EVIDENCE

Massachusetts Guide to Evidence 2018 eBook Edition

Massachusetts Supreme Judicial Court
Advisory Committee on
Massachusetts Evidence Law

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MASSACHUSETTS GUIDE TO EVIDENCE

2018 Edition

SUPREME JUDICIAL COURT
ADVISORY COMMITTEE
ON MASSACHUSETTS EVIDENCE LAW

SUPREME JUDICIAL COURT

The Supreme Judicial Court recommends the use of the *Massachusetts Guide to Evidence*. Our recommendation of the *Massachusetts Guide to Evidence* is not to be interpreted as an adoption of a set of rules of evidence, nor a predictive guide to the development of the common law of evidence. The purpose of the *Massachusetts Guide to Evidence* is to make the law of evidence more accessible and understandable to the bench, bar, and public. We encourage all interested persons to use the *Massachusetts Guide to Evidence*.

Chief Justice Ralph D. Gants

Justice Barbara A. Lenk

Justice Frank M. Gaziano

Justice David A. Lowy

Justice Kimberly S. Budd

Justice Elspeth B. Cypher

Justice Scott L. Kafker

January 2018

PREFACE

The *Massachusetts Guide to Evidence* is prepared annually by the Supreme Judicial Court's Advisory Committee on Massachusetts Evidence Law. By direction of the Justices of the Supreme Judicial Court, the Guide organizes and states the law of evidence applied in proceedings in the courts of the Commonwealth, as set forth in the Federal and State Constitutions, General Laws, common law, and rules of court. The Committee invites comments and suggestions on the Guide.

The Guide follows the arrangement of the law contained in the Federal Rules of Evidence and thus is comprised of eleven articles. Wherever possible, the Guide expresses the principles of Massachusetts evidence law by using the language that appears in the corresponding Federal rules. Thus, since the law governing testimony by expert witnesses is found in Rule 702 of the Federal Rules of Evidence, the corresponding provision of Massachusetts law is found in Section 702 of the Guide and is based on the language that appears in the Federal rule. In some cases, a principle of Massachusetts law has no counterpart in the Federal rules of evidence. For example, the first complaint doctrine, a special hearsay exception applicable in sexual assault cases, is found in Section 413 of the Guide, but it has no counterpart in the Federal rules. Finally, Article XI of the Guide contains a series of miscellaneous provisions that do not fit within the other ten articles but that are closely related to core evidentiary issues. These include provisions on spoliation or destruction of evidence (Section 1102), witness cooperation agreements (Section 1104), eyewitness identification (Section 1112), and opening statements and closing arguments (Section 1113).

Each section of the Guide, in addition to the statement of the law of Massachusetts current through December 31, 2017, contains an accompanying "Note" that includes supporting authority. Some sections are based on a single statute or decision, while other sections were derived from multiple sources. Certain sections were drafted "nearly verbatim" from a source with minimal changes, for instance, revised punctuation, gender-neutral terms, or minor reorganization, to allow the language to be stated more accurately in the context of the *Massachusetts Guide to Evidence*.

The Guide is not a set of rules, but rather, as the title suggests, a guide to evidence based on the law as it exists today. The Committee did not attempt, nor is it authorized, to suggest modifications, adopt new rules, or predict future developments in the law. The Committee has recommended to the Supreme Judicial Court that the Guide be published annually to address changes in the law and to make any other revisions as necessary. The Committee's goal is to reflect the most accurate and clear statement of current law as possible. Ultimately, the law of evidence in Massachusetts is what is contained in the authoritative decisions of the Supreme Judicial Court and of the Appeals Court, and the statutes duly enacted by the Legislature.

Supreme Judicial Court Advisory Committee
on Massachusetts Evidence Law

INTRODUCTION TO THE 2018 EDITION

On behalf of the Supreme Judicial Court's Advisory Committee on Massachusetts Evidence Law, we want to express our gratitude to the Flaschner Judicial Institute for its support in publishing this 2018 official edition of the *Massachusetts Guide to Evidence*. As a result of Flaschner's commitment to the continuing education and professional development of the Massachusetts judiciary, for the tenth straight year, the Guide will be distributed to every trial and appellate judge in the Commonwealth.

In June 2006, the Justices of the Supreme Judicial Court, at the request of the Massachusetts Bar Association, the Boston Bar Association, and the Massachusetts Academy of Trial Attorneys, appointed the Supreme Judicial Court Advisory Committee on Massachusetts Evidence Law to prepare a guide to the Massachusetts law of evidence. The Justices charged the Committee "to assemble the current law in one easily usable document, along the lines of the Federal Rules of Evidence, rather than to prepare a Restatement or to propose changes in the existing law of evidence." In November 2008, the Advisory Committee published the first edition of the *Massachusetts Guide to Evidence*. The Guide presents evidence law as it currently exists, replete with explanatory notes and citations to governing legal authorities. In preparing each annual edition, the Committee has fulfilled its charge to advance the delivery of justice by making the Massachusetts law of evidence more accessible and understandable for the bench, bar, and public.

Publication of the tenth edition is a benchmark that deserves some special recognition of the efforts of the many persons who have participated in the creation and annual preparation of the Guide, including

- the Massachusetts Bar Association, the Boston Bar Association, and the Massachusetts Academy of Trial Attorneys, for their requests of the Supreme Judicial Court to reconsider the Court's position on the adoption of rules of evidence, which resulted in the appointment of the Advisory Committee and creation of the Guide;

- the Justices of the Supreme Judicial Court for boldly experimenting with a new committee and form of legal publication approved by the Court;

- the Advisory Committee members, including their law clerks and interns, who have painstakingly analyzed countless Massachusetts decisions, statutes, rules of procedure, and drafts of the Guide;

- the many judges, attorneys, court personnel, and interested persons who have provided feedback and suggestions on how to improve or what to include in the Guide;

- the Flaschner Judicial Institute, its Executive Vice President, Robert J. Brink, Esq., and its copy editor extraordinaire, Michael Huppe, for their work in publishing the Guide and making copies available to each sitting judge of the Commonwealth;

- the Chief Justices of each Department of the Trial Court, the Appeals Court, and the Supreme Judicial Court, for accommodating the time commitment of Committee members to participate on the committee; and

– Kevin Buckley and Meg Hayden, the Web Administrators of the Massachusetts Trial Court, for their work in publishing the Guide on the court's Web site.

The value of the Guide in practice is confirmed by the fact that it has been cited as a source of authority by the Appeals Court and by the Supreme Judicial Court in both published and unpublished opinions more than 800 times since it was first published in 2008. The Guide is also frequently cited and relied upon by judges throughout the Trial Court. Ultimately, the best evidence of the Guide's value is the frequency with which it is cited by lawyers and parties in civil, criminal, juvenile, and youthful offender cases as an authoritative expression of Massachusetts evidence law. The extraordinary consensus that exists among the members of the bench and the bar as to the Guide's authoritativeness is a tribute to the acumen and dedication of the members of the Advisory Committee with whom we serve who labor throughout the year to understand and to concisely integrate into the fabric of the Guide developments in our common law, court rules, constitutional law, and statutes, as well as pertinent decisions of the United States Supreme Court, that sometimes bring about sweeping changes in the law of evidence and in the responsibilities of lawyers and judges.

