and distance, when describing conditions of initial observation); *see also Lawson*, 352 Or. at 744 (information that witness receives after viewing event may falsely inflate witness's "recollections concerning the quality of [his or her] opportunity to view a perpetrator and an event").

[iv] *See* Study Group Report, *supra* note i ,at 30, quoting *Lawson*, 352 Or. at 775 (Appendix) ("[S]tudies confirm that the use of a disguise negatively affects later identification accuracy. In addition to accoutrements like masks and sunglasses, studies show that hats, hoods, and other items that conceal a perpetrator's hair or hairline also impair a witness's ability to make an accurate identification"); *Henderson*, 208 N.J. at 266 ("Disguises and changes in facial features can affect a witness'[s] ability to remember and identify a perpetrator"); State v. Clopten, 223 P.3d 1103, 1108 (Utah 2009) ("[A]ccuracy is significantly affected by factors such as the amount of time the culprit was in view, lighting conditions, use of a disguise, distinctiveness of the culprit's appearance, and the presence of a weapon or other distractions"); Wells & Olson, Eyewitness Testimony, 54 Ann. Rev. Psychol. 277, 281 (2003) (Wells & Olson) ("Simple disguises, even those as minor as covering the hair, result in significant impairment of eyewitness identification"); *see also* Cutler, A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy, 4 Cardozo Pub. L. Pol'y & Ethics J. 327, 332 (2006) ("In data from over 1300 eyewitnesses, the percentage of correct judgments on identification tests was lower among eyewitnesses who viewed perpetrators wearing hats [44%] than among eyewitnesses who viewed perpetrators whose hair and hairlines were visible [57%]").

[v] *See* Study Group Report, *supra* note i, at 30-31, quoting *Lawson*, 352 Or. at 774 (Appendix) ("Witnesses are better at remembering and identifying individuals with distinctive features than they are those possessing average features"); *Clopten*, 223 P.3d at 1108; Wells & Olson, *supra* note iv, at 281 ("Distinctive faces are much more likely to be accurately recognized than nondistinctive faces" but "what makes a face distinctive is not entirely clear"); *see also* Shapiro & Penrod, Meta-Analysis of Facial Identification Studies, 100 Psychol. Bull. 139, 140, 145 (1986) (meta-analysis finding that distinctive targets were "easier to recognize than ordinary looking targets").

[vi] *See* Study Group Report, *supra* at 130 ("A weapon can distract the witness and take the witness's attention away from the perpetrator's face, particularly if the weapon is directed at the witness. As a result, if the crime is of short duration, the presence of a visible weapon may reduce the accuracy of an identification. In longer events, this distraction may decrease as the witness adapts to the presence of the weapon and focuses on other details"); *Guilbert*, 306 Conn. at 253; *Lawson*, 352 Or. at 771-72 (Appendix); *see also* Kassin, Hosch, & Memon, On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts, 56 Am. Psychol. 405, 407-12 (2001) (Kassin et al.) (in 2001 survey, eighty-seven per cent of experts agree that principle that "[t]he presence of a weapon impairs an eyewitness's ability to accurately identify the perpetrator's face" is reliable enough to be presented in court); Maass & Köhnken, Eyewitness Identification: Simulating the "Weapon Effect," 13 Law & Hum. Behav. 397, 405-06 (1989); Steblay, A Meta-Analytic Review of the Weapon Focus Effect, 16 Law & Hum. Behav. 413, 415-17 (1992) (meta-analysis finding "weapon-absent condition[s] generated significantly more accurate descriptions of the perpetrator than did the weapon-present condition"); *id.* at 421 ("To not consider a weapon's effect on eyewitness performance is to ignore relevant information. The weapon effect does reliably occur, particularly in crimes of short duration in which a threatening weapon is visible"); Wells & Quinlivan, Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later, 33 Law & Hum. Behav. 1, 11 (2009) (Wells & Quinlivan). *But see* National Academies, *supra* note ii, at 93-94 (recent meta-analysis "indicated that the effect of a

weapon on accuracy is slight in actual crimes, slightly larger in laboratory studies, and largest for simulations").

[1] *See Gomes*, 470 Mass. at 372-73; Study Group Report, *supra* note i, at 29, quoting Special Master's Report, *supra* note i, at 43 (while moderate levels of stress might improve accuracy, "eyewitness under high stress is less likely to make a reliable identification of the perpetrator"); *Lawson*, 352 Or. at 769 (Appendix); *see also* Deffenbacher, Bornstein, Penrod, & McGorty, A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory, 28 Law & Hum. Behav. 687, 699 (2004) (finding "considerable support for the hypothesis that high levels of stress negatively impact both accuracy of eyewitness identification as well as accuracy of recall of crime-related details"); Morgan, Hazlett, Doran, Garrett, Hoyt, Thomas, Baranoski, & Southwick, Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress, 27 Int'l J.L. & Psychiatry 265, 272-74 (2004). *But see* Study Group Report, *supra* note i, quoting *Henderson*, 208 N.J. at 262 ("There is no precise measure for what constitutes 'high' stress, which must be assessed based on the facts presented in individual cases").

[viii] *See* Study Group Report, *supra* note i, at 135 (recommending instruction stating, "If the witness had seen the defendant before the incident, you should consider how many times the witness had seen the defendant and under what circumstances"); *see also* Pezdek & Stolzenberg, Are Individuals' Familiarity Judgments Diagnostic of Prior Contact?, 20 Psychol. Crime & L. 302, 306 (2014) (twenty-three per cent of study participants misidentified subjects with unfamiliar faces as familiar, and only forty-two per cent correctly identified familiar face as familiar); Read, The Availability Heuristic in Person Identification: The Sometimes Misleading Consequences of Enhanced Contextual Information, 9 Applied Cognitive Psychol. 91, 94-100 (1995). *See generally* Coleman, Newman, Vidmar, & Zoeller, Don't I Know You?: The Effect of Prior Acquaintance/Familiarity on Witness Identification, Champion, Apr. 2012, at 52, 53 ("To a degree," increased interaction time may produce "marginally more accurate identifications," but increased interaction time may also generate more incorrect identifications); Schwartz, Memory for People: Integration of Face, Voice, Name, and Biographical Information, in SAGE Handbook of Applied Memory 9 (2014) ("familiarity exists on a continuum from very familiar [your spouse's face] to moderately familiar [the face of the person who works downstairs] to completely unfamiliar [a person you have never met]. Unfortunately, little research directly addresses the continuum from [familiar] to unfamiliar").

[ix] *See* Study Group Report, *supra* note i, at 31 ("A witness may have more difficulty identifying a person of a different race or ethnicity"); Kassin et al., *supra* note vi, at 407-12 (in 2001 survey, ninety per cent of experts agree that principle that "[e]yewitnesses are more accurate when identifying members of their own race than members of other races" is reliable enough to be presented in court); Meissner & Brigham, Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review, 7 Psychol., Pub. Pol'y, & L. 3, 15 (2001) (meta-analysis of thirty-nine research articles concluding that participants were "1.4 times more likely to correctly identify a previously viewed own-race face when compared with performance on other-race faces" and "1.56 times more likely to falsely identify a novel other-race face when compared with performance on own-race faces"); Wells & Olson, *supra* note iv, at 280-81; *see also* *Commonwealth v. Zimmerman*, 441 Mass. 146, 154-55 (2004) (Cordy, J., concurring); *State v. Cabagbag*, 127 Haw. 302, 310-11 (2012); *Lawson*, 352 Or. at 775 (Appendix); National Academies, *supra* note ii, at 96, citing Grimsley, Innocence Project, What Wrongful Convictions Teach Us About Racial Inequality, Innocence Blog (Sept. 26, 2012, 2:30 P.M.), at http://www.innocenceproject.org/Content/What_Wrongful_Convictions_Teach_Us_About_Racial_Inequality.php [http://perma.cc/KX2J-XECN] ("Recent analyses revealed that cross-racial [mis]identification was present in 42 percent of the cases in which an erroneous eyewitness identification was made").

In *Bastaldo*, 472 Mass. at 28-29, the court concluded that there is "not yet a near consensus in the relevant scientific community that people are generally less accurate at recognizing the face of someone of a different *ethnicity* than the face of someone of their own ethnicity" (emphasis added).

However, there are studies that "support the conclusion that people are better at recognizing the faces of persons of the same ethnicity than a different ethnicity." *Id.*; *see* Gross, Own-Ethnicity Bias in the Recognition of Black, East Asian, Hispanic and White Faces, 31 Basic & Applied Social Psychol. 128, 132 (2009) (study revealed that white participants recognized white faces better than they recognized Hispanic, Asian, and black faces, but found no significant difference between Hispanic participants' recognition of white faces and Hispanic faces); Platz & Hosch, Cross-Racial/Ethnic Eyewitness Identification: A Field Study, J. Applied Social Psychol. 972, 979, 981 (1988) (Mexican-American and white convenience store clerks better recognized customers of their own group than customers of other group); *see also* Chiroro, Tredoux, Radaelli, & Meissner, Recognizing Faces Across Continents: The Effect of Within-Race Variations on the Own-Race Bias in Face Recognition, 15 Psychonomic Bull. & Rev. 1089, 1091 (2008) (white South African participants better recognized white South African faces than white North American faces, and black South African participants better recognized black South African faces than black North American faces).

[x] *See* Study Group Report, *supra* note i, at 31-32, quoting *Lawson*, 352 Or. at 778 (Appendix) ("The more time that elapses between an initial observation and a later identification procedure [a period referred to in eyewitness identification research as a 'retention interval'] . . . the less reliable the later recollection will be. . . . [D]ecay rates are exponential rather than linear, with the greatest proportion of memory loss occurring shortly after an initial observation, then leveling off over time"); National Academies, *supra* note ii, at 15 ("For eyewitness identification to take place, perceived information must be encoded in memory, stored, and subsequently retrieved. As time passes, memories become less stable").

[xi] *See Gomes*, 470 Mass. at 370-71; Study Group Report, *supra* note i, at 19 ("Social science research demonstrates that little correlation exists between witness confidence and the accuracy of the identification"); *Lawson*, 352 Or. at 777 (Appendix) ("Despite widespread reliance by judges and juries on the certainty of an eyewitness's identification, studies show that, under most circumstances, witness confidence or certainty is not a good indicator of identification accuracy"); *Clopten*, 223 P.3d at 1108; *see also* *Commonwealth v. Cruz*, 445 Mass. 589, 597-600 (2005); *Commonwealth v. Santoli*, 424 Mass. 837, 845-46 (1997); *Commonwealth v. Jones*, 423 Mass. 99, 110 n.9 (1996).

[xii] *See Henderson*, 208 N.J. at 254 ("to the extent confidence may be relevant in certain circumstances, it must be recorded in the witness'[s] own words" before any possible influence from any extraneous information, known as feedback, that confirms witness's identification); *Lawson*, 352 Or. at 745 ("Retrospective self-reports of certainty are highly susceptible to suggestive procedures and confirming feedback, a factor that further limits the utility of the certainty variable"); Wells & Bradfield, Distortions in Eyewitnesses' Recollections: Can the Postidentification-Feedback Effect Be Moderated?, 10 Psychol. Sci. 138, 138 (1999) (Distortions) ("The idea that confirming feedback would lead to confidence inflation is not surprising. What is surprising, however, is that confirming feedback that is given after the identification leads eyewitnesses to misremember how confident they were at the time of the identification"); *see also* *Commonwealth v. Crayton*, 470 Mass. 228, 239 (2014) ("Social science research has shown that a witness's level of confidence in an identification is not a reliable predictor of the accuracy of the identification, especially where the level of confidence is inflated by [an identification procedure's] suggestiveness").

[xiii] *See Gomes*, 470 Mass. at 373-74; Study Group Report, *supra* note i, at 21-22; Special Master's Report, *supra* note i, at 30-31 ("An extensive body of studies demonstrates that the memories of witnesses for events and faces, and witnesses' confidence in their memories, are highly malleable and can readily be altered by information received by witnesses both before and after an identification procedure"); *Lawson*, 352 Or. at 786 (Appendix) ("The way in which eyewitnesses are questioned or converse about an event can alter their memory of the event").

[xiv] *See* Study Group Report, *supra* note i, at 22, quoting *Henderson*, 208 N.J. at 255 (postidentification feedback "affects the reliability of an identification in that it can distort memory, create a false sense of confidence, and alter a witness'[s] report of how he or she viewed an event");

Special Master's Report, *supra* note i, at 33 ("A number of studies have demonstrated that witnesses' confidence in their identifications, and their memories of events and faces, are readily tainted by information that they receive after the identification procedure"); Steblay, Wells, & Douglass, The Eyewitness Post Identification Feedback Effect 15 Years Later: Theoretical and Policy Implications, 20 Psychol., Pub. Pol'y, & L. 1, 11 (2014) ("Confirming feedback significantly inflates eyewitness reports on an array of testimony-relevant measures, including attention to and view of the crime event, ease and speed of identification, and certainty of the identification decision"); *see also* *Commonwealth v. Collins*, 470 Mass. 255, 263 (2014) ("Where confirmatory feedback artificially inflates an eyewitness's level of confidence in his or her identification, there is also a substantial risk that the eyewitness's memory of the crime at trial will 'improve' ").