The 2018 edition of the Guide contains many significant revisions and additions. These include substantial revisions made to Section 1107 (Inadequate Police Investigation Evidence) and Section 1115 (Evidentiary Issues in Care and Protection and Termination of Parental Rights Cases). Two new sections have also been added: Section 1117 (Civil Commitment Hearings for Mental Illness) and Section 1118 (Civil Commitment Hearings for Alcohol and Substance Use Disorders). Finally, a "Weapons Evidence" subsection that thoroughly discusses the admissibility of weapons-related evidence at trial has been added to the Note to Section 403 (Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons).

In closing, we hope that you will take the opportunity to write to us with comments, suggestions, and even criticisms about the material contained in the *Massachusetts Guide to Evidence* so that we will be better informed about how to improve it and thereby make the law of evidence in Massachusetts more accessible to all.

Hon. Peter W. Agnes, Jr.
Editor-in-Chief

Joseph F. Stanton, Esq.
Reporter

Supreme Judicial Court Advisory Committee
on Massachusetts Evidence Law

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Research Assistants

Matthew Lashof-Sullivan, Esq.

Sean C. Connolly, Esq.

Student Interns

Elizabeth Farrenkopf, Matthew London, and Nicholas Rausa

Acknowledgments

Over the years, many judges and lawyers, too numerous to identify, have generously contributed their time and talents to help make this Guide useful to the bench and the bar. We encourage judges and lawyers with an interest in the law of evidence to suggest improvements to the Guide. Comments and questions should be directed to the reporter at Joseph.Stanton@jud.state.ma.us

Currency, Usage, and Terminology

Currency and usage. The *Massachusetts Guide to Evidence* has been updated to state the Massachusetts law of evidence as it exists through December 31, 2017. The Supreme Judicial Court Advisory Committee on Massachusetts Evidence Law has made every effort to provide accurate and informative statements of the law in the *Massachusetts Guide to Evidence*. Counsel and litigants are encouraged to conduct their own research for additional authorities that may be more applicable to the case or issue at hand. Importantly, given the fluidity of evidence law, all users of this Guide should perform their own research and monitor the law for the most recent modifications to and statements of the law. The Guide is not intended to constitute the rendering of legal or other professional advice, and the Guide is not a substitute for the advice of an attorney.

*"**Not recognized" sections.*** Where the Advisory Committee has noted that the Federal Rules of Evidence contain a provision on a particular subject and the Committee has not identified any Massachusetts authority that recognizes that subject, or where the Supreme Judicial Court has declined to follow the Federal rule on that subject, the topic is marked "not recognized" to await further development, if any, of the law on that topic.

"Nearly verbatim" sections. The notes to some sections state that the section's text was derived "nearly verbatim" from a specific statute, court decision, or court rule. This phrase explains that the Advisory Committee made minor modifications to an authority's original language to allow the language to be stated more accurately in the context of the *Massachusetts Guide to Evidence*. Such modifications may include revised punctuation, gender-neutral terms, minor reorganization, and the use of numerals instead of spelling numerals.

Comments and suggestions. Please send any comments or suggestions to the Advisory Committee on Massachusetts Evidence Law, c/o Joseph Stanton, Reporter, Appeals Court, Clerk's Office, John Adams Courthouse, One Pemberton Square, Room 1200, Boston, MA 02108-1705, or by email to Joseph.Stanton@jud.state.ma.us

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ARTICLE I. GENERAL PROVISIONS

Section 101. Title

This volume may be referenced as the *Massachusetts Guide to Evidence*.

NOTE

The volume may be cited as Mass. G. Evid. § xxx (2018).

Section 102. Purpose and Construction

The sections contained in this Guide summarize the law of evidence applied in proceedings in the courts of the Commonwealth of Massachusetts as set forth in the Massachusetts General Laws, common law, and rules of court, and as required by the Constitutions of the United States and Massachusetts.

The provisions contained in this Guide may be cited by lawyers, parties, and judges, but are not to be construed as adopted rules of evidence or as changing the existing law of evidence.

NOTE

The Advisory Committee has made every effort to provide the most accurate and clear statement of the law of evidence in Massachusetts as it exists at the time of the publication of this Guide. Importantly, these provisions are not to be interpreted as a set of formal or adopted rules of evidence, and they do not change Massachusetts law. Because Massachusetts has not adopted rules of evidence, the development of Massachusetts evidence law continues to be based on the common law and legislative processes. This Guide is intended to collect the law of evidence from those common law and legislative sources, and to make it readily accessible to judges, lawyers, and parties in Massachusetts courts so that judicial and administrative proceedings may be conducted fairly, efficiently, and without unjustifiable expense and delay.

The Guide tracks the general organization and structure of the Federal Rules of Evidence, but numerous sections have been changed or added to reflect the differences between Federal and Massachusetts law. Where the Advisory Committee determined that Federal law and Massachusetts law are consistent or very similar, the Guide uses the language of the Federal rule and identifies any minor differences in the Note accompanying that section. Sections of the Guide that are derived from Massachusetts statutes track the language of the statute as closely as possible, and the accompanying Note identifies the statute that provides the basis for the section. In all cases, the Note to each section identifies the authority on which the section is based, as well as other relevant authorities that may be helpful in interpreting or applying the section.

Discretion. Whether evidence should be admitted or excluded often reduces to the exercise of discretion, especially when the parties disagree about whether the evidence is relevant (see Section 401, Test for Relevant Evidence), or whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, being unnecessarily time consuming, or needless presentation of cumulative evidence (see Section 403, Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons). At one time, a discretionary decision was considered to be one that involved a choice made by the judge that was subject to review and reversal in only the most rare and unusual circumstances when it was shown that "no conscientious judge acting intelligently could honestly have taken the view expressed by him." See Commonwealth v. Bys, 370 Mass. 350, 361 (1976), quoting Davis v. Boston Elevated Ry. Co., 235 Mass. 482, 502 (1920). In recent years, appellate courts have established a variety of guidelines for the exercise of discretion by trial judges. See, e.g., Commonwealth v. Aviles, 461 Mass. 60, 73 (2011) (first complaint doctrine set forth in Section 413 is guideline to regulate exercise of judicial discretion); Commonwealth v. Heang, 458 Mass. 827, 850 (2011) (guideline for how expert witnesses may express degree of certitude in support of their opinions); Commonwealth v. Britto, 433 Mass. 596, 613–614 (2001) (guidelines for questioning of witnesses by jurors); Commonwealth v. Festa, 369 Mass. 419, 429–430 (1976) (guidelines for the use of interpreters); Com-

monwealth v. Bourgeois, 68 Mass. App. Ct. 433, 437 n.10 (2007) (discussing Lampron-Dwyer protocol established to regulate access to records in hands of third party).

In keeping with this trend in the law toward guided discretion, see, in particular, Lonergan-Gillen v. Gillen, 57 Mass. App. Ct. 746, 748–749 (2003), the Supreme Judicial Court has recalibrated the standard of review for discretionary decisions:

> "An appellate court's review of a trial judge's decision for abuse of discretion must give great deference to the judge's exercise of discretion; it is plainly not an abuse of discretion simply because a reviewing court would have reached a different result. But the 'no conscientious judge' standard is so deferential that, if actually applied, an abuse of discretion would be as rare as flying pigs. When an appellate court concludes that a judge abused his or her discretion, the court is not, in fact, finding that the judge was not conscientious or, for that matter, not intelligent or honest. Borrowing from other courts, we think it more accurate to say that a judge's discretionary decision constitutes an abuse of discretion where we conclude the judge made 'a clear error of judgment in weighing' the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives."

L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014). The following is a list of situations where the new abuse of discretion standard has been applied.

***Generally*.**

- ***Admissibility of Excited Utterances*.** Commonwealth v. Rodriguez, 90 Mass. App. Ct. 315, 318–319 (2016).
- ***Admissibility of Expert Testimony*.** Commonwealth v. Snyder, 475 Mass. 445, 452 (2016); Commonwealth v. Coates, 89 Mass. App. Ct. 728, 733 (2016).
- ***Admissibility of Prior Bad Acts for Nonpropensity Purpose*.** Commonwealth v. Veiovis, 477 Mass. 472, 482 (2017); Commonwealth v. Robertson, 88 Mass. App. Ct. 52, 54 (2015).
- ***Admissibility of Statements Not Admitted for Their Truth*.** Commonwealth v. Barbosa, 477 Mass. 658, 672 (2017).
- ***Motion to Reopen Evidence to Allow Additional Testimony*.** Clark v. Leisure Woods Estates, Inc., 89 Mass. App. Ct. 87, 95–96 (2016).
- ***Remedy for Violation of Sequestration Order*.** Commonwealth v. Neves, 474 Mass. 355, 368 (2016).
- ***Sanctions for Attorney Misconduct*.** Wong v. Luu, 472 Mass. 208, 220 (2015).
- ***Weighing Probative Value of Evidence Versus Risk of Unfair Prejudice*.** Commonwealth v. Facella, 478 Mass. 393, 407 (2017); Commonwealth v. Dew, 478 Mass. 304, 315 (2017); Commonwealth v. Hammond, 477 Mass. 499, 505 (2017).

***Criminal Cases*.**

- ***Admissibility of Eyewitness Identification Not Arising from Police Procedure*.** Commonwealth v. Johnson, 473 Mass. 594, 602 (2016).
- ***Direct Appeal from Conviction of First-Degree Murder Under G. L. c. 278, § 33E*.** Commonwealth v. Chatman, 473 Mass. 840, 846 (2016).
- ***Dismissal of Criminal Complaint Without Prejudice*.** Commonwealth v. Butler, 87 Mass. App. Ct. 183, 186–187 (2015).
- ***Lay Witness Identification of Firearm*.** Commonwealth v. Thomas, 476 Mass. 451, 465 (2017). Cross-Reference: Note "Inanimate Objects" to Section 1112(a), Eyewitness Identification Generally.
- ***Motion to Discharge Counsel*.** Commonwealth v. Castano, 478 Mass. 75, 88 (2017).

- ***Motion for Mistrial*.** Commonwealth v. Bryan, 476 Mass. 351, 352–353 (2017).
- ***Motion for New Trial*.** Commonwealth v. Duart, 477 Mass. 630, 634 (2017); Commonwealth v. Ellis, 475 Mass. 459, 476 (2016); Commonwealth v. DiBenedetto, 475 Mass. 429, 442 (2016).
- ***Motion to Reduce Verdict from Second-Degree Murder to Manslaughter*.** Commonwealth v. Grassie, 476 Mass. 202, 214 (2017).
- ***Motion for Resentencing*.** Commonwealth v. Perez, 477 Mass. 677, 682 (2017).

***Civil Cases*.**

- ***Application of Judicial Estoppel*.** Murphy v. Wachovia Bank of Del., 88 Mass. App. Ct. 9, 16–17 (2015).
- ***Award of Attorney's Fees*.** Schechter v. Schechter, 88 Mass. App. Ct. 239, 260 (2015).
- ***Characterization of Income for Calculation of Child Support*.** Hoegen v. Hoegen, 89 Mass. App. Ct. 6, 9–10 (2016).
- ***Child Custody and Child Support Orders*.** Rosenwasser v. Rosenwasser, 89 Mass. App. Ct. 577, 580 (2016); Ventrice v. Ventrice, 87 Mass. App. Ct. 190, 196 (2015); Murray v. Super, 87 Mass. App. Ct. 146, 148 (2015).
- ***Civil Action in Nature of Certiorari*.** Frawley v. Police Comm'r of Cambridge, 473 Mass. 716, 729 (2016).
- ***Motion to Alter or Amend Judgment as to Damages*.** Quarterman v. City of Springfield, 91 Mass. App. Ct. 254, 260 (2017).

***Miscellaneous*.**

- ***Grant of Parole to Juvenile Homicide Offender*.** Diatchenko v. District Attorney for the Suffolk Dist., 471 Mass. 12, 31 (2015).
- ***Prisoner's Petition for Name Change*.** Jaynes, petitioner, 88 Mass. App. Ct. 745, 747 (2015).
- ***Section 403 Balancing Test*.** Commonwealth v. Gomes, 475 Mass. 775, 785 (2016).

Section 103. Rulings on Evidence, Objections, and Offers of Proof

(a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error injuriously affects a substantial right of the party and,

(1) if the ruling admits evidence, a party, on the record,

(A) timely objects or moves to strike and

(B) states the specific ground, unless it was apparent from the context, or,

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(b) Preliminary Evidentiary Motions: Effect on Appellate Rights. Where a party fails to object to the admission of evidence at trial, the party's appellate rights with respect to the admission of that evidence are preserved only if the party raised the same specific objection to the very same evidence in a motion in limine, and the motion was heard and denied.

(c) Court's Statement About the Ruling; Directing an Offer of Proof. The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.

(d) Preventing the Jury or Witnesses from Hearing Inadmissible Evidence. To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury or witnesses by any means.

(e) Substantial Risk of a Miscarriage of Justice in Criminal Cases. In criminal cases, a court may take notice of a plain error that constitutes a substantial risk of a miscarriage of justice, even if the claim of error was not properly preserved.

(f) Motions in Limine. Where the issue can reasonably be anticipated, a motion in limine should be filed prior to trial.

(g) Exclusion as Sanction. Although the court should impose the least severe sanction necessary to remedy the prejudice to the innocent party, nothing in this section precludes a court from excluding evidence as a sanction for a violation of a discovery rule, order, or other obligation imposed on a party in a civil or criminal case.

NOTE

Subsection (a). This subsection is derived from G. L. c. 231, § 119, which states as follows:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or anything done or omitted by the trial court or by any of the parties is ground for modifying or otherwise disturbing a judgment or order unless the appeals court or the supreme judicial court deems that the error complained of has injuriously affected the substantial rights of the parties. If either court finds that the error complained of affects only one or some of the issues or parties involved it may affirm the judgment as to those issues or parties unaffected and may modify or reverse the judgment as to those affected."

See also G. L. c. 231, § 132 (stating that no new trial in a civil proceeding may be granted based upon the improper admission or exclusion of evidence unless the error injuriously affected the proponent's substantial rights). To determine whether a substantial right was injuriously affected by the exclusion of evidence

> "the appropriate test is whether the proponent of erroneously excluded, relevant evidence has made a plausible showing that the trier of fact might have reached a different result if the evidence had been before it. Thus the erroneous exclusion of relevant evidence is reversible error unless, on the record, the appellate court can say with substantial confidence that the error would not have made a material difference."

DeJesus v. Yogel, 404 Mass. 44, 48–49 (1989).