[xv] *See* Study Group Report, *supra* note i, at 22, quoting *Lawson*, 352 Or. at 788 (Appendix) ("[T]he danger of confirming feedback [whether from law enforcement, other witnesses, or the media] lies in its tendency to increase the *appearance* of reliability without increasing reliability itself"); *Henderson*, 208 N.J. at 253 ("Confirmatory or post-identification feedback presents the same risks. It occurs when police signal to eyewitnesses that they correctly identified the suspect"); *Lawson*, 352 Or. at 777-78 (Appendix); Hope, Ost, Gabbert, Healey, & Lenton, "With a Little Help from My Friends . . .": The Role of Co-Witness Relationship in Susceptibility to Misinformation, 127 Acta Psychologica 476, 481 (2008); Skagerberg, Co-Witness Feedback in Line-ups, 21 Applied Cognitive Psychol. 489, 494 (2007) ("post-identification feedback does not have to be presented by the experimenter or an authoritative figure [e.g., police officer] in order to affect a witness'[s] subsequent crime-related judgments").

[xvi] *See* Study Group Report, *supra* note i, at 21-22; *Henderson*, 208 N.J. at 255; *Lawson*, 352 Or. at 744; *see also* Douglass & Steblay, Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect, 20 Applied Cognitive Psychol. 859, 863-65 (2006) (participants who received confirming feedback "expressed significantly more retrospective confidence in their decision compared with participants who received no feedback"); Wells & Bradfield, "Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. Applied Psychol. 360, 366-367 (1998) (witnesses receiving confirming feedback reported "a better view of the culprit, a greater ability to make out details of the face, greater attention to the event, [and] a stronger basis for making an identification" compared to witnesses receiving no feedback); Distortions, *supra* note xii, at 140-43; National Academies, *supra* note ii, at 92-93 ("Research has . . . shown that . . . if an eyewitness hears information or misinformation from another person before law enforcement involvement, his or her recollection of the event and confidence in the identification can be altered . . .").

[xvii] *See* Study Group Report, *supra* note i, at 117, 136 n.4, citing Principles of Neural Science, Box 62-1, at 1239 (Kandel, Schwartz, & Jessell eds., 2000); *see also* Clark, Marshall, & Rosenthal, Lineup Administrator Influences on Eyewitness Identification Decisions, 15 J. Experimental Psychol.: Applied 63, 72 (2009) (Clark, Marshall, & Rosenthal) ("Most witnesses appeared to be unaware of the influence" of lineup administrator in staged experiment).

[xviii] *See* Study Group Report, *supra* note i, at 140, quoting Wells & Quinlivan, *supra* note vi, at 6 ("From the perspective of psychological science, a procedure is suggestive if it induces pressure on the eyewitness to make a lineup identification [a suggestion by commission], fails to relieve pressures on the witness to make a lineup selection [a suggestion by omission], cues the witness as to which person is the suspect, or cues the witness that the identification response was correct or incorrect").

[xix] *See* Study Group Report, *supra* note i, at 22-23, quoting *Lawson*, 352 Or. at 779 (Appendix) ("research shows that lineup administrators who know the identity of the suspect often consciously or unconsciously suggest that information to the witness"); National Academies, *supra* note ii, at 91-92 ("Law enforcement's maintenance of neutral pre-identification communications — relative to the identification of a suspect — is seen as vital to ensuring that the eyewitness is not subjected to

conscious or unconscious verbal or behavioral cues that could influence the eyewitness' identification").

[xx] *See Silva-Santiago*, 453 Mass. at 795, quoting *Commonwealth v. Melvin*, 399 Mass. 201, 207 n.10 (1987) ("we 'disapprove of an array of photographs which distinguishes one suspect from all the others on the basis of some physical characteristic' "); Wells & Olson, *supra* note iv, at 287 ("Ideally, lineup fillers would be chosen so that an innocent suspect is not mistakenly identified merely from 'standing out,' and so that a culprit does not escape identification merely from blending in"); *see also Henderson*, 208 N.J. at 251; *Lawson*, 352 Or. at 781 (Appendix); Malpass, Tredoux, & McQuiston-Surrett, Lineup Construction and Lineup Fairness, in 2 Handbook of Eyewitness Psychology 156 (2007) ("Decades of empirical research suggest that mistaken eyewitness identifications are more likely to occur when the suspect stands out in a lineup").

[xxi] *See Silva-Santiago*, 453 Mass. at 797 ("we acknowledge that [a double-blind procedure] is the better practice [compared to a non-blind procedure] because it eliminates the risk of conscious or unconscious suggestion"); Study Group Report, *supra* note i, at 88 ("When showing a photo array or conducting a lineup, the police must use a technique that will ensure that no investigator present will know when the witness is viewing the suspect. The preference is that the police have an officer who does not know who the suspect is administer the array or lineup"); *Guilbert*, 306 Conn. at 237-38 (courts across country accept that "identifications are likely to be less reliable in the absence of a double-blind, sequential identification procedure"); *Henderson*, 208 N.J. at 249 ("The consequences are clear: a non-blind lineup procedure can affect the reliability of a lineup because even the best-intentioned, non-blind administrator can act in a way that inadvertently sways an eyewitness trying to identify a suspect"); *see also* National Academies, *supra* note ii, at 27 ("As an alternative to a double-blind array, some departments use 'blinded' procedures. A blinded procedure prevents an officer from knowing when the witness is viewing a photo of the suspect, but can be conducted by the investigating officer"); *id.* at 107 ("The committee [appointed by the National Academy of Sciences] recommends blind [double-blind or blinded] administration of both photo arrays and live lineups and the adoption of clear, written policies and training on photo array and live lineup administration. Police should use blind procedures to avoid the unintentional or intentional exchange of information that might bias an eyewitness").

[xxii] *See* Clark, Marshall, & Rosenthal, *supra* note xvii, at 74 (subtle, nondirective statements by lineup administrator "can lead a witness to make an identification, particularly when the perpetrator was not present"); Malpass & Devine, Eyewitness Identification: Lineup Instructions and the Absence of the Offender, 66 J. Applied Psychol. 482, 486-87 (1981) (where subject witnesses were asked to identify assailant in staged experiment, "[c]hanging the instruction from biased [suspect is present in lineup] to unbiased [suspect may or may not be present] resulted in fewer choices and fewer false identifications without a decrease in correct identifications").

[xxiii] *See* Study Group Report, *supra* note i, at 26, citing Special Master's Report, *supra* note i, at 29 (showups carry their own risks of misidentification "due to the fact that only one person is presented to the witness"); *Lawson*, 352 Or. at 742-43 ("A 'showup' is a procedure in which police officers present an eyewitness with a single suspect for identification, often [but not necessarily] conducted in the field shortly after a crime has taken place. Police showups are generally regarded as inherently suggestive — and therefore less reliable than properly administered lineup identifications — because the witness is always aware of whom police officers have targeted as a suspect"); Dysart & Lindsay, Show-up Identifications: Suggestive Technique or Reliable Method?, in 2 Handbook of Eyewitness Psychology 141 (2007) ("Overall, show-ups [fare] poorly when compared with line-ups. Correct identification rates are equal and false identification rates are about two to three times as high with show-ups compared with line-ups"); *see also Silva-Santiago*, 453 Mass. at 797; *Commonwealth v. Martin*, 447 Mass. 274, 279 (2006) ("One-on-one identifications are generally disfavored because they are viewed as inherently suggestive").

[xxiv] *See Lawson*, 352 Or. at 783 (Appendix) ("Showups are most likely to be reliable when they occur immediately after viewing a criminal perpetrator in action, ostensibly because the benefits of a fresh memory outweigh the inherent suggestiveness of the procedure. In as little as two hours after an event occurs, however, the likelihood of misidentification in a showup procedure increases dramatically"); Yarmey, Yarmey, & Yarmey, Accuracy of Eyewitness Identifications in Showups and Lineups, 20 Law & Hum. Behav. 459, 473 (1996) ("Although showups conducted within [five minutes] of an encounter were significantly better than chance, identifications performed [thirty minutes] or longer after a low-impact incident are likely to be unreliable"); Dysart & Lindsay, The Effects of Delay on Eyewitness Identification Accuracy: Should We Be Concerned?, in 2 Handbook of Eyewitness Psychology 370 (2007) (results of studies support conclusion that showups, "if they are to be used, should be used within a short period after the crime, perhaps a maximum of [twenty-four] hours," but acknowledging that "such a conclusion is highly speculative, given the minimal amount of data available").

[xxv] *See Gomes*, 470 Mass. at 375-76; Study Group Report, *supra* note i, at 25, quoting Special Master's Report, *supra* note i, at 27-28 ("The problem is that successive views of the same person create uncertainty as to whether an ultimate identification is based on memory of the original observation or memory from an earlier identification procedure"); *Henderson*, 208 N.J. at 255; Deffenbacher, Bornstein, & Penrod, Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference, 30 Law & Hum. Behav. 287, 306 (2006) (Deffenbacher, Bornstein, & Penrod) ("prior mugshot exposure decreases accuracy at a subsequent lineup, both in terms of reductions in rates for hits and correct rejections as well as in terms of increases in the rate for false alarms").

In *Gomes*, 470 Mass. at 376 n.37, quoting Study Group Report, *supra* note i, at 31, the Supreme Judicial Court noted that support for the phenomenon of "unconscious transference," which occurs "when a witness confuses a person seen at or near the crime scene with the actual perpetrator," was not as conclusive as the support for mugshot exposure. Unconscious transference nevertheless has substantial support and is relevant to the issue of multiple viewings of a person identified. *See* Study Group Report, *supra* note i, at 31, quoting Special Master's Report, *supra* note i, at 46 ("The familiar person is at greater risk of being identified as the perpetrator simply because of his or her presence at the scene. . . . This 'bystander error' most commonly occurs when the observed event is complex, i.e., involving multiple persons and actions, but can also occur when the familiarity arises from an entirely unrelated exposure"); *Lawson*, 352 Or. at 785-86 ("Yet another facet of the multiple viewing problem is the phenomenon of unconscious transference. Studies have found that witnesses who, prior to an identification procedure, have incidentally but innocently encountered a suspect may unconsciously transfer the familiar suspect to the role of criminal perpetrator in their memory"); *Guilbert*, 306 Conn. at 253-54 ("the accuracy of an eyewitness identification may be undermined by an unconscious transference, which occurs when a person seen in one context is confused with a person seen in another"); *see also* Deffenbacher, Bornstein, & Penrod, *supra* note xxv, at 301, 304-05 (although negative impact of unconscious transference was less pronounced than that of mugshot exposure, both types of errors considered "products of the same basic transference design"); Ross, Ceci, Dunning, & Toglia, Unconscious Transference and Mistaken Identity: When a Witness Misidentifies a Familiar but Innocent Person, 79 J. Applied Psychol. 918, 923 (1994) (witnesses in experiment who viewed bystander in staged robbery "were nearly three times more likely to misidentify the bystander than were control subjects" who did not view bystander).
f weight for jury), *aff'd*, 379 Mass. 391 (1979).

9.180 INTOXICATION WITH ALCOHOL OR DRUGS

2009 Edition

You have heard evidence suggesting that the defendant may have been intoxicated (with alcohol) (on drugs) at the time of the offense with which he (she) is charged.

I. SPECIFIC INTENT CRIMES

Intoxication (or drunkenness) (on drugs) is never by itself an excuse or justification for a crime, if you find that one was committed. However, it may be relevant to your deliberations on the issue of whether the defendant had the criminal intent that is required for conviction of this offense.

I have told you that one of the elements of *[offense charged]* which the Commonwealth must prove beyond a reasonable doubt is that the defendant specifically intended to *[describe required specific intent]* . The defendant cannot be guilty of this offense without that intent. When you consider whether or not the Commonwealth has proved that the defendant had the necessary intent, you may take into account any evidence of intoxication.

Sometimes a person may be so intoxicated (with alcohol) (on drugs) that he is not capable of having the required intent to commit the crime. Such a defendant must be acquitted. In other cases, even if a person is intoxicated to some degree, he may still be able to form the necessary intent. In those cases, the person may be convicted, since intoxication is not an excuse for a crime if the defendant had the necessary intent.

You may consider any evidence of intoxication (with liquor) (on drugs), along with all the other evidence in the case, in deciding whether the Commonwealth has proved beyond a reasonable doubt that the defendant acted with the intent to _____ .