***Judicial Duty to Give Curative Instruction*.** In a criminal case, if defense counsel is unable to present certain evidence promised in an opening statement because the court changes an earlier ruling, the danger of prejudice is so great that the judge must give the jury an explanation why the defendant could not keep the promise made in the opening statement. Commonwealth v. Chambers, 465 Mass. 520, 534–535 (2013) (alternatively, the judge may decline to give the curative instruction and instead allow the defendant to present the evidence).

Subsection (a)(1). This subsection is derived from Commonwealth v. Marshall, 434 Mass. 358, 365 (2001), and Commonwealth v. Pickles, 364 Mass. 395, 399 (1973). "[O]bjections to evidence, or to any challenged order or ruling of the trial judge, are not preserved for appeal unless made in a precise and timely fashion, as soon as the claimed error is apparent." Commonwealth v. Perryman, 55 Mass. App. Ct. 187, 192 (2002). But see Commonwealth v. DePina, 476 Mass. 614, 624 n.9 (2017) (In a joint trial, one defendant's objection, which put the judge on notice of the basis of the objection, "served the purpose of the requirement of a contemporaneous objection[,]" thus preserving the appellate rights of both defendants.). "The purpose of requiring an objection is to afford the trial judge an opportunity to act promptly to remove from the jury's consideration evidence which has no place in the trial." Abraham v. Woburn, 383 Mass. 724, 726 n.1 (1981). If a timely objection is not made, the evidence is properly admitted, and the fact finder is entitled to give it such probative effect as it deems appropriate. Id. But any objected-to statement at trial "is only worth what it is worth." Commonwealth v. Drapaniotis, 89 Mass. App. Ct. 267, 274–276 (2016).

In both jury trials and jury-waived trials, counsel have the obligation to make timely objections. See Commonwealth v. Freeman, 352 Mass. 556, 563–564 (1967) (jury trials); Commonwealth v. Mazzone, 55 Mass. App. Ct. 345, 348 (2002) (jury-waived trials). Counsel have the same duty to make objections to improper questions by a judge as they do when the questions are asked by opposing counsel. Commonwealth v. Watkins, 63 Mass. App. Ct. 69, 72–73 (2005). Generally, counsel should make an objection to a question before the answer is given. See Commonwealth v. Baptiste, 372 Mass. 700, 706 (1977). Self-represented litigants are bound by the same rules of procedure as litigants with counsel. Mains v. Commonwealth, 433 Mass. 30, 35–36 (2000).

"When objecting, counsel should state the specific ground of the objection unless it is apparent from the context." Commonwealth v. Marshall, 434 Mass. at 365, quoting P.J. Liacos, Massachusetts Evidence § 3.8.3, at 85 (7th ed. 1999). See Mass. R. Civ. P. 46; Mass. R. Crim. P. 22. The court may ask the party objecting to the admission or exclusion of evidence to state the precise ground for the objection. See Rule 8 of the Rules of the Superior Court. Further argument or discussion of the grounds is not allowed unless the court requests it. Id. The need for an exception has been abolished by Mass. R. Civ. P. 46 and Mass. R. Crim. P. 22.

A motion to strike is used to eliminate an answer that is objectionable either on substantive grounds or on the ground that it is nonresponsive. Commonwealth v. Pickles, 364 Mass. at 399. When testimony is subject to an objection that is sustained, but not followed by a motion to strike, the issue is not preserved. When an answer is nonresponsive and objectionable, a subsequent objection or a motion to strike is necessary to preserve the issue. Commonwealth v. Womack, 457 Mass. 268, 272–273 (2010); Commonwealth v. Rosado, 59 Mass. App. Ct. 913, 914 (2003).

As to the court's instructions to the jury, an objection is necessary to preserve an issue regarding the giving or failure to give an instruction. See Mass. R. Civ. P. 51(b); Mass. R. Crim. P. 24(b). See also Harlow v. Chin, 405 Mass. 697, 703 n.5 (1989); Commonwealth v. Barbosa, 399 Mass. 841, 844 (1987). Counsel should renew any prior objection with specificity following the charge. Fein v. Kahan, 36 Mass. App. Ct. 967, 968 n.4 (1994).

Subsection (a)(2). This subsection is derived from Commonwealth v. Chase, 26 Mass. App. Ct. 578, 581 (1988), and Mass. R. Civ. P. 43(c). "[A]n offer of proof is required to preserve the right to appellate review of the denial of an offer to introduce evidence through the direct examination of a witness." Commonwealth v. Chase, 26 Mass. App. Ct. at 581.

The offer of proof should state or summarize the testimony or evidence and show that the proponent would be prejudiced by the exclusion of the offered evidence. Holmgren v. LaLiberte, 4 Mass. App. Ct. 820, 821 (1976). The court may consider only so much of the offer of proof that is responsive to the excluded question or evidence and apparently within the witness's knowledge. Coral Gables, Inc. v. Beerman, 296 Mass. 267, 268–269 (1936). An offer of proof that fails to satisfy the statutory or common-law requirements for the admissibility of the evidence will lead to the exclusion of the evidence. See Rockport Granite Co. v. Plum Island Beach Co., 248 Mass. 290, 295 (1924).

An offer of proof is not necessary where the context is clear, see Commonwealth v. Donovan, 17 Mass. App. Ct. 83, 88 (1983), or where there is no doubt what the testimony will be, see Commonwealth v. Caldron, 383 Mass. 86, 89 n.2 (1981); Commonwealth v. Smith, 163 Mass. 411, 429 (1895).

If the evidence is excluded on cross-examination, an offer of proof generally need not be made, Stevens v. William S. Howe Co., 275 Mass. 398, 402 (1931), although there is a "relatively rare group of cases where, if the purpose or significance of the question is obscure and the prejudice to the cross-examiner is not clear . . . the record must disclose the cross-examiner's reason for seeking an answer to an excluded question." Breault v. Ford Motor Co., 364 Mass. 352, 358 (1973).

Subsection (b). This subsection is derived from Commonwealth v. Grady, 474 Mass. 715 (2016), in which the Supreme Judicial Court held that,

> "[g]oing forward, we dispense with any distinction, at the motion in limine stage, between objections based on constitutional grounds and objections based on other grounds. We will no longer require a defendant to object to the admission of evidence at trial where he or she has already sought to preclude the very same evidence at the motion in limine stage, and the motion was heard and denied."

Id. at 719. See also Commonwealth v. Almele, 474 Mass. 1017 (2016) (decided the same day as Grady). However, to be safe, the Supreme Judicial Court has recommended that the "better practice" is for a party "to object at trial even if he or she has already raised an objection prior to trial." Commonwealth v. Almele, 474 Mass. at 1018. See Commonwealth v. Santana, 477 Mass. 610, 620 n.7 (2017) (motion in limine objecting to "tooth mark" evidence based on lack of expert testimony to explain significance does not preserve hearsay objection to investigator's statement that he was told someone may have bitten the duct tape). The court also indicated that judges should no longer engage in the practice of "preserving" or "saving" a party's rights when ruling on a motion in limine because this practice may lull the party into not "voicing a necessary objection at trial." Commonwealth v. Almele, 474 Mass. at 1019; Commonwealth v. Grady, 474 Mass. at 721.

Subsection (c). The first sentence is derived from Mass. R. Civ. P. 43(c). As to the second sentence, if the court sustains an objection to a question, the court may permit the witness to answer the question in order to satisfy the need for an offer of proof.

Subsection (d). This subsection is derived generally from Mass. R. Civ. P. 43(c), Mass. R. Civ. P. 51(b), and Mass. R. Crim. P. 24(b). See Commonwealth v. Scullin, 44 Mass. App. Ct. 9, 14 (1997) ("[I]t is essential that [the court] take steps to ensure that the jury is not exposed to the questionable evidence before the issue of admissibility is finally decided. Failing to follow this course places the opponent of the evidence in a difficult situation, and may create an unfair advantage for the proponent of the testimony, especially in the event the evidence ultimately is excluded."). See also Ruszczyk v. Secretary of Pub. Safety, 401 Mass. 418, 422 (1988). Cross-Reference: Section 611(a), Mode and Order of Examining Witnesses and Presenting Evidence: Control by the Court.

The court has the discretion to employ any one of several methods to determine preliminary questions while insulating the jury from inadmissible evidence. These methods range from pretrial motions to suppress or motions in limine, to conducting proceedings during trial at sidebar, in chambers, or while the jury is absent from the courtroom. The court also has discretion whether to rule on the admissibility of evidence in advance of the trial by a motion in limine or to wait until the issue arises at trial. See Commonwealth v. Olsen, 452 Mass. 284, 292–293 (2008) (trial judge properly declined to rule in advance on motion in limine to permit defendant to call twenty-two witnesses to testify to the fact that the prosecution's chief witness had a poor reputation in the community for truth-telling, leaving the issue to be decided as it arose with particular witnesses).

Subsection (e). This subsection is derived from Commonwealth v. Alphas, 430 Mass. 8, 13 (1999); Commonwealth v. Freeman, 352 Mass. 556, 561–564 (1967); and Commonwealth v. Watkins, 63 Mass. App. Ct. 69, 72–73 (2005). See also G. L. c. 278, § 33E.

As stated above, a timely objection at trial is required to preserve an issue for appellate review. If an objection was not made, the appellate court can consider an issue but does so under a limited standard of review. For cases other than capital cases on direct appeal, the appellate court will apply the so-called Freeman standard to unpreserved trial errors and analyze whether the error created a substantial risk of a miscarriage of justice. Commonwealth v. Alphas, 430 Mass. at 13. The proper standard of review for a noncapital offense is as follows:

> "An error creates a substantial risk of a miscarriage of justice unless we are persuaded that it did not 'materially influence[]' the guilty verdict. In making that determination, we consider the strength of the Commonwealth's case against the defendant (without consideration of any evidence erroneously admitted), the nature of the error, whether the error is 'sufficiently significant in the context of the trial to make plausible an inference that the jury's result might have been otherwise but for the error,' and whether it can be inferred 'from the record that counsel's failure to object was not simply a reasonable tactical decision.'" (Citations and footnotes omitted.)

Id. However, the application of the more stringent standard of review based on counsel's failure to object does not, standing alone, create a substantial risk of a miscarriage of justice. Commonwealth v. Vargas, 475 Mass. 338, 358 n.28 (2016). Under G. L. c. 278, § 33E, in any case in which the defendant was found guilty of murder in the first degree, see Commonwealth v. Francis, 450 Mass. 132, 137 n.5 (2007), the Supreme Judicial Court has a special duty and plenary authority to review the whole case, on the law and the evidence, and may order a new trial or reduce the verdict even in the absence of an objection. See Commonwealth v. Wright, 411 Mass. 678, 682 n.1 (1992). A trial judge may reduce a jury verdict to any lesser included offense "to ensure that the result in every criminal case is consonant with justice." Commonwealth v. Chhim, 447 Mass. 370, 381 (2006); G. L. c. 278, § 11; Mass. R. Crim. P. 25(b)(2). This power, which is designed to rectify a disproportionate verdict, or ameliorate injustice caused by the Commonwealth, defense counsel, the jury, the judge's own error, or the interaction of several causes, should be used sparingly. Commonwealth v. Keough, 385 Mass. 314, 316–321 (1982). A judge considering a motion to reduce a verdict may rely on essentially the same considerations as does the Supreme Judicial Court when deciding whether to reduce a verdict to a lesser degree of guilt pursuant to G. L. c. 278, § 33E. Commonwealth v. Pagan, 471 Mass. 537, 543 (2015).

Subsection (f). This subsection is derived from Commonwealth v. Spencer, 465 Mass. 32, 42 (2013).

***Purpose*.** Massachusetts practice encourages the use of motions in limine. Motions in limine are useful to clarify or simplify the issues that need to be addressed prior to trial and to prevent irrelevant, inadmissible, or prejudicial matters from being considered by the trier of fact. See Commonwealth v. Lopez, 383 Mass. 497, 500 n.2 (1981). Such motions should be "narrowly limited to focus on a discrete issue or item of anticipated evidence," and "must not be used to choke off a valid defense in a criminal action, or to 'knock out' the entirety of the evidence supporting a defense before it can be heard by the jury." Commonwealth v. O'Malley, 14 Mass. App. Ct. 314, 324–325 (1982). See also Commonwealth v. Hood, 389 Mass. 581, 594 (1983); J.D.H. v. P.A.H., 71 Mass. App. Ct. 285, 290 (2008) (court may rely on evidence excluded in motion in limine where moving party later introduces the evidence where it is favorable to nonmoving party).

***Timing*.** While a motion in limine may be filed during trial in advance of the evidence being offered, Commonwealth v. Spencer, 465 Mass. 32, 42 (2013), there is a preference for filing and ruling on such motions in advance of trial since it may affect counsels' conduct of the trial. See Commonwealth v. Woodbine, 461 Mass. 720, 735 n.21 (2012); Commonwealth v. Diaz, 383 Mass. 73, 81 (1981). In some cases, such as where there are challenges to the reliability of expert witness testimony, a pretrial motion in limine is required to preserve the opposing party's rights. Commonwealth v. Sparks, 433 Mass. 654, 659 (2001). A judge retains the discretion to reserve on a ruling until the evidence is presented at trial.

***Illustrations*.** Cases involving common examples of motions in limine include the following: McLaughlin v. City of Lowell, 84 Mass. App. Ct. 45, 70 (2013) (application of collateral estoppel or issue preclusion); Scott v. Garfield, 454 Mass. 790, 802 (2009) (issues relating to collateral source rule and amount of medical bills); N.E. Physical Therapy Plus, Inc. v. Liberty Mut. Ins. Co., 466 Mass. 358, 360 (2013)

(admissibility of data compilations pursuant to G. L. c. 233, § 79B); Vassallo v. Baxter Healthcare Corp., 428 Mass. 1, 9 (1998) (Daubert-type motions relating to admissibility of expert testimony); Croall v. Massachusetts Bay Transp. Auth., 26 Mass. App. Ct. 957, 959 (1988) (similar occurrences); and McDaniel v. Pickens, 45 Mass. App. Ct. 63, 67 (1998) (evidence of insurance offered to show bias).

A motion in limine may be used to obtain a ruling in advance of trial on whether a statement is subject to the rule against hearsay or whether the probative value of otherwise relevant evidence is substantially outweighed by its prejudicial effect. Commonwealth v. Spencer, 465 Mass. 32, 42 (2013). A motion in limine is also a useful method for obtaining a ruling on the admissibility of evidence of prior bad acts, see Commonwealth v. Leonard, 428 Mass. 782 (1999), as well as on evidence of prior criminal convictions and the application of the rape-shield law. See Commonwealth v. Harris, 443 Mass. 714 (2005). A motion in limine is commonly used to obtain a ruling in advance of trial on the admissibility of evidence under the first complaint doctrine. See, e.g., Commonwealth v. Aviles, 461 Mass. 60, 63–66 (2011).