"[W]here proof of a crime requires proof of a specific criminal intent and there is evidence tending to show that the defendant was under the influence of alcohol or some other drug at the time of the crime, the judge should instruct the jury, if requested, that they may consider evidence of the defendant's intoxication at the time of the crime in deciding whether the Commonwealth has proved that specific intent beyond a reasonable doubt. If the judge gives such an instruction, he should further instruct the jury that, if they find beyond a reasonable doubt that the defendant had the required specific intent, the defendant's intoxication, if any, is not an excuse or justification for his actions." *Commonwealth v. Henson*, 394 Mass. 584, 592-594, 476 N.E.2d 947, 953-954 (1985). See *Commonwealth v. Sires*, 413 Mass. 292, 300-301, 596 N.E.2d 1018, 1024 (1992); *Commonwealth v. Lawrence*, 404 Mass. 378, 395, 536 N.E.2d 571, 582 (1989) (Commonwealth not required to prove beyond a reasonable doubt the absence of intoxication); *Commonwealth v. Jones*, 400 Mass. 544, 548, 511 N.E.2d 17, 19-20 (1987); *Commonwealth v. Sylvester*, 400 Mass. 334, 336-337, 509 N.E.2d 275, 278 (1987). See also *Commonwealth v. Grey*, 399 Mass. 469, 474, 505 N.E.2d 171, 175 (1987) (where raised by evidence, reversible error to refuse on request to charge that mental impairment may negate specific intent).

Intoxication may also be a defense to a statute requiring specific "knowledge" rather than "intent." The model instruction may be appropriately adapted if there is evidence of intoxication that may have negated a knowledge requirement. *Commonwealth v. Sama*, 411 Mass. 293, 299, 582 N.E.2d 498, 491 (1991).

Intoxication may also negate premeditation, *Commonwealth v. Farrell*, 322 Mass. 606, 621, 78 N.E.2d 697, 705-706 (1948), or extreme atrocity or cruelty, *Commonwealth v. Perry*, 385 Mass. 639, 648-649, 433 N.E.2d 446, 452-453 (1982), or the "third prong" of malice, *Sama, supra*, but in the District Court such elements are relevant only to a charge of delinquency by reason of murder.

As to whether intoxication or addiction alone will support an insanity defense, see the third supplemental instruction to Instruction 9.200 (Lack of Criminal Responsibility).

II. GENERAL INTENT CRIMES

Intoxication (or drunkenness) (on drugs) is not a legal defense to a criminal charge. The law takes the view that even if (alcohol has) (drugs have) to some extent blinded a person's intellect and passions, nevertheless it is not an excuse for a crime, since a person brings it upon himself. A person who is intoxicated (with liquor) (on drugs) has the same responsibility to obey the law as a person who is sober.

Commonwealth v. Blake, 409 Mass. 146, 155, 564 N.E.2d 1006, 1012 (1991); *Commonwealth v. Troy*, 405 Mass. 253, 260, 540 N.E.2d 162, 166 (1989); *Commonwealth v. Fano*, 400 Mass. 296, 305 n.14, 508 N.E.2d 859, 865 n.14 (1987); *Henson*, 394 Mass. at 592, 476 N.E.2d at 953; *Commonwealth v. Lanoue*, 392 Mass. 583, 592 n.6, 467 N.E.2d 159, 165 n.6 (1984); *Commonwealth v. Doucette*, 391 Mass. 443, 455, 462 N.E.2d 1084, 1094 (1984); *Commonwealth v. Sheehan*, 376 Mass. 765, 768, 383 N.E.2d 1115, 1118 (1978); *Commonwealth v. Wallace*, 14 Mass. App. Ct. 358, 361 n.7, 439 N.E.2d 848, 850 n.7 (1982) (effects of liquor or voluntarily-consumed drugs "are well known to everybody").

9.200 LACK OF CRIMINAL RESPONSIBILITY

2009 Edition

You have heard testimony suggesting that the defendant may have been lacking criminally responsibility at the time of the offense with which he (she) is charged. Under the law, a person is not guilty if he (she) lacked criminal responsibility when he (she) committed a crime. This is sometimes referred to as not guilty by reason of insanity. Before the defendant may be found guilty, the Commonwealth must prove beyond a reasonable doubt that he (she) committed the offense charged and that he (she) was sane when he (she) did so.

A person is lacking in criminal responsibility if he (she) has a mental disease or defect, and as a result of that mental disease or defect

either **he (she) is substantially unable to appreciate the criminality — the wrongfulness — of his (her) conduct,**

or **he (she) is substantially unable to conform his (her) conduct to the requirements of the law.**

The defendant's mental condition must have been such that he (she) was unable to realize that his (her) behavior was wrong or was unable to make himself (herself) behave as the law requires.

In considering whether or not the defendant was sane, if you feel it appropriate you may take into account that the great majority of people are sane, and that there is a resulting likelihood that any particular person is sane. However, you should also carefully weigh any specific evidence of sanity or insanity that has been presented in this case. You may consider not only the opinions of any psychiatrists who testified, but also all of the other evidence. You are not bound by the statements or opinions of any witness; you may accept or reject any testimony, in whole or in part, as you see fit.

Remember that it is not up to the defendant to prove that he (she) lacked criminal responsibility at the time of the crime. Rather, the burden is on the Commonwealth to prove beyond a reasonable doubt *both* that the defendant committed the crime, *and* that the defendant was sane at the time that he (she) committed the crime.

Therefore, if you have a reasonable doubt whether the defendant committed every one of the required elements of this crime, you must find the defendant not guilty. If you have a reasonable doubt whether the defendant was sane at the time of the crime, then you must find him (her) not guilty by reason of lack of criminal responsibility.

Commonwealth v. McHoul, 352 Mass. 544, 546-547, 226 N.E.2d 556, 557-558 (1967) (adopting definition of insanity from Model Penal Code § 4.01[1] [Proposed Official Draft 1962]).

A defense of lack of criminal responsibility may be raised by "any evidence which, if believed, might create a reasonable doubt concerning the defendant's criminal responsibility at the time of the [crime]." Expert testimony is not always required to raise such a doubt; the defendant may rely on the facts of the case, the Commonwealth's witnesses, the testimony of lay witnesses, or any combination. *Commonwealth v. Mills*, 400 Mass. 626, 627-632, 511 N.E.2d 572, 573-576 (1987) (discussing when facts of case alone sufficient to raise insanity issue); *Commonwealth v. Monico*, 396 Mass. 793, 800-801, 488 N.E.2d 1168, 1172 (1986) (collecting cases on that issue); *Commonwealth v. Genius*, 387 Mass. 695, 697-698, 442 N.E.2d 1157, 1159 (1982) (same); *Commonwealth v. O'Brien*, 377 Mass. 772, 784, 388 N.E.2d 658, 664 (1979) (jury need not accept even uncontradicted expert testimony of insanity); *Commonwealth v. Mattson*, 377 Mass. 638, 643-644, 387 N.E.2d 546, 549-550 (1979); *Commonwealth v. Laliberty*, 373 Mass. 238, 245-247, 366 N.E.2d 736, 742 (1977); *Blaisdell v. Commonwealth*, 372 Mass. 753, 764-765, 364 N.E.2d 191, 199-200 (1977) (defendant's psychiatric records; observations of lay witnesses). "This court's view has consistently been that '[w]here the appropriateness of an insanity instruction is marginal, the better choice would seem to be to err on the side of giving it . . . .'" *Mills*, 400 Mass. at 630, 511 N.E.2d at 575.

Once the issue of insanity has been raised, the Commonwealth must prove beyond a reasonable doubt that the defendant was sane at the time of the crime. *Commonwealth v. Kappler*, 416 Mass. 574, 578, 625 N.E.2d 513, 516 (1993); *Commonwealth v. Kostka*, 370 Mass. 516, 531-532, 350 N.E.2d 444, 451 (1976); *Commonwealth v. Smith*, 357 Mass. 168, 177-180, 258 N.E.2d 13, 19-21 (1970). The Commonwealth must prove both the defendant's substantial capacity to appreciate the wrongfulness of his conduct and his substantial capacity to conform his conduct to the requirements of the law. *Commonwealth v. Goudreau*, 422 Mass. 731, 735, 666 N.E.2d 112, 115 (1996). The Commonwealth may rest, in whole or part, on the "presumption of sanity" (although that phrase should not be used with the jury) to overcome even uncontradicted expert evidence of insanity. *Kappler*, 416 Mass. at 579, 585-587, 625 N.E.2d at 516, 520; *Commonwealth v. Matthews*, 406 Mass. 380, 392, 548 N.E.2d 843, 850 (1990); *Commonwealth v. Brown*, 387 Mass. 220, 221-222, 439 N.E.2d 296, 297 (1982); *Kostka*, 370 Mass. at 531-537, 350 N.E.2d at 451; *Commonwealth v. Robinson*, 14 Mass. App. Ct. 591, 594, 441 N.E.2d 553, 556 (1982) ("The 'presumption of sanity' is really a short-hand expression for the fact that the majority of people are sane, and the related probability that any particular person is sane").

The judge may not limit an instruction on lack of criminal responsibility to the specific medical diagnosis raised by defense psychiatric experts, since the burden of proving sanity remains on the Commonwealth and the jury is not bound by any particular definition of "mental disease or defect." *Commonwealth v. Mulica*, 401 Mass. 812, 520 N.E.2d 134 (1988).

The model instruction draws some phrasing from Federal Judicial Center, Pattern Criminal Jury Instructions § 55 (1983 ed.), and Manual of Model Jury Instructions for the Ninth Circuit § 6.03 (1985 ed.).

SUPPLEMENTAL INSTRUCTIONS

1. Consequences of NGI verdict. **I want to explain to you what could happen to the defendant if he (she) is found not guilty by reason of lack of criminal responsibility.**

A judge may order such a person to be hospitalized for an initial 40-day observation period, either at a facility for the mentally ill or, in certain cases, under strict security at Bridgewater State Hospital. During that period, the district attorney or certain mental health personnel may petition the court to commit the person for 6 months.

If it is shown beyond a reasonable doubt that the person continues to be mentally ill and that his (her) discharge would create a likelihood of serious harm to himself or to others, a judge may grant the petition and order the person committed for 6 months. After that, a judge will review the person's mental condition at least once a year, and there may be additional periods of commitment if he (she) continues to be mentally ill and dangerous. If the person is no longer mentally ill and dangerous, he (she) will be discharged.

The district attorney must be notified prior to any hearing about the person's release, and may be heard at any such hearing, but the final decision, either to recommit or to release the person, is always made by a judge.

I have given you this information so that you are not concerned about the possible consequences of the difficult function which you are about to perform. However, now please put the possible consequences of your decision out of your minds when you consider your verdict. You must decide this case solely on the evidence before you, in light of the law as I have explained it to you.

"Where the defense of insanity is fairly raised, the defendant on his timely request, is entitled to an instruction regarding the consequences of a verdict of not guilty by reason of insanity. Such instruction shall also be given on the request of the jury, if the defendant does not object thereto." *Commonwealth v. Mutina*, 366 Mass. 810, 821 & 823 n.12, 323 N.E.2d 294, 301 & 302 n.12 (1975). *Commonwealth v. Robbins*, 422 Mass. 305, 312, 662 N.E.2d 213, 218 (1996) (affirming instruction that included accurate explanation of burden of proof for committing defendant to treatment center); *Commonwealth v. Biancardi*, 421 Mass. 251, 254, 656 N.E.2d 1234, 1235 (1995) (reversible error for judge to refuse defendant's request to instruct jury on consequences of NGI verdict). See also 1, 793 (1982). Such an instruction is not required sua sponte, *Commonwealth v. Bannister*, 15 Mass. App. Ct. 71, 81, 443 N.E.2d 1325, 1332 (1983), but may be given sua sponte if the defendant does not object, *Commonwealth v. Callahan*, 380 Mass. 821, 826- 828, 406 N.E.2d 385, 388-389 (1980).

Callahan, supra, suggests that a judge should not charge (either sua sponte or in response to a jury question) about the consequences of an NGI verdict if the defendant objects to such a charge, but does not indicate whether doing so would be reversible error.

The judge need not give a parallel instruction on the consequences of a simple "not guilty" verdict. *Commonwealth v. Blanchette*, 409 Mass. 99, 108-109, 564 N.E.2d 992, 997-998 (1991).

2. Mental illness or defect. **You are not required to adopt any particular definition of "mental illness or defect." Because it may be of some help to you, I am going to read you the definition of "mental illness" that is used by the Commonwealth's Department of Mental Health. The Department defines mental illness as "a substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality or ability to meet the ordinary demands of life . . . ."**

104 Code Mass. Regs. § 3.01(a) (defining "mental illness" for purposes of involuntary commitment and determination of criminal responsibility under G.L. c. 123). See *Mills*, 400 Mass. at 635 & n.3, 511 N.E.2d at 577 & n.3 (O'Connor, Nolan and Lynch, JJ., dissenting) ("This court has never defined the words 'mental disease or defect' for purposes of the McHoul rule"); *Commonwealth v. Shelley*, 381 Mass. 340, 348 n.4, 409 N.E.2d 732, 737 n.4 (1981) (jury not required to adopt any particular definition of "mental disease or defect"); Laliberty, supra (same).

For a description of Battered Women's Syndrome, see *Commonwealth v. Conaghan*, 48 Mass. App. Ct. 304, 312, 720 N.E.2d 48, 55 (1999), rev'd on other grounds, 433 Mass. 105, 740 N.E.2d 956 (2000).

3. Alcohol or drug intoxication. **Intoxication with (alcohol) (drugs) is not by itself a "mental disease or defect" that will support a finding of lack of criminal responsibility. However, under some circumstances a person's consumption of (alcohol) (drugs) may activate a latent mental disease or defect, apart from the intoxication itself. Such a latent mental disease or defect, once activated, may be the basis for a finding of lack of criminal responsibility, unless the defendant knew or had reason to know that the (alcohol) (drugs) would activate that illness.**

Commonwealth v. Herd, 413 Mass. 834, 839-840, 604 N.E.2d 1294, 1298-1299 (1992) (irrelevant if drug-induced mental disease or defect was the "natural and inevitable result of illegal drug use" or was impermanent, but it may not be limited to periods of the defendant's intoxication and it must last "for a substantial time after the intoxicating effects of the drug had worn off"); *Commonwealth v. Blake*, 409 Mass. 146, 157, 564 N.E.2d 1006,1013 (1991); *Commonwealth v. Brennan*, 399 Mass. 358, 361-363, 504 N.E.2d 612, 614-616 (1987) (alcohol); *Commonwealth v. Doucette*, 391 Mass. 443, 459, 462 N.E.2d 1084, 1096 (1984) (drugs); *Commonwealth v. Shelley*, 381 Mass. 340, 350, 409 N.E.2d 732, 738-739 (1980) (alcohol); *Commonwealth v. Sheehan*, 376 Mass. 765, 767-772, 383 N.E.2d 1115, 1119 (1978) (drugs); *Commonwealth v. McGrath*, 358 Mass. 314, 319-320, 264 N.E.2d 667, 670-671 (1970) (drugs and alcohol).

NOTES:

1. **Advance notice of defense of lack of criminal responsibility**. Where the defendant has failed to give advance notice of a defense of lack of criminal responsibility, Mass. R. Crim. P. 14(b)(2) permits the judge to exclude expert testimony of insanity, but only where the defendant has refused to submit to a court-ordered examination. But the judge may not exclude nonexpert testimony by the defendant or other lay witnesses. *Commonwealth v. Dotson,* 402 Mass. 185, 187-189, 521 N.E.2d 395, 396-397 (1988); *Commonwealth v. Guadalupe,* 401 Mass. 372, 516 N.E.2d 1159 (1987).

2. **Antipsychotic medication.** Where relevant to the issue of the defendant's sanity, a defendant who is under the influence of antipsychotic medication at the time of trial has a right on request: (1) to have the jury observe him or her in an unmedicated state, *Commonwealth v. Louraine,* 390 Mass. 28, 453 N.E.2d 437 (1983), or (2) if he or she continues to take such medication during trial, to present evidence of such to the jury, *Commonwealth v. Gurney,* 413 Mass. 97, 100-104, 595 N.E.2d 320, 322-324 (1992).

3. **Individual voir dire of potential jurors.** "In all future cases in which the defendant indicates that his or her lack of criminal responsibility may be placed in issue and so requests, the judge shall inquire individually of each potential juror, in some manner, whether the juror has any opinion that would prevent him or her from returning a verdict of not guilty by reason of insanity, if the Commonwealth fails in its burden to prove the defendant criminally responsible. It will be in the

judge's discretion whether to ask more detailed questions concerning a juror's views of the defense of insanity . . . . It may be desirable for the judge to give the entire venire a brief description of the charges and related facts . . . (in a form agreed to by the parties). Such a practice might help identify persons who tend to view as insane anyone who did what the defendant is charged with doing, as well as those who oppose the use of the defense of insanity." *Commonwealth v. Seguin,* 421 Mass. 243, 248-249 & n.6, 656 N.E.2d 1229, 1233 & n.6 (1995), cert. denied, 516 U.S. 1180 (1996).

In such questioning, a judge is not required to ask open-ended questions. A judge sufficiently complied with *Seguin* by asking each juror individually, "One of the issues in this case may be the defendant's mental state at the time the crimes were allegedly committed. In that regard, there may be testimony from psychiatrists and psychologists and other mental health professionals. Do you have any feelings or opinions that would prevent you from considering such testimony in a fair and impartial manner? . . . Do you have any feelings or opinions that would prevent you from returning a verdict of not guilty by reason of insanity if you felt such a verdict was warranted by the evidence? . . . Is there any other reason you know of why you could not serve as a fair, objective and impartial juror in this case?" *Commonwealth v. Lo,* 428 Mass. 45, 48-50 & n.7, 696 N.E.2d 935, 938-940 & n.7 (1998).

4. **"Insanity defense" and "criminal responsibility" terminology.** The term "insanity defense" is a shorthand colloquialism for a claim that the defendant lacked criminal responsibility. *Commonwealth v. Lo,* 428 Mass. 45, 46 n.2, 696 N.E.2d 935, 937 n.2 (1998). Since the phrase "insanity defense" is a legal and not a medical term, it is recommended that it generally be avoided, since repeated references to the "defense" of insanity may mislead the jury as to the burden of proof. "Criminal responsibility" is an appropriate shorthand reference to the *McHoul* standard that may be used by expert witnesses and counsel without running afoul of the prohibition against witnesses testifying in terms of the ultimate issue. *Commonwealth v. Colleran,* 452 Mass. 417, 426-427, 895 N.E.2d 425, 433-434 (2008).

5. **Verdict form**. Where an issue of lack of criminal responsibility is raised, the jury should be given a verdict form with "guilty," "not guilty," and "not guilty by reason of lack of criminal responsibility" options for their verdict. *Commonwealth v. Chandler,* 29 Mass. App. Ct. 571, 581-582, 563 N.E.2d 235, 242 (1990).

9.220 MENTAL IMPAIRMENT SHORT OF INSANITY

2009 Edition

(for specific intent crimes only)

You have heard evidence about the defendant's mental condition at the time of the alleged offense.

Where the jury was also instructed on lack of criminal responsibility. **If you find that the Commonwealth has proved beyond a reasonable doubt that the defendant was sane at the time of the offense, such evidence may still be relevant to your deliberations on another issue.**

A mental impairment that does not rise to the level of lack of criminal responsibility (what is sometimes referred to as insanity) is not an excuse or justification for a criminal act. However, the defendant's mental condition may be relevant to your deliberations on the issue of whether the defendant had the criminal intent that is required for conviction of this offense.

I have told you that one of the elements of *[offense charged]* which the Commonwealth must prove beyond a reasonable doubt is that the defendant specifically intended to *[describe required specific intent]* . The defendant cannot be guilty of this offense without that intent. When you consider whether or not the Commonwealth has proved that the defendant had the necessary intent, you may take into account any evidence about the defendant's mental condition.

Sometimes a person's mental condition may be such that he or she is not capable of having the necessary intent to commit the crime. Such a defendant must be acquitted. In other cases, a person may have some mental impairment, but may still be able to form the necessary intent. Such a defendant may be convicted, since mental impairment short of insanity is not an excuse for a crime if the defendant was able to, and did, form the required intent.

You may consider any evidence of the defendant's mental condition, along with all the other evidence in the case, in deciding whether the Commonwealth has proved beyond a reasonable doubt that the defendant acted with the intent to _____ .

The jury should be permitted to consider any evidence of the defendant's mental impairment at the time of the crime, but which does not rise to the level of an insanity defense, in determining whether the Commonwealth has proved a specific intent that is required for the crime. If there is such evidence, failure to give such a charge on request is reversible error. *Commonwealth v. Grey*, 399 Mass. 469, 470-472, 505 N.E.2d 171, 173-174 (1987); *Commonwealth v. Gassett*, 30 Mass. App. Ct. 57, 565 N.E.2d 1226 (1991). See McMahon, "Recognizing Diminished Capacity," 78 Mass. L. Rev. 41 (1993).

NOTE:

Individual voir dire of prospective jurors not required. Individual voir dire of prospective jurors is in the judge's discretion, and not automatically required, when there will be evidence of mental illness or impairment but no claim of lack of criminal responsibility.

In such a case, a judge appropriately indicated to the entire venire that evidence might be introduced about the defendant's mental condition and its impact on his ability to commit the crime, and asked if any prospective juror had "any opinions about mental illness or about evidence concerning mental illness on the part of a defendant that you think might interfere with your ability to listen to the evidence and to be a fair and an impartial juror, deciding the case based only on the evidence and the instructions of law that I will give to you." Jurors who responded affirmatively were then questioned individually as to whether they could listen to the evidence with an open mind and consider fairly whether the defendant did or did not have the capacity to form the necessary specific intent to commit the crime. If any prospective juror had difficulty understanding the question or hesitated in answering, the judge inquired further. *Commonwealth v. Ashman*, 430 Mass. 736, 738-740, 723 N.E.2d 510, 513-514 (2000).

9.230 DURESS

May 2017

"Necessity is the defense one pleads when circumstances force one to perform a criminal act. Duress, or coercion, applies when human beings force one to act." *Commonwealth v. Garuti,* 23 Mass. App. Ct. 561, 564 (1987), quoting from *United States v. Nolan,* 700 F.2d 479, 484 n.1 (9th Cir.), cert. denied, 462 U.S. 1123 (1983).

In some situations, duress may excuse a person's committing what would otherwise be a criminal offense. Duress is a form of coercion. Our law holds that free will is essential to the commission of a criminal act, and therefore a person may not be found guilty for an act which he (she) committed under duress.

If evidence of duress is present, you may not find the defendant guilty unless the Commonwealth proves beyond a reasonable doubt that the defendant did in fact commit the offense, and also proves beyond a reasonable doubt that the defendant did not act under duress.

To prove that the defendant did not act under duress, the Commonwealth must prove *one* of the following three things beyond a reasonable doubt:

***First:* That the defendant did not receive a present and immediate threat which caused him (her) to have a well-founded fear of imminent death or serious bodily injury if he (she) did not do the criminal act. The threat must be imminent and must be present throughout the commission of the crime; or**

***Second:* That the defendant had a reasonable opportunity to escape; and or**

Third: **That the defendant, or any other person of reasonable firmness, had a choice and would have been able to do otherwise in the circumstances.**

> *If relevant to the evidence.* **The defense of duress is not available to a person who voluntarily enters into a criminal enterprise and willingly places himself in a situation in which it is likely that he could be subject to coercion. The defense is also not available to a person who recklessly places himself in a situation where it is likely that such coercion may be applied.**

To conclude, if there is evidence of duress, the Commonwealth must prove beyond a reasonable doubt that the defendant did in fact commit the offense, and must also prove beyond a reasonable doubt that one or more of those three factors were not present.

> *Commonwealth v. Robinson,* 382 Mass. 189, 198-209 (1981); *Commonwealth v. Perl*, 50 Mass. App.Ct. 445, 447-48 (2000) (reaffirming imminence requirement); *Commonwealth v. Egardo*, 42 Mass. App. Ct. 41, 44-45, rev'd on other grounds, 426 Mass. 48 (1997) (preferable to avoid language that "a threat of future harm is not enough," since this formulation has been criticized as emphasizing the proximity requirement at the cost of logic, since all threats involve future harms); *Garuti,* 23 Mass. App. Ct. at 565.
>
> The same rules of proof apply to coercion by a husband as by anyone else. *Commonwealth v. Barnes,* 369 Mass. 462, 467-68 (1976). The common law presumption that a wife who commits a crime in the presence of her husband has been coerced by him into doing so, see e.g., *Commonwealth v. Helfman,* 258 Mass. 410, 416 (1927); *Commonwealth v. Egan,* 103 Mass. 71, 72 (1869), has been abolished.

NOTES:

1. Abusive relationship evidence. Where there is an issue of duress, "a defendant shall be permitted to introduce either or both of the following in establishing the reasonableness of the defendant's apprehension that death or serious bodily injury was imminent, the reasonableness of the defendant's belief that he had availed himself of all available means to avoid physical combat or the reasonableness of a defendant's perception of the amount of force necessary to deal with the perceived threat: (a) evidence that the defendant is or has been the victim of acts of physical, sexual or psychological harm or abuse; (b) evidence by expert testimony regarding the common pattern in abusive relationships; the nature and effects of physical, sexual or psychological abuse and typical responses thereto, including how those effects relate to the perception of the imminent nature of the threat of death or serious bodily harm; the relevant facts and circumstances which form

the basis for such opinion; and evidence whether the defendant displayed characteristics common to victims of abuse." G.L. c. 233, § 23F.