Subsection (g). The trial court's ruling on the exclusion of evidence as a sanction is reviewable for an abuse of discretion. Commonwealth v. Sanford, 460 Mass. 441, 445 (2010). Sanctions are to be appropriately tailored to cure prejudice relating to a party's noncompliance with its discovery obligations and to ensure a fair trial. Commonwealth v. Carney, 458 Mass. 418, 427–428 (2010). Factors to be considered include the prevention of surprise, the effectiveness of sanctions short of exclusion of evidence, the presence or absence of bad faith, the prejudice to the nonoffending party, and the materiality of the evidence. Commonwealth v. Reynolds, 429 Mass. 388, 398 (1999). But see Commonwealth v. Giontzis, 47 Mass. App. Ct. 450, 462–463 (1999) (not prejudicial error to allow Commonwealth's undisclosed rebuttal witness to testify even though there was evidence of surprise and bad faith).

Generally, the judge should impose the least severe sanction necessary to remedy the prejudice to the innocent party. Keene v. Brigham & Women's Hosp., Inc., 439 Mass. 223, 235 (2003). See Wiedmann v. Bradford Group, Inc., 444 Mass. 698, 704–705 (2005) (oral testimony may be excluded as sanction for destruction of supporting documents). Exclusion of evidence as a sanction need not be based on an intentional act, but there must be some fault attributable to the sanctioned party. Kippenhan v. Chaulk Servs., Inc., 428 Mass. 124, 127 (1998).

While a trial judge may exclude expert testimony for failure to comply with discovery, the judge must consider other options, including a sua sponte continuance of the trial or an order for a deposition of the late-identified expert. Morgan v. Jozus, 67 Mass. App. Ct. 17, 24 (2006). A pretrial motion to compel is not a prerequisite for relief for the innocent party. Mohamed v. Fast Forward, Inc., 41 Mass. App. Ct. 643, 648 (1996).

Cross-Reference: Section 1102, Spoliation or Destruction of Evidence; Mass. R. Crim. P. 14(c); Mass. R. Civ. P. 37.

Section 104. Preliminary Questions

(a) In General. The court must decide any preliminary question about whether a witness is qualified or competent, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by the law of evidence, except that on privilege.

(b) Relevance That Depends on a Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence, de bene, on the condition that the proof be introduced later. Evidence so admitted is subject to a motion to strike if that proof is not forthcoming.

(c) Conducting a Hearing So That the Jury Cannot Hear It. The court must conduct any hearing on a preliminary question so that the jury cannot hear it if

(1) the hearing involves the admissibility of a confession or

(2) justice so requires.

(d) Cross-Examining a Defendant in a Criminal Case. By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case, except issues that affect the witness's credibility.

(e) Evidence Relevant to Weight and Credibility. The law stated in this section does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

NOTE

Subsection (a). This subsection is derived from Nally v. Volkswagen of Am., Inc., 405 Mass. 191, 197–198 (1989), and Commonwealth v. Figueroa, 56 Mass. App. Ct. 641, 646 (2002). See also Gorton v. Hadsell, 63 Mass. 508, 511 (1852) (explaining that Massachusetts follows the orthodox principle under which "it is the province of the judge . . . to decide all questions on the admissibility of evidence. It is also his province to decide any preliminary questions of fact, however intricate, the solution of which may be necessary to enable him to determine the other question of admissibility."). The court may consider, in appropriate circumstances, representations of counsel and summary testimony. When the credibility of witnesses is in dispute on a preliminary question of fact, the court's determination is final. See Commonwealth v. Lyons, 426 Mass. 466, 470 (1998); Davis v. Boston Elevated Ry. Co., 235 Mass. 482, 502 (1920). The general rule in all cases, except as to waiver of Miranda rights and the voluntariness of defendants' statements in criminal cases, is that the judge's findings of preliminary facts on which the admissibility of evidence depends need only be by a fair preponderance of the evidence. See Care & Protection of Laura, 414 Mass. 788, 792 (1993); Commonwealth v. Polian, 288 Mass. 494, 498–499 (1934). As to the waiver of Miranda rights and the issue of voluntariness, the standard under Massachusetts law is proof beyond a reasonable doubt. Commonwealth v. Day, 387 Mass. 915, 920 (1983).

When the preliminary question involves the applicability of a privilege and the substance of the proposed testimony or evidence is not known to the court, it may be necessary to require that the party or witness asserting the privilege make a disclosure in camera of enough of the evidence to enable the court to make a preliminary determination. See Commonwealth v. Collett, 387 Mass. 424, 436 (1982) (in camera review may be appropriate in determining applicability of client–social worker privilege); Notes to Section 511(b), Privilege Against Self-Incrimination: Privilege of a Witness (discussing Commonwealth v. Martin, 423 Mass. 496 [1996]). See also Carr v. Howard, 426 Mass. 514, 531 (1998) (medical peer review privilege). An in camera hearing should not be used unless the court is not able to determine the existence of the privilege from the record. Commonwealth v. Martin, 423 Mass. at 504–505. See, e.g., Bays v. Theran, 418 Mass. 685, 693 (1994); Bougas v. Chief of Police of Lexington, 371 Mass. 59, 65–66 (1976). Whether a privilege exists on behalf of a minor or incapacitated person is a preliminarily determination made by the court. If a privilege exists, the court appoints a guardian ad litem or guardian to waive or assert the privilege. G. L. c. 233, § 20B. See Adoption of Diane, 400 Mass. 196, 200–202 (1987).

Preliminary questions involving the voluntariness of a defendant's statement, whether there was a valid waiver of the rights required by Miranda v. Arizona, 384 U.S. 436 (1966), or whether an identification was unnecessarily suggestive, should be raised in advance of trial by a motion to suppress. See Mass. R. Crim. P. 13(c)(1), (2). When voluntariness is a live issue and is challenged by a pretrial motion to suppress or an objection at trial, the court shall conduct an evidentiary hearing. See Commonwealth v. Adams, 389 Mass. 265, 269–270 (1983); Commonwealth v. Miller, 68 Mass. App. Ct. 835, 842 (2007); Commonwealth v. Gonzalez, 59 Mass. App. Ct. 622, 624 (2003); Commonwealth v. Florek, 48 Mass. App. Ct. 414, 419 (2000). However, if a pretrial motion to suppress was heard and determined in advance of trial, and the evi-

dence at trial is not materially different, the trial judge has no duty to rehear the motion based on an objection made at trial. See Commonwealth v. Parker, 412 Mass. 353, 356 (1992).

In some criminal cases, there are certain preliminary facts which, after being found by the judge, must also be submitted to the jury. In those situations, the judge must instruct the jury to disregard the evidence if they do not believe that those preliminary facts exist. See, e.g., Commonwealth v. Tavares, 385 Mass. 140, 152 (humane practice rule), cert. denied, 457 U.S. 1137 (1982); Commonwealth v. Key, 381 Mass. 19, 22 (1980) (dying declaration); Commonwealth v. Boyer, 52 Mass. App. Ct. 590, 598 (2001) (statements by joint venturers). See also G. L. c. 233, § 78 (business records). Cross-Reference: Section 1101(c)(3), Applicability of Evidentiary Sections: Where Inapplicable: Certain Other Proceedings.