2. Threatened harm to third parties. See *Commonwealth v. Perl*, 50 Mass. App. Ct. at 451-52 (duress defense applicable to threats of harm to third parties).

9.240 NECESSITY

May 2017

> "Necessity is the defense one pleads when circumstances force one to perform a criminal act. Duress, or coercion, applies when human beings force one to act." *Commonwealth v. Garuti,* 23 Mass. App. Ct. 561, 564 (1987), quoting from *United States v. Nolan,* 700 F.2d 479, 484 n.1 (9th Cir.),
> cert. denied, 462 U.S. 1123 (1983).
>
> For a defendant to be entitled to necessity defense instruction, he or she must present some evidence on each of the four underlying conditions of the defense: (1) a clear and imminent danger, not one which is debatable or speculative; (2) a reasonable expectation that his or her action will be effective as the direct cause of abating the danger; (3) there is no legal alternative which will be effective in abating the danger; and (4) the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue. If the defendant satisfies these foundational conditions, the burden is then on the commonwealth to prove beyond a reasonable doubt the absence of necessity. *Commonwealth v. Magadini*, 474 Mass. 593, 597 (2016).

In some situations, necessity may excuse a person's committing what would otherwise be a criminal offense. A person is allowed to commit what would otherwise be a criminal offense if the person acts out of necessity. The rule of necessity exists because it would be unjust and contrary to public policy to impose criminal liability on a person if the harm that results from his breaking the law is significantly less than the harm that would result from his complying with the law in that particular situation.

If evidence of necessity is present, the Commonwealth must prove beyond a reasonable doubt that the defendant did *not* act

out of necessity. In other words, if you have a reasonable doubt whether or not the defendant acted out of necessity, your verdict must be not guilty.

To prove that the defendant did not act out of necessity, the Commonwealth must prove *one* of the following three things beyond a reasonable doubt:

***First:* That the defendant was not faced with a clear and imminent danger, but rather one that was debatable or speculative; or**

***Second:* That the defendant did not reasonably expect that his (her) actions would be effective in directly reducing or eliminating the danger; or**

***Third:* That the defendant had a reasonable legal alternative which would have been effective in reducing or eliminating the danger,**

You may not find the defendant guilty unless the Commonwealth proved beyond a reasonable doubt that the defendant did in fact commit the offense, and also proved beyond a reasonable doubt that one or more of those three factors were absent and therefore the defendant did not act out of necessity.

NOTES:

1. **Fourth element when there is a limiting statute.** There is a fourth element to a necessity defense: that "the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue." *Commonwealth v. Schuchardt,* 408 Mass. 347, 349-350 (1990); *Commonwealth v. O'Kane*, 53 Mass. App. Ct. 466, 470 n.3. However, this is usually not a jury issue:

- *If there is no relevant statute on whether a necessity defense is available,* the judge should either omit all reference to this fourth element, or inform the jury that the Legislature has made the defense potentially available in this situation, leaving the jury to decide whether the evidence satisfies the first three elements.
- *If there is a relevant statute that has precluded a necessity defense* in this situation, the judge should so rule as a matter of law and not instruct the jury on the defense of necessity.
- *If there is a relevant statute limiting a necessity defense to specified circumstances,* the judge should instruct the jury on the first three elements, and also inform the jury that they must determine whether the facts of the case fall within the limited circumstances specified by statute.

Commonwealth v. Lora, 43 Mass. App. Ct. 136, 140 & n.7 (1997).

2. **Burden of Production**. The defendant must present some evidence on each of the four elements before the judge must instruct on, and permit the jury to consider, a necessity defense. *Commonwealth v. Kendall,* 451 Mass. 10, 16 n.5 (2008) (affirming denial of defendant's request for necessity instruction because no evidence that defendant was without alternative to abate emergency). However, with respect to the third element, the law does "not require a defendant to rebut every alternative that is conceivable; rather, a defendant is required to rebut alternatives that likely would have been considered by a reasonable person in a similar situation." *Commonwealth v. Magadini*, 474 Mass. 593, 601 (2016) (defendant's testimony that he had been denied entry to the local homeless shelter, that he was unable to rent an apartment despite repeated attempts, and that he had no place else to stay was sufficient for the issue to go to the jury; whether it is an effective legal alternative for a homeless person to seek shelter outside of his or her home town is a question of fact for the jury to decide). In determining whether an instruction on a necessity defense is warranted, "all reasonable inferences should be resolved in favor of the defendant, and, no matter how incredible his testimony, that testimony must be treated as true." *Id*. at 600.

3. **Motions in limine**. Generally a judge should not exclude a necessity defense on a motion in limine. "It is, perhaps, more prudent for the judge to follow the traditional, and constitutionally sounder, course of waiting until all the evidence has been introduced at trial before ruling on its sufficiency to raise a proffered defense. If, at that time, the defendant has failed to produce some evidence on each element of the defense, the judge should decline to instruct on it . . . . In that event, the judge may, if appropriate, give curative instructions to caution the jury against considering evidence not properly before them . . . . We believe that ordinarily a judge should not allow a motion which serves to exclude, in advance of its being offered, potential evidence of the [necessity] defense. Since a judge is required to instruct on any hypothesis supported by evidence, in most instances proffer of disputed matter at trial, ruled upon in the usual course, is more likely to be fair and result in correct rulings" (citations and internal quotation marks omitted). *Commonwealth v. Hood,* 389 Mass. 581, 595 & n.5, quoting from *Commonwealth v. O'Malley,* 14 Mass. App. Ct. 314, 325 (1982). See also *Hood*, 389 Mass. at 596-598 (Liacos, J., concurring) (expressing belief that allowance of such a motion in limine, over a proper offer of proof, is reversible error).

See *Kendall,* 451 Mass. at 15-16 (necessity defense not available to intoxicated defendant who drove seriously injured girl friend to hospital but offered no evidence that legal alternatives were unavailable, e.g., seeking other assistance from others nearby); *Commonwealth v. Leno,* 415 Mass. 835, 839-41 (1993) (necessity defense not available to operator of illegal needle exchange program); *Schuchardt,* 408 Mass. at 349-50 (necessity defense deals with generally recognized harms, not those — such as the arms race — which are debatable and the subject of legislation and regulation); *Commonwealth v. Iglesia,* 403 Mass. 132, 135-36 (1988) (burden on Commonwealth to prove beyond a reasonable doubt the absence of necessity; permissible to charge first on relevant factors and then define burden of proof); *Commonwealth v. Weaver,* 400 Mass. 612, 614-15 (1987) (necessity instruction properly denied where insufficient evidence that defendant's actual motive was to avoid greater evil; opinion includes firearm example); *Hood,* 389 Mass. at 590-595 (necessity instruction properly denied where defendant failed to offer sufficient evidence that no effective alternatives were available); *Commonwealth v. Ben B.*, 59 Mass. App. Ct. 919, 920 (2003) (same); *Commonwealth v. Brugmann,* 13 Mass. App. Ct. 373, 376-81 (1982) (same; discusses policy grounds for necessity defense); *Commonwealth v. Averill,* 12 Mass. App. Ct. 260, 261-63 (1981) (necessity instruction properly denied where no evidence that defendants expected an immediate reduction in perceived danger, since there must be reasonable anticipation of "a direct causal relationship" between act and abatement of danger). But see *Magadini*, 474 Mass. at 602 (necessity caused by cold weather may be a defense to trespassing for a homeless person).

4. **Prison escape.** If a necessity defense is raised in a prison escape case, at a minimum there must be evidence that the defendant: (1) was faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future; (2) had no time for complaint to the authorities, or shows a history of futile complaints; (3) had no time or opportunity to resort to the courts; (4) used no force or violence toward prison personnel or other innocent persons in escaping; and (5) immediately surrendered to authorities once safe from the immediate threat. *Commonwealth v. Thurber,* 383 Mass. 328, 330-333 (1981); *O'Malley,* 14 Mass. App. Ct. at 319-322. See *United States v. Bailey,* 444 U.S. 394, 411-413 (1980).

9.250 PARENTAL DISCIPLINE

June 2016

A (parent) (stepparent) (guardian) may use reasonable force against a minor child under (his) (her) care if it is reasonable and reasonably related to a legitimate purpose.

If there is evidence that the defendant was the (parent) (stepparent) (guardian) of the alleged victim and that the alleged victim was under the age of 18, the Commonwealth bears the additional burden of proving

beyond a reasonable doubt at least one of three things: (1) that the force used was unreasonable; or (2) that the force used was not reasonably related to the purpose of safeguarding or promoting the welfare of the child, or (3) that the force used caused or created a substantial risk of causing physical harm, gross degradation, or severe mental distress.

In evaluating the reasonableness of the force used and its relation to safeguarding or promoting the welfare of the child, you may consider evidence, if any, of the child's age, the physical and mental condition of the child, the nature of the child's alleged misconduct, the child's ability to understand or appreciate the correction, and any other evidence you believe relevant.

In deciding whether the force used or a risk of injury it created was so extreme as to be inherently impermissible, you may consider the child's age, the child's physical and mental condition, any physical or mental injury the discipline caused, and any other evidence you believe relevant. I instruct you that an injury that is limited to fleeting pain, or marks which are only temporary, is not so extreme as to be inherently impermissible.

If the defendant claims to be a stepparent:

A stepparent is a person who is part of a stable family unit and serves as (mother) (father) and coparent. That person must have assumed all the duties and obligations of a parent toward the child.

Commonwealth v. Dorvil, 472 Mass. 1, 12-13 (2015)

Notes

1. **Stepparent may assert parental discipline defense.** A stepparent who serves an *in loco parentis* role is entitled to raise the affirmative defense of parental discipline. *Commonwealth v. Packer*, 88 Mass. App. Ct. 585, 590-91 (2015), *rev. denied*, 473 Mass. 1109 (2016). The burden is on the defendant to prove he or she stands in loco parentis to the child. *Commonwealth* v. *O'Connor*, 407 Mass. 663, 668 (1990).

2. **Judge should make preliminary determination.** If a parental discipline defense is raised by one who is not a biological or adoptive parent, a judge may consider making a preliminary determination whether there is sufficient evidence for the issue to go to the jury. See note 2 on Instruction 9.260 for self-defense.

3. **Factors relating to the role of stepparent.** Factors that may considered on a defendant's status as a stepparent include (1) the nature and length of the relationship between the defendant and the biological parent or legal guardian; (2) the extent to which a biological parent remains actively involved in the child's rearing; (3) whether the child resides with the defendant; (4) the extent and nature of the defendant's role in rearing the child; (5) whether the defendant contributes financially to the household; (6) whether the other parent and/or the child view the defendant as a co-parent; and (7) whether there is a formal or implicit understanding between the defendant and a parent as to the defendant's role in rearing the child. *Commonwealth* v. *Packer,* 88 Mass. App. Ct. 585, 590-93 (2015), *rev. denied*, 473 Mass. 1109 (2016).

9.260 SELF-DEFENSE; DEFENSE OF ANOTHER; DEFENSE OF PROPERTY

2009 Edition

I. SELF-DEFENSE

INTRODUCTION

A person is allowed to act in self-defense. If evidence of self-defense is present, the Commonwealth must prove beyond a reasonable doubt that the defendant did *not* act in self-defense. In other words, if you have a reasonable doubt whether or not the defendant acted in self-defense, your verdict must be not guilty.

Here instruct either on "A. Use of Non-Deadly Force" or "B. Use of Deadly Force." In the occasional situation in which the level of force cannot be determined as a matter of law, the jury must be instructed on both. See note 4, infra.

A. USE OF NON-DEADLY FORCE

To prove that the defendant did not act in self-defense, the Commonwealth must prove *one* of the following things beyond a reasonable doubt:

First*, that the defendant did not reasonably believe he (she) was being attacked or immediately about to be attacked, and that his (her) safety was in immediate danger; *or

Second,* that the defendant did not do everything reasonable in the circumstances to avoid physical combat before resorting to force; *or

***Third*, that the defendant used more force to defend himself (herself) than was reasonably necessary in the circumstances.**

B. USE OF DEADLY FORCE

If the defendant (used deadly force, which is force intended or likely to cause death or great bodily harm) (or) (used a dangerous weapon in a manner intended or likely to cause death or great bodily harm), the Commonwealth must prove *one* of the following three things beyond a reasonable doubt:

First*, that the defendant did not reasonably and actually believe that he (she) was in immediate danger of great bodily harm or death; *or

Second*, that the defendant did not do everything reasonable in the circumstances to avoid physical combat before resorting to force; *or

***Third,* that the defendant used more force to defend himself (herself) than was reasonably necessary in the circumstances.**

In conclusion, to obtain a conviction for the offense(s) of _____, the Commonwealth must prove each element of the offense beyond a reasonable doubt. If there is evidence of self-defense, the Commonwealth also has the burden to prove beyond a reasonable doubt that the defendant did not act in self-defense.