For a comprehensive discussion of the difference between preliminary questions of fact upon which admissibility is determined by the judge under Mass. G. Evid. § 104(a) and the judge's determinations of conditional relevance under Mass. G. Evid. § 104(b), see Commonwealth v. Bright, 463 Mass. 421, 427–429 (2012).

Subsection (b). This subsection is derived from Commonwealth v. Perry, 432 Mass. 214, 234 (2000); Commonwealth v. Leonard, 428 Mass. 782, 785–786 (1999); Fauci v. Mulready, 337 Mass. 532, 540 (1958); and Harris-Lewis v. Mudge, 60 Mass. App. Ct. 480, 485 n.4 (2004). "Relevancy conditioned on fact" means that the judge is satisfied that a reasonable jury could find that the event took place or the condition of fact was fulfilled. Commonwealth v. Leonard, 428 Mass. at 785–786. See, e.g., Commonwealth v. Gambora, 457 Mass. 715, 730 (2010) (expert shoe-print evidence was relevant because reasonable jury could have found that police seizure of sneaker "from a closet in a bedroom at the defendant's mother's home—a room where the police also found personal papers bearing the defendant's name and photographs of him"—warranted an inference that the sneaker belonged to him, and therefore made it relevant). Contrast Section 104(a) (judge finds facts by preponderance of evidence).

In the event that the foundation evidence is not subsequently produced, the court has no duty to strike the evidence, admitted de bene, on its own motion. Commonwealth v. Sheppard, 313 Mass. 590, 595–596 (1943); Harris-Lewis v. Mudge, 60 Mass. App. Ct. at 485 n.4. If the objecting party fails to move to strike the evidence, the court's failure to strike it is not error. Muldoon v. West End Chevrolet, Inc., 338 Mass. 91, 98 (1958). See Commonwealth v. Navarro, 39 Mass. App. Ct. 161, 166 (1995). See also Section 611(a), Mode and Order of Examining Witnesses and Presenting Evidence: Control by the Court.

Subsection (c). This subsection is derived from Fed. R. Evid. 104(c) and Proposed Mass. R. Evid. 104(c) and is consistent with Massachusetts law. See Ruszcyk v. Secretary of Pub. Safety, 401 Mass. 418, 422–423 (1988).

Subsection (d). This subsection is derived from Fed. R. Evid. 104(d) and Proposed Mass. R. Evid. 104(d) and is consistent with Massachusetts law. See Commonwealth v. Judge, 420 Mass. 433, 444–446 (1995). It is well established that a defendant's testimony in support of a motion to suppress evidence may not be admitted against him or her at trial on the issue of guilt. See Simmons v. United States, 390 U.S. 377, 394 (1968). Such testimony may, however, be used for purposes of impeachment at trial if the defendant elects to testify. See Commonwealth v. Judge, 420 Mass. at 446 n.9 (the fact that defendant's testimony at suppression hearing may later be used at trial does not mean the scope of cross-examination of defendant at preliminary hearing should be limited). See also United States v. Smith, 940 F.2d 710, 713 (1st Cir. 1991) (defendant's testimony at a pretrial hearing can be used against him for impeachment purposes at trial).

Subsection (e). This subsection is based on the long-standing principle that, in cases tried to a jury, questions of admissibility are for the court, while the credibility of witnesses and the weight of the evidence are questions for the jury. See Vassallo v. Baxter Healthcare Corp., 428 Mass. 1, 13 (1998); Commonwealth v. Festa, 369 Mass. 419, 424–425 (1976); Commonwealth v. Williams, 105 Mass. 62, 67 (1870).

Section 105. Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes

If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.

NOTE

This section is derived from Commonwealth v. Carrion, 407 Mass. 263, 275 (1990) ("Evidence admissible for one purpose, if offered in good faith, is not inadmissible by the fact that it could not be used for another purpose."). If there is no request for a limiting instruction, the evidence is before the trier of fact for all purposes. See, e.g., Commonwealth v. Roberts, 433 Mass. 45, 48 (2000); Commonwealth v. Hollyer, 8 Mass. App. Ct. 428, 431 (1979).

A party must ask for an instruction limiting the scope of the evidence, if one is desired, at the time the evidence is admitted. Commonwealth v. Roberts, 433 Mass. at 48. "[T]here is no requirement that the judge give limiting instructions sua sponte." Commonwealth v. Sullivan, 436 Mass. 799, 809 (2002). "A judge may refuse to limit the scope of the evidence where the objecting party fails to request limiting instructions when the evidence is introduced." Commonwealth v. Roberts, 433 Mass. at 48. "After the close of the evidence it is too late to present as of right a request for a ruling that the evidence be stricken." Id.

The trial judge has discretion in determining how to formulate limiting instructions. The Supreme Judicial Court has stated that

> "[a] trial judge may properly bring to the jury's attention issues of fact and conflicts of testimony. [The judge] may point out factors to be considered in weighing particular testimony. Nothing . . . precludes, or could properly preclude, such guidance where the judge clearly places the function of ultimate appraisal of the testimony upon the jury."

Barrette v. Hight, 353 Mass. 268, 271 (1967).

Instructions Required. Once the judge has determined that the probative value is not substantially outweighed by the danger of unfair prejudice, a limiting instruction is required where, even though evidence is admissible for one purpose, there is a risk that the evidence will improperly be used for an inadmissible purpose. See Commonwealth v. McGee, 467 Mass. 141, 158 (2014) (a firearm that could not have been used to shoot victim, but that was offered to establish that defendant was familiar with firearms, was admissible only if accompanied by limiting instruction that it could not be taken as propensity evidence).

Timing of Limiting Instructions. Although contemporaneous limiting instructions are preferred, a judge has discretion as to the timing of a limiting instruction. Commonwealth v. Facella, 478 Mass. 393, 402–403 (2017) (no error where judge gave limiting instruction immediately following witness's direct examination, rather than during the testimony, as requested).

Section 106. Doctrine of Completeness

(a) Remainder of Writings or Recorded Statements. If a party introduces all or part of a writing or recorded statement, the court may permit an adverse party to introduce any other part of the

writing or statement that is (1) on the same subject, (2) part of the same writing or conversation, and (3) necessary to an understanding of the admitted writing or statement.

(b) Curative Admissibility. When the erroneous admission of evidence causes a party to suffer significant prejudice, the court may permit incompetent evidence to be introduced to cure or minimize the prejudice.

NOTE

Subsection (a). This subsection is derived from Commonwealth v. Aviles, 461 Mass. 60, 74 (2011). See Mass. R. Civ. P. 32(a)(4). "When a party introduces a portion of a statement or writing in evidence the doctrine of verbal completeness allows admission of other relevant portions of the same statement or writing which serve to 'clarify the context' of the admitted portion." Commonwealth v. Carmona, 428 Mass. 268, 272 (1998), quoting Commonwealth v. Robles, 423 Mass. 62, 69 (1996). "The purpose of the doctrine is to prevent one party from presenting a fragmented and misleading version of events by requiring the admission of other relevant portions of the same statement or writing which serve to clarify the context of the admitted portion" (citations and quotations omitted). Commonwealth v. Eugene, 438 Mass. 343, 351 (2003). "The portion of the statement sought to be introduced must qualify or explain the segment previously introduced" (citations and quotations omitted). Commonwealth v. Richardson, 59 Mass. App. Ct. 94, 99 (2003). See, e.g., Commonwealth v. Aviles, 461 Mass. at 74 (where defendant offered portion of victim's testimony describing touching of her buttocks, Commonwealth was properly permitted to offer testimony about touching of vaginal area, as both answers pertained to issue of where defendant had touched victim and were made during the same line of questioning).