If each element of the crime has been proved beyond a reasonable doubt and it has also been proved beyond a reasonable doubt that the defendant did not act in self-defense, you should return a verdict of guilty. If any element of the crime has not been proved beyond a reasonable doubt, or the Commonwealth did not prove beyond a reasonable doubt that the defendant did not act in self-defense, you must find the defendant not guilty.

SUPPLEMENTAL INSTRUCTIONS

1.Reasonable apprehension. **A person cannot lawfully act in self-defense unless he (she) is attacked or is immediately about to be attacked. The Commonwealth may prove that the defendant did not act in self-defense by proving beyond a reasonable doubt that there was no overt act — either words, a gesture, or some other action — that gave rise to a reasonable belief of attack or immediate danger**

Where use of deadly force is at issue add:

of great bodily harm or death.

2. Duty to retreat. **A person cannot lawfully act in self-defense unless he or she has exhausted all other reasonable alternatives before resorting to force. A person may use physical force in self-defense only if he (she) could not get out of the situation in some other way that was available and reasonable at the time. The Commonwealth may prove the defendant did not act in self-defense by proving beyond a reasonable doubt that the defendant resorted to force without using avenues of escape that were reasonably available and which would not have exposed the defendant to further danger.**

You may consider any evidence about where the incident took place, whether or not the defendant might have been able to escape by walking away or otherwise getting to safety or by summoning help if that could be done in time, or by holding the attacker at bay if the means were available, or by some other method. You may consider whether the use of force reasonably seemed to be the only means of protection in the circumstances. You may take into account that a person who is attacked may have to decide what to do quickly and while under emotional strain.

3. Excessive force. **A person cannot lawfully act in self-defense if one uses more force than necessary in the circumstances to defend oneself. How much force is necessary may vary with the situation. Exactness is not always possible. You may consider whether the defendant had to decide how to respond quickly under pressure. The Commonwealth may prove the defendant did not act in self-defense by proving beyond a reasonable doubt that the defendant used clearly excessive and unreasonable force. You may also consider any evidence about the relative size or strength of the persons involved, where the incident took place, (and what kind of weapons, if any, were used), among other things.**

4. Retaliation. **A person cannot lawfully act in self-defense when one uses force in retaliation. The right to self-defense arises from necessity and ends when the necessity ends. The Commonwealth may prove the defendant did not act in self-defense by proving beyond a reasonable doubt that the defendant was no longer in any immediate danger and was just pursuing his (her) attacker for revenge or to ward off any possibility of attack in the indefinite future.**

5. The "castle rule": retreat not required in dwelling. **A person lawfully occupying a house, apartment or other dwelling is not required to retreat from or use other means to avoid combat with an unlawful intruder, if two circumstances exist:**

First*, the occupant reasonably believes that the intruder is about to inflict great bodily injury or death on him (her) or on another person lawfully in the dwelling; *and

***Second,* the occupant uses only reasonable means to defend himself (herself) or the other person lawfully in the dwelling.**

A "dwelling" is a place where a person lives; a place where one is "temporarily or permanently residing and which is in [one's] exclusive possession." The term includes all buildings or parts of buildings used as dwellings, including (apartment houses) (tenement houses) (hotels) (boarding houses) (dormitories) (hospitals) (institutions) (sanitoriums) (or) (other buildings where people reside).

The term "dwelling" does not extend to common areas such as common hallways in an apartment building. In multiunit housing, the "dwelling" only extends to areas over which the person has a right of exclusive control.

The Commonwealth may prove that the defendant did not act in self-defense in a dwelling by proving beyond a reasonable doubt:

First*, that (the premises were not a dwelling) (or) (the defendant was not a lawful occupant of the premises) (or) (the alleged victim was not an unlawful intruder) (or) (the defendant did not reasonably believe that the alleged victim was about to inflict great bodily injury or death on him (her) or on another person lawfully in the dwelling) (or) (the defendant used clearly excessive force to defend himself (herself) or the other person lawfully in the dwelling); *and

***Second,* that the defendant resorted to force without using avenues of escape that were reasonably available and which would not have exposed the defendant to further danger.**

If there is an issue as to whether the alleged victim was an unlawful intruder, the jury must be instructed on trespass (Instruction 8.220) or given other appropriate instructions.

6. Defendant as original aggressor. **Generally, the original aggressor has no right of self-defense unless he (she) withdraws from the conflict in good faith and announces his (her) intention of abandoning the fight.**

Commonwealth v. Naylor, 407 Mass. 333, 553 N.E.2d 542 (1990); *Commonwealth v. Evans*, 390 Mass. 144, 152-154, 454 N.E.2d 458 (1983); *Commonwealth v. Walden*, 380 Mass. 724, 405 N.E.2d 939 (1980); *Commonwealth v. Johnson*, 379 Mass. 177, 396 N.E.2d 974 (1979); *Commonwealth v. Maguire*, 375 Mass. 768, 772, 378 N.E.2d 445 (1978). See *Commonwealth v. Harrington*, 379 Mass. 446, 454, 399 N.E.2d 475 (1980) (defendant not required to prove that he was not the aggressor as prerequisite to self-defense claim).

7. Victim's prior threats and violence against defendant. **In considering who was being attacked by whom, you may take into account any threats of violence made by *[the alleged victim]* against the defendant and whether, as the defendant contends, *[the alleged victim]* was trying to carry out such threats during this incident. If the defendant was aware, at the time of the incident, that such threats had been made, you may also consider them in determining whether the defendant was reasonably afraid for his (her) own safety.**

Commonwealth v. Edmonds, 365 Mass. 496, 499-501, 313 N.E.2d 429 (1974); *Commonwealth v. Rubin*, 318 Mass. 587, 63 N.E.2d 344 (1945). See also G.L. c. 233, § 23F as to the use of evidence of past or present physical, sexual or psychological harm or abuse of the defendant.

You may also consider any specific, recent acts of violence that were committed by *[the alleged victim]* against the defendant and that were known to the defendant, on the issue of whether the defendant was reasonably afraid for his (her) own safety.

Commonwealth v. Rodriquez, 418 Mass. 1, 633 N.E.2d 1039 (1994); *Commonwealth v. Pidge*, 400 Mass. 350, 509 N.E.2d 281 (1987); Fontes, 396 Mass. at 735-736, 488 N.E.2d 760. These three were all homicide cases, but it is likely that the rule is applicable to all self-defense claims.

8. Victim's prior acts of violence unknown to defendant. **In considering who was being attacked by whom, you may take into account any act (acts) of violence that may have been initiated by *[the alleged victim]* on (a prior occasion) (prior occasions), even if the defendant did not know of (that act) (those acts) of violence at the time of this incident. You may consider that evidence on the issue of whether *[the alleged victim]* initiated this incident.**

"Where the identity of the first aggressor is in dispute, the accused may offer evidence of specific incidents of violence allegedly initiated by the victim, or a third party acting in concert with or to assist the victim, whether known or unknown to the accused, and the prosecution may rebut the same in reputation form only." Mass. G. Evid. § 404(a)(2)(B) (2008-2009). Accord, *Commonwealth v. Pring-Wilson*, 448 Mass. 718, 863 N.E.2d 936 (2007); *Commonwealth v. Adjutant*, 443 Mass. 649, 824 N.E.2d 1 (2005). The alleged acts must be more probative than prejudicial. Admission of specific acts of violence is preferred over more general evidence of a victim's reputation for violence. Adjutant, supra. Such evidence must be otherwise admissible under the rules of evidence, and the judge has discretion to limit additional cumulative evidence. *Commonwealth v. Clemente*, 452 Mass. 295, 306 & n.18, 893 N.E.2d 19, 32 & n.8 (2008).

9. Victim's reputation for violence known to defendant. **You may consider whether [the alleged victim] had a reputation for violence or quarreling that was known to the defendant on the issue of whether the defendant was reasonably (and actually) afraid for his (her) own safety.**

With respect to a claim of self-defense, the jury may consider whether the victim had a reputation for violence or being quarrelsome that was known to the defendant prior to the alleged incident. *Commonwealth v. Clemente*, 452 Mass. 295, 308, 893 N.E.2d 19, 33 (2008). *Commonwealth v. Adjutant*, 443 Mass. 649, 824 N.E.2d 1 (2005), did not alter the rule that (unlike specific acts of violence) such reputation evidence is admissible only if known to the defendant. Id.

"In a criminal proceeding, in support of a claim of self-defense, the accused may offer evidence known to the accused prior to the incident in question of the victim's reputation for violence, of specific instances of the victim's violent conduct, or of statements made to the victim that caused reasonable apprehension of violence on the part of the accused." Mass. G. Evid. § 404(a)(2)(A) (2008-2009). *Commonwealth v. Dilone*, 385 Mass. 281, 431 N.E.2d 576 (1982); *Commonwealth v. Simmons*, 383 Mass 40, 43, 417 N.E.2d 430 (1981); *Commonwealth v. Edmonds*, 365 Mass. 496, 313 N.E.2d 429 (1974); *Commonwealth v. Rubin*, 318 Mass. 587, 63 N.E.2d 344 (1945); *Commonwealth v. Kamishlian*, 21 Mass. App. Ct. 931, 486 N.E.2d 743 (1985) (defendant's nickname suggesting he was violent or quarrelsome); *Commonwealth v. MacMurtry*, 20 Mass. App. Ct. 629, 633, 482 N.E.2d 332 (1985); *Commonwealth v. Marler*, 11 Mass. App. Ct. 1014, 419 N.E.2d 854 (1981). Admission of such evidence "is limited to acts that are not too remote, lest the trial turn into a distracting and prejudicial investigation of the victim's character." *Commonwealth v. Kartell*, 58 Mass. App. Ct. 428, 790 N.E.2d 739 (2003). Accord, *Commonwealth v. Fontes*, 396 Mass. 733, 735-737 (1986). Admission of evidence of specific acts of violence is preferred over more general evidence of the victim's reputation for violence. *Commonwealth v. Adjutant*, supra.

Once the defense has raised the issue of the victim's allegedly violent character, the prosecution may rebut by offering evidence of the victim's reputation for peacefulness, *Adjutant*, supra; *Lapointe*, 402 Mass. at 324-5, 522 N.E.2d 937.

10. Mutual combat. **When two people engage in a fist fight by agreement, generally neither of them is acting in self-defense because they have not used all reasonable means to avoid combat. But a person regains the right of self-defense if during the fight he (she) reasonably concludes that the other person, contrary to their mutual understanding, has escalated the fight by introducing deadly force.**

Commonwealth v. Bertrand, 385 Mass. 356, 432 N.E.2d 78 (1982); *Commonwealth v. Collberg*, 119 Mass. 350 (1876); *Commonwealth v. Barber*, 18 Mass. App. Ct. 460, 466 N.E.2d 531 (1984), aff'd, 394 Mass. 1013, 477 N.E.2d 587 (1985).

11. Injury-prone victim. **If a person has exhausted all proper means to avoid physical combat, he (she) may use appropriate non-deadly force in self-defense if he (she) reasonably believes that his (her) personal safety is in danger, even against someone, like a drunk, who is known to be susceptible to injury.**

Commonwealth v. Bastarache, 382 Mass. 86, 414 N.E.2d 984 (1980).

12. Police privilege; Resisting arrest. **Because of the nature of the job, a police officer is permitted to use force in carrying out his (her) official duties if such force is necessary and reasonable. A person who is arrested by someone who he (she) knows is a police officer is not allowed to resist that arrest with force, whether the arrest is lawful or not. Even if the arrest is illegal, the person must resort to the legal system to restore his (her) liberty.**

However, if a police officer uses excessive or unnecessary force to make an arrest — whether the arrest is legal or illegal — the person who is being arrested may defend himself (herself) with as much force as reasonably appears to be necessary. The person arrested is required to stop resisting once he (she) knows or should know that if he (she) stops resisting, the officer will also stop using excessive or unnecessary force. The Commonwealth must prove beyond a reasonable doubt that the police officer did not use excessive or unnecessary force in making the arrest.

Commonwealth v. Moreira, 388 Mass. 596, 447 N.E.2d 1224 (1983) (resisting unlawful arrest); *Commonwealth v. Martin*, 369 Mass. 640, 341 N.E.2d 885 (1976) (police privilege); *Commonwealth v. Urkiel*, 63 Mass. App. Ct. 445, 826 N.E.2d 769 (2005) (unconstitutional entry into dwelling does not itself constitute excessive force giving rise to right to resist); *Commonwealth v. Francis*, 24 Mass. App. Ct. 576, 511 N.E.2d 38 (1987) (knowledge of officer's identity); *Commonwealth v. McMurtry*, 20 Mass. App. Ct. 629, 632, 482 N.E.2d 332 (1985). G.L. c. 111B, § 8, sixth par. (police privilege in protective custody situations). See also G. L. c. 268, § 32B (resisting arrest).

The Commonwealth has the burden of proof on the issue of whether the police used excessive force. *Commonwealth v. Graham*, 62 Mass. App. Ct. 642, 818 N.E.2d 1069 (2004).

13. Deadly force during citizen's arrest. **A person may use deadly force to make a citizen's arrest only if:**

***First*, he (she) believes that such force is necessary to make a lawful arrest;**

***Second*, the arrest is for a felony;**

***Third*, either he (she) announces the purpose of the arrest or believes it is already known to the person being arrested or believes it cannot reasonably be made known to the person being arrested;**

***Fourth, either* he (she) is assisting a person whom he (she) believes is a peace officer; or he (she) is a peace officer;**

***Fifth*, he (she) believes there is no substantial risk of injury to innocent persons;**

***Sixth*, he (she) believes that the person being arrested used or threatened to use force in committing the felony;**

***Seventh*, he (she) believes that there is a substantial risk that the person being arrested will cause death or serious bodily harm to someone if he (she) is not immediately arrested.**

(If made pursuant to a warrant:

and *Eighth*, that the warrant was valid or was believed by the citizen to be valid.)

Crimes that may be punished with a state prison sentence are called "felonies," while other crimes are called "misdemeanors."

I instruct you as a matter of law that *[the relevant crime]* is a (felony) (misdemeanor).

Deadly force is force that is (intended or likely to cause death or great bodily harm) (or) (applied using a dangerous weapon likely to cause death or serious injury). It is the level of force used, not to the degree of injury caused, if any, that determines whether it is deadly force.

(*If a warrantless arrest was made by a police officer outside his/her jurisdiction:*

A police officer who makes a warrantless arrest outside of his [her] jurisdiction acts as a private citizen. The officer must have probable cause to believe that a felony was committed and that this person committed it.)

***14. Non-deadly force during citizen's arrest.* A person may use reasonable force to make a citizen's arrest only if:**

***First*, he (she) believes that such force is immediately necessary to make a lawful arrest;**

Second*, he (she) announces the purpose of the arrest *or* believes that it is already known to the person being arrested *or* believes that it cannot reasonably be made known to the person being arrested, *and

Choose appropriate instruction below:

A. If arrest was made pursuant to a warrant: ***Third*, the arrest was pursuant to a valid warrant or the citizen making the arrest believed it was valid.**

B. If arrest was made without a warrant: ***Third*, the arrest without a warrant was for a felony. Crimes that may be punished with a state prison sentence are called "felonies" while other crimes are called "misdemeanors."**

***C. If warrantless arrest was made by a police officer outside his/her jurisdiction*:**

***Third*, the police officer made a warrantless arrest outside of his (her) jurisdiction and had probable cause to believe a felony was committed and that it was committed by this person.**

I instruct you as a matter of law that *[relevant crime]* is a (felony) (misdemeanor).

Commonwealth v. Grise, 398 Mass. 247, 496 N.E.2d 162 (1986) (warrantless citizen arrests limited to felonies only); *Commonwealth v. Klein*, 372 Mass. 823, 828-832, 363 N.E.2d 1313 (1977) (burden of proof on Commonwealth); *Commonwealth v. Lussier*, 333 Mass. 83, 128 N.E.2d 569 (1955). Extra-territorial arrests by police are limited to felonies. *Commonwealth v. Twombly*, 435 Mass. 440, 758 N.E.2d 1051 (2001); *Commonwealth v. Savage*, 430 Mass. 341, 719 N.E.2d 473 (1999); *Commonwealth v. Clairborne*, 423 Mass. 275, 667 N.E.2d 873 (1996); *Commonwealth v. Morrissey*, 422 Mass. 1, 660 N.E.2d 376 (1996). On arrest by a bail surety, see *Commonwealth v. Cabral*, 443 Mass. 171, 819 N.E.2d 951 (2005).

II. DEFENSE OF ANOTHER

Society wishes to encourage all of us to come to the aid of each other when that is necessary. Therefore, a person may use reasonable force when that is necessary to help another person, if it reasonably appears that the person being aided is in a situation where the law would allow him to act in self-defense himself.

If there is any evidence in this case that the defendant may have been coming to the aid of another person, you must find the defendant not guilty unless the Commonwealth proves beyond a reasonable doubt at least *one* of the following two things:

First:* That a reasonable person in the defendant's position would *not* have believed that his (her) use of force was necessary in order to protect *[third party]* ; *or

***Second:* That to a reasonable person in the defendant's position would *not* have believed that *[third party]* was justified in using such force in his (her) own self-defense.**

So when does a person have a right to act in self-defense?

Here instruct on self-defense.

Defense of another is a complete defense. *Commonwealth v. Johnson*, 412 Mass. 368, 589 N.E.2d 311 (1992). The legal principles regarding defense of another "are not unlike those which control the use of self-defense." As with self-defense, in determining whether there is sufficient evidence to raise the issue of defense of another, all reasonable inferences should be resolved in favor of the defendant. *Commonwealth v. Green*, 55 Mass. App. Ct. 376, 379, 770 N.E.2d 995 (2002). Where defense of another has been properly raised, the Commonwealth has the burden of disproving the defense beyond a reasonable doubt. Id.; *Commonwealth v. Monico*, 373 Mass. 298, 302-304, 366 N.E.2d 1241, 1244 (1977) (defense not limited to persons related to defendant); *Commonwealth v. Martin*, 369 Mass. at 649, 341 N.E.2d at 891; *Commonwealth v. Montes*, 49 Mass. App. Ct. 789, 794- 796, 733 N.E.2d 1068 (2000) (absent excessive force by police, defendant cannot assist another in resisting even an unlawful arrest; doubtful that common-law right to resist an unlawful arrest, now abolished in Massachusetts, ever permitted third parties to assist another in resisting an unlawful arrest); *Commonwealth v. McClendon*, 39 Mass. App. Ct. 122, 125-126, 653 N.E.2d 1138 (1995) (use of force justified only in response to immediate danger to third person). Where defense of others is relied on by the defendant and the evidence is sufficient to raise the issue, an instruction is required, even absent a request by the defendant. *Commonwealth v. Kivlehan*, 57 Mass. App. Ct. 793, 795- 796, 786 N.E.2d 431 (2003).

III. DEFENSE OF PROPERTY

A person may use reasonable force, but not deadly force, to defend his lawful property against someone who has no right to it. A person may also use reasonable force, but not deadly force, to regain lawful possession of his property where his (her) possession has been momentarily interrupted by someone with no right to the property.

Finally, a person may also use reasonable force, but not deadly force, to remove a trespasser from his property after the trespasser has been requested to leave and has refused to do so.

See Instruction 8.220 (Trespass).

If there is evidence in this case that the defendant used force in (that situation) (any of those situations), you must find the defendant not guilty unless the Commonwealth has proved one of two things beyond a reasonable doubt:

either **that a reasonable person in the defendant's position would *not* have believed that force was necessary in order to (defend) (regain possession of) (remove a trespasser from) his (her) property;**

or **that the defendant used force that was deadly or unreasonable.**

Deadly force is force that is intended to, or likely to, kill or seriously injure someone. It refers' to the level of force the defendant used, not to the degree of injury, if any, to *[alleged victim]* .

How much force is reasonable may vary with the situation. Exactness is not always possible and you may take into account whether the defendant had to decide how to respond quickly under pressure. A person who uses what is clearly excessive and unreasonable force becomes an aggressor and loses the right to act in defense of his (her) property.

Commonwealth v. Donohue, 148 Mass. 529, 531-532, 20 N.E. 171, 172 (1889); *Low v. Elwell*, 121 Mass.309 (1876); *Commonwealth v. Clark*, 2 Metc. 23, 25 (1840); *Commonwealth v. Kennard*, 8 Pick, 133 (1829). But see G.L. c. 186, § 14 and G L. c. 266, § 120 (residential landlord may not evict tenant except through court proceedings). See also Klein, supra, (citing Model Penal Code on defense of property); *Commonwealth v. Haddock*, 46 Mass. App. Ct. 246, 248 n.2 & 249, 770 N.E.2d 440 (1999) (person may use reasonable non-deadly force to defend personal property from theft or destruction and real property from unwelcome invasion).

NOTES:

1. **Self-defense is a complete exoneration.** *Commonwealth v. Carlino*, 429 Mass. 692, 710 N.E.2d 967 (1999); *Commonwealth v. Evans*, 390 Mass. 144, 454 N.E.2d 458 (1983). Self-defense is available in assault cases as well as homicide cases. *Commonwealth v. Burbank*, 388 Mass. 789, 448 N.E.2d 735 (1983) (assault and battery with dangerous weapon); *Commonwealth v. Mann,* 116 Mass. 58 (1874) (assault and battery).

Self-defense is available only where there is an immediate need to resort to force and not where other remedies are available. *Commonwealth v. Lindsey*, 396 Mass. 840, 489 N.E.2d 666 (1986)

(unlawfully carrying a firearm in putative self-defense); *Commonwealth v. Brugmann*, 13 Mass. App. Ct. 373, 433 N.E.2d 457 (1982) (unlawful attempt to shut down nuclear power plant).

2. **When self-defense instruction must be given.** A defendant is entitled to an instruction on self-defense if the evidence, viewed in the light most favorable to the defendant, warrants at least a reasonable doubt about whether the elements of self-defense may be present. *Commonwealth v. Harrington*, 379 Mass. 446, 399 N.E.2d 475 (1980). The evidence of self-defense may come from the Commonwealth's case, the defendant's case or both. *Commonwealth v. Galvin*, 56 Mass. App. Ct. 698, 779 N.E.2d 998 (2002). All reasonable inferences should be resolved in favor of the defendant, and a judge should err on the side of caution in determining whether self-defense has been raised sufficiently to warrant an instruction. *Commonwealth v. Pike*, 428 Mass. 393, 701 N.E.2d 951 (1998); *Commonwealth v. Galvin,* 56 Mass. App. Ct. at 701, 779 N.E.2d at 1001; *Commonwealth v. Toon*, 55 Mass. App. Ct. 642, 644, 773 N.E.2d 993, 998 (2002). A self-defense instruction may be appropriate as to some counts but not as to others. *Commonwealth v. Clark*, 20 Mass. App. Ct. 392, 480 N.E.2d 1034 (1985).

If there is an evidentiary basis, a judge should instruct on self-defense sua sponte, even absent a defense request. *Commonwealth v. Galvin, supra.*

"Although it is generally preferable to instruct on the elements of a defense to a crime after describing the elements of the crime," a judge may choose to instruct on self-defense first and then on the elements of the crimes charged. *Commonwealth v. Santiago,* 425 Mass. 491, 506, 681 N.E.2d 1205, 1216 (1997).

A self-defense instruction is not required where the defendant entirely denies striking the victim. *Commonwealth v. Vezina*, 13 Mass. App. Ct. 1002, 433 N.E.2d 99 (1982). A judge may properly withdraw a selfdefense instruction earlier given to the jury if the judge later concludes that there is no evidence to support it. *Commonwealth v. Carrion*, 407 Mass. 263, 552 N.E.2d 558 (1990). See *Commonwealth v. Lyons*, 71 Mass. App. Ct. 671, 675-676, 885 N.E.2d 848, 851-852 (2008) (where defendant was charged with indecent assault and battery, and the Commonwealth requested an instruction on lesser included offense of assault and battery,) court erred in withdrawing self-defense instruction because evidence permitted view that contact occurred only when defendant tried to push complainant away during scuffle.

3. **Burden of proof and phrasing of instruction.** Self-defense is "probably the most sensitive part of jury instructions in a criminal trial." *Commonwealth v. Deagle,* 10 Mass. App. Ct. 748, 751, 412 N.E.2d 911, 914 (1980). When the issue of self-defense is properly raised, the Commonwealth has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense and this burden of proof should be expressly incorporated into the charge. *Commonwealth v. A Juvenile*, 396 Mass. 108, 483 N.E.2d 822 (1985). Self-defense instructions "must be carefully prepared and delivered so as to eliminate any language that might convey to the jury the impression that a defendant must prove that he acted in self-defense." *Commonwealth v. Vidito*, 21 Mass. App. Ct. 332, 487 N.E.2d 206 (1985). Where deadly force was used, special care must be taken to instruct the jury that the Commonwealth has the burden of proving beyond a reasonable doubt the absence of circumstances justifying deadly force in self-defense. *Commonwealth v. Fontes*, 396 Mass. 733, 488 N.E.2d 760 (1986).

If the judge properly instructs the jury on the Commonwealth's burden of proof with respect to self-defense, the judge is not required also to expressly instruct the jury to consider any evidence of self-defense presented by the defendant. As long as the judge does not distinguish between evidence of self-defense presented by the defendant and that presented by the Commonwealth, the jury should not be instructed on the burden of production because it lies outside the function of the jury. *Commonwealth v. Glacken*, 451 Mass. 163, 883 N.E.2d 1228 (2008).

A judge should not (1) suggest that self-defense is a "defense" or that it must be established "to your satisfaction", *Commonwealth v. Simmons*, 383 Mass. 40, 417 N.E.2d 430 (1981), nor (2) use "if

you find" or "the defendant claims" language, *Commonwealth v. Mejia*, 407 Mass. 493, 554 N.E.2d 1186 (1990), nor (3) refer to selfdefense as a "legal justification for conduct which would otherwise constitute a crime," *Commonwealth v. Vidito, supra.* However, a judge may tell the jury that they must first "determine" or "find" whether self-defense exists, *Id.,* 21 Mass. App. Ct. at 338, 487 N.E.2d at 210. A judge should avoid any explicit analogy with the "prudent person" standard of negligence law. *Commonwealth v. Doucette*, 391 Mass. 443, 462 N.E.2d 1084 (1984). A judge is not required to charge that any particular weapon may give rise to self-defense rights, *Commonwealth v. Monico*, 396 Mass. 793, 806- 807, 488 N.E.2d 1168, 1177 (1986) (shod foot).

4. **Deadly force and non-deadly force involve two different standards.** The right to use non-deadly force arises at a "somewhat lower level of danger" than the right to use deadly force. *Commonwealth v. Pike*, 428 Mass. at 395, 701 N.E.2d at 955. For that reason, the standards for self-defense using deadly force and non-deadly force "are mutually exclusive." *Commonwealth v. Walker*, 443 Mass. 213, 820 N.E.2d 195 (2005). It is reversible error for a judge to give self-defense instructions related to deadly force when he or she should charge on self-defense related to non-deadly force, since doing so lowers the Commonwealth's burden in proving that the defendant did not act in self-defense. *Commonwealth v. Baseler*, 419 Mass. 500, 503-504, 645 N.E.2d 1179, 1181 (1995).

Where the level of force cannot be determined as a matter of law, it is a jury issue and the defendant is entitled to instructions on both use of deadly force and non-deadly force in self-defense. Where a weapon which may be dangerous was not used in its intended deadly manner, the jury must determine if it was deadly force. *Commonwealth v. Walker, supra; Commonwealth v. Cataldo*, 423 Mass. 318, 668 N.E.2d 762 (1996) (conflicting evidence about whether defendant who threatened aggressor with gun but did not shoot, intended to do so); *Commonwealth v. Baseler, supra* (conflicting evidence about whether defended himself by drawing gun or only by struggling). When the only force used was deadly force, the defendant is not entitled to a non-deadly force instruction. *Commonwealth v. Lopes*, 440 Mass. 731, 802 N.E.2d 97 (2004).

Non-deadly force. Non-deadly force is justified in self-defense if (1) the defendant had a reasonable concern for his or her safety, (2) the defendant pursued all possible alternatives to combat, and (3) the force used was no greater than required in the circumstances. *Commonwealth v. Haddock*, 46 Mass. App. Ct. 246, 704 N.E.2d 537 (1999). "A defendant is entitled to an instruction on the use of non-deadly force if any view of the evidence, regardless of its credibility, and resolving all reasonable inferences in favor of the defendant, would support a finding that nondeadly force was, in fact, used in self-defense." *Lopes, supra*. There is no right to use non-deadly force if there was no overt act against the defendant. *Commonwealth v. Alebord*, 49 Mass. App. 915, 733 N.E.2d 169 (2000).

Deadly force. When deadly force is used, the first two prongs of self-defense are the same, but (3) is instead that the defendant had a reasonable fear that he or she was in imminent danger of death or serious bodily harm, and that no other means would suffice to prevent such harm. *Id.* Where deadly force was used, to show that "the defendant did not act in proper self-defense, the Commonwealth must prove at least one of the following propositions beyond a reasonable doubt: (1) the defendant did not have a reasonable ground to believe, and did not believe, that he was in imminent danger of death or serious bodily harm, from which he could save himself only by using deadly force; or (2) the defendant had not availed himself of all proper means to avoid physical combat before resorting to the use of deadly force; or (3) the defendant used more force than was reasonably necessary in all the circumstances of the case." *Commonwealth v. Glacken,* 451 Mass. 163, 883 N.E.2d 1228 (2008).

Deadly force is "force intended or likely to cause death or great bodily harm. This tracks our long-standing definition of a 'dangerous weapon'." *Commonwealth v. Klein*, 372 Mass. 823, 827, 363 N.E.2d 1313 (1977). "Deadly force" refers to the level of force used, not the seriousness of the resulting injury. *Commonwealth v. Noble*, 429 Mass. 44, 707 N.E.2d 819 (1999) (use of fist is non-deadly force even if death results); *Commonwealth v. Pike*, 428 Mass. 393 at 396 n.3, 701 N.E.2d at 955 n.3 (judge should instruct on standard for non-deadly force if force generally considered non-deadly results in death in particular case); *Commonwealth v. Wolmart*, 57 Mass. App. Ct. 780, 786 N.E.2d 427 (2002) (use of

knife was deadly force despite relatively minor injury). For when deadly force may be used in self-defense, see *Commonwealth v. Berry*, 431 Mass. 326, 727 N.E.2d 517 (2000); *Commonwealth v. Pike*, 428 Mass. at 395, 701 N.E.2d at 955 (assault with overt threat to cause serious bodily injury sufficient to warrant instruction on deadly force in self-defense); *Commonwealth v. Barber*, 394 Mass. 1013, 477 N.E.2d 587 (1985); *Commonwealth v. Harrington*, 379 Mass. 446, 399 N.E.2d 475 (1980); *Commonwealth v. Hartford*, 346 Mass. 482, 194 N.E.2d 401 (1963); *Commonwealth v. Houston*, 332 Mass. 687, 127 N.E.2d 294 (1955).

5. **Retaliation.** A person loses the right to self-defense if he or she pursues the original aggressor for retribution or to prevent future attacks, *Commonwealth v. Barber*, 394 Mass. 1013, 477 N.E.2d 587 (1985), or where if he or she has already disarmed the victim and retaliates in anger, *Clark, supra.*

6. **Reasonable apprehension.** A person may use non-deadly force in self-defense when he "has a reasonable concern over his personal safety," *Commonwealth v. Baseler, supra*; *Commonwealth v. Bastarache*, 382 Mass. 86, 414 N.E.2d 984 (1980), based on some overt act by the other, *Commonwealth v. Alebord*, 49 Mass. App. 915, 733 N.E.2d 169 (2000). Location, physical attributes, threats and weapons may be considered as to the reasonableness of the defendant's state of mind. *Vidito,* 21 Mass. App. Ct. at 338, 487 N.E.2d at 210.

To use deadly force in self-defense, a person must have reasonable cause to believe and actually did believe that he was in imminent danger of death or serious bodily harm from which he could save himself only by using deadly force. *Commonwealth v. Berry*, 431 Mass. 326, 727 N.E.2d 517 (2000). A first strike can be justified on a reasonable belief that the victim is reaching for a deadly weapon, *Commonwealth v. Bray*, 19 Mass. App. Ct. 751, 477 N.E.2d 596 (1985), but not on mere fear of a non-imminent assault, *Commonwealth v. Hartford*, 346 Mass. 482, 194 N.E.2d 401 (1963).

7. **Mistaken but reasonable apprehension.** A defendant is entitled to a self-defense instruction if he had a mistaken but reasonable belief that death or serious bodily injury was imminent, or that he had used all available means to avoid physical combat, or as to the amount of force necessary to deal with the perceived threat, provided that there is some evidence of the other elements of self-defense. *Commonwealth v. Glass*, 401 Mass. 799, 809; 519 N.E.2d 1311, 1318 (1988). See also *Commonwealth v. Walker, supra; Commonwealth v. Toon, supra.* For such a belief to be reasonable, the victim must have committed some overt act, including threats, against the defendant. *Commonwealth v. Walker, supra.*

8. **"Battered person's syndrome."** General Laws c. 233, § 23E provides that in self-defense cases, the defendant may introduce (1) evidence that he or she has been "the victim of acts of physical, sexual or psychological harm or abuse" and (2) expert testimony "regarding the common pattern in abusive relationships; the nature and effects of physical, sexual or psychological abuse and typical responses thereto, including how those effects relate to the perception of the imminent nature of the threat of death or serious bodily harm; the relevant facts and circumstances which form the basis for such opinion; and evidence whether the defendant displayed characteristics common to victims of abuse" on the issues of the reasonableness of: (1) the defendant's apprehension of danger, (2) the defendant's belief that he or she had used all available means to avoid physical combat, and (3) the defendant's perception of the amount of force necessary. In essence, the same rule is also now the common law of this Commonwealth. *Commonwealth v. Rodriguez,* 418 Mass. 1, 7, 633 N.E.2d 1039, 1042 (1994).

The Commonwealth may also offer such testimony "to help explain the conduct of a victim or a complainant over the course of an abusive relationship." The expert's testimony must be confined to the general pattern of behavioral and emotional characteristics shared by typical battering victims, and may not discuss the symptoms exhibited by the particular victim, nor opine on whether the particular victim suffers from that syndrome, nor describe or profile the typical attributes of batterers. *Commonwealth v. Goetzendanner,* 42 Mass. App. Ct. 637, 640-646, 679 N.E.2d 240, 243-246 (1997).

9. **Duty to retreat.** A person must generally use all proper means of escape before resorting to physical combat. *Commonwealth v. Niemic*, 427 Mass. 718, 696 N.E.2d 117 (1998); *Commonwealth v. Gagne*, 367 Mass. 519, 326 N.E.2d 907 (1975). The location of an assault is "an element of major importance" in determining whether all proper means have been taken to avoid deadly force. *Commonwealth v. Shaffer*, 367 Mass. 508 at 512, 326 N.E.2d 880 (1975). See also *Commonwealth v. Williams*, 53 Mass. App. Ct. 719, 761 N.E.2d 1005 (2000) (little effort to avoid combat).

10. **Retreat not required in dwelling.** The retreat requirement has been modified by the "castle law," G.L. c. 278, § 8A, which provides that an occupant of a dwelling need not retreat before using reasonable means to defend himself or other occupants against an unlawful intruder whom the occupant reasonably believes is about to inflict great bodily injury or death on him or another lawful occupant. Nor is the occupant required to exhaust any other means of avoiding combat in such circumstances; the statutory term "retreat" encompasses all such means. *Commonwealth v. Peloquin,* 437 Mass. 204, 208, 770 N.E.2d 440 (2002); *Commonwealth v. Gregory*, 17 Mass. App. Ct. 651, 461 N.E.2d 831 (1984).

The word "dwelling" is given its usual common law meaning and therefore excludes common areas of a multiple dwelling, *Commonwealth v. Albert,* 391 Mass. 853, 862; 466 N.E.2d 78, 85 (1984), an open porch and outside stairs, *Commonwealth v. McKinnon,* 446 Mass. 263; 843 N.E.2d 1020 (2006), and driveways, *Commonwealth v. Bennett*, 41 Mass. App. 920, 671 N.E.2d 966 (1996). This statute does not eliminate the duty to retreat from a confrontation with a person lawfully on the premises, *Commonwealth v. Lapointe*, 402 Mass. 321, 522 N.E.2d 937 (1988), even when that guest launches a life-threatening assault on the defendant. *Commonwealth v. Peloquin, supra; Commonwealth v. Painten*, 429 Mass. 536, 709 N.E.2d 423 (1999). There is no right under the "castle law" to resist unlawful entry by police into one's residence, *Commonwealth v. Gomes*, 59 Mass. App. Ct. 332, 795 N.E.2d 1217 (2003), or to resist unlawful arrest unless excessive force is used and the occupant is unable to retreat, *Commonwealth v. Peterson*, 53 Mass. App. Ct. 388, 759 N.E.2d 719 (2001).

The jury should be instructed on how to determine if the victim was an unlawful intruder. *Commonwealth v. Noble*, 429 Mass. 44, 707 N.E.2d 819 (1999). A person who enters lawfully but refuses to leave is a trespasser. *Commonwealth v. Peloquin*, 437 Mass. 204, 209, 770 N.E.2d 440 (2002). A person may use no more force than reasonably necessary to remove a trespasser, *Commonwealth v. Haddock*, 46 Mass. App. Ct. 246, 704 N.E.2d 537 (1999).

11. **Excessive force.** The defendant may be found guilty if his use of deadly force was unreasonable and clearly excessive in the circumstances. *Commonwealth v. Stokes*, 374 Mass. 583, 374 N.E.2d 87 (1978). *Commonwealth v. Haddock*, 46 Mass. App. Ct. 246, 704 N.E.2d 537 (1999) (objectively unreasonable belief that deadly force was required).

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