The decision as to when the remainder of the writing or statement is admitted is left to the discretion of the judge, but the "better practice is to require an objection and contemporaneous introduction of the complete statements when the original statement is offered." McAllister v. Boston Hous. Auth., 429 Mass. 300, 303 (1999). See Section 611(a), Mode and Order of Examining Witnesses and Presenting Evidence: Control by the Court. Compare Commonwealth v. Thompson, 431 Mass. 108, 115, cert. denied, 531 U.S. 864 (2000) (doctrine is not applicable to defendant's effort to admit alibi portion of his or her statement that has nothing to do with statement offered by Commonwealth), with Commonwealth v. Crayton, 470 Mass. 228, 230 (2014) (in prosecution for possession of child pornography, it was error to admit defendant's statement to police that he had been using a particular computer at library while excluding his contemporaneous denial that he had viewed child pornography on that computer).

Subsection (b). This subsection is derived from Commonwealth v. Ruffen, 399 Mass. 811, 813–814 (1987) ("The curative admissibility doctrine allows a party harmed by incompetent evidence to rebut that evidence only if the original evidence created significant prejudice."). See also Commonwealth v. Reed, 444 Mass. 803, 810–811 (2005) (court required to admit evidence); Burke v. Memorial Hosp., 29 Mass. App. Ct. 948, 950 (1990), citing Commonwealth v. Wakelin, 230 Mass. 567, 576 (1918).

ARTICLE II. JUDICIAL NOTICE

Section 201. Judicial Notice of Adjudicative Facts

(a) Scope. This section governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it

(1) is generally known within the trial court's territorial jurisdiction or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) When Taken. A court may take judicial notice at any stage of the proceeding, whether requested or not, except a court shall not take judicial notice in a criminal trial of any element of an alleged offense.

(d) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(e) Instructing the Jury. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

NOTE

Subsection (a). There is a settled distinction between "adjudicative facts" and "legislative facts." See Cast Iron Soil Pipe Inst. v. Board of State Examiners of Plumbers & Gas Fitters, 8 Mass. App. Ct. 575, 586 (1979), and cases cited. Adjudicative facts are "the kind of facts that go to a jury in a jury case." Reid v. Acting Comm'r of the Dep't of Community Affairs, 362 Mass. 136, 142 (1972), quoting Davis, Administrative Law Treatise § 7.02. Legislative facts are those facts, including statistics, policy views, and other information, that constitute the reasons for legislation or administrative regulations. See Massachusetts Fed'n of Teachers, AFT, AFL-CIO v. Board of Educ., 436 Mass. 763, 772 (2002). Accord United States v. Bello, 194 F.3d 18, 23 (1st Cir. 1999); ABA Comm. on Ethics and Prof'l Responsibility, Independent Factual Research by Judges Via the Internet, Formal Op. 478 (2017).

The Supreme Judicial Court is "not inclined towards a narrow and illiberal application of the doctrine of judicial notice." Finlay v. Eastern Racing Ass'n, Inc., 308 Mass. 20, 27 (1941).

For an extensive list of matters on which a court may take judicial notice, see W.G. Young, J.R. Pollets, & C. Poreda, Annotated Guide to Massachusetts Evidence § 201 (2017–2018 ed.).

Subsection (b)(1). This subsection is derived from Nantucket v. Beinecke, 379 Mass. 345, 352 (1979). See also Commonwealth v. Kingsbury, 378 Mass. 751, 754 (1979). Accord Dimino v. Secretary of Commonwealth, 427 Mass. 704, 707 (1998) ("Factual matters which are 'indisputably true' are subject to judicial notice" [citations omitted].).

Subsection (b)(2). This subsection is derived from Commonwealth v. Green, 408 Mass. 48, 50 n.2 (1990). See also Commonwealth v. Kingsbury, 378 Mass. 751, 754 (1979). Accord Commonwealth v. Greco, 76 Mass. App. Ct. 296, 301 & n.11 (2010) ("judge did not err in taking judicial notice of the single and indisputable fact that, based upon the PDR [Physician's Desk Reference], Seroquel is the brand name for the generic drug quetiapine," while "not suggest[ing] that the PDR may be judicially noticed for other purposes"); Federal Nat'l Mtge. Ass'n v. Therrian, 42 Mass. App. Ct. 523, 525 (1997) ("facts which are . . . verifiably true [e.g., Lynn is in Essex County] are susceptible of judicial notice"). "Judicial notice is not to be extended to personal observations of the judge or juror." Nantucket v. Beinecke, 379 Mass. 345, 352 (1979), citing Duarte, petitioner, 331 Mass. 747, 749–750 (1954). See also Commonwealth v. Kirk, 39 Mass. App. Ct. 225, 229 (1995) ("judicial notice . . . cannot be taken of material factual issues that can only be decided by the fact finder on competent evidence").

In Yankee Atomic Elec. Co. v. Secretary of the Commonwealth, 402 Mass. 750, 759 n.7 (1988), the court explained the difference between "judicial notice" of facts and "official notice" of facts. The latter includes matters that are "indisputably true," as well as other factual matters that an agency may take notice of due to its special familiarity with the subject matter. See G. L. c. 30A, § 6.

***Court Records and Judicial Findings*.** "[A] judge may take judicial notice of the court's records in a related action." Jarosz v. Palmer, 436 Mass. 526, 530 (2002). Findings of the court in an earlier proceeding may be judicially noticed to the extent that they are relevant and material. See Adoption of Simone, 427 Mass. 34 (1998) (in proceedings to dispense with biological parents' consent to adoption, it was permissible to take judicial notice of earlier findings in care and protection proceeding, even though such findings could not be given dispositive effect).

***Judicial Notice of Evidence Not Permitted*.** It is improper for a "judge to take 'notice,' judicial or otherwise," of information gained from the judge's active participation in a related case. Care & Protection of Zita, 455 Mass. 272, 281–282 (2009). See Adoption of Zak, 90 Mass. App. Ct. 840, 844 n.7 (2017).

Subsection (c). This subsection, which is derived from Fed. R. Evid. 201(d) and Proposed Mass. R. Evid. 201(f), reflects the Massachusetts practice that judicial notice may be taken at any time by a trial or appellate court. Maguire v. Director of Office of Medicaid, 82 Mass. App. Ct. 549, 551 n.5 (2012); Commonwealth v. Grinkley, 44 Mass. App. Ct. 62, 69 n.9 (1997). While there is no express authority for the proposition that judicial notice is discretionary in connection with adjudicative facts, see Commonwealth v. Finegan, 45 Mass. App. Ct. 921, 922 (1998), the principle follows logically from the settled proposition that when there are no disputed facts, a legal dispute is ripe for a decision by the court. See Jackson v. Longcope, 394 Mass. 577, 580 n.2 (1985) (judicial notice may be taken by the court in connection with a motion to dismiss under Mass. R. Civ. P. 12[b][6]); Commonwealth v. Kingsbury, 378 Mass. 751, 754–755 (1979) ("The right of a court to take judicial notice of subjects of common knowledge is substantially the same as the right of jurors to rely on their common knowledge."). See also Commonwealth v. Marzynski, 149 Mass. 68, 72 (1889) (court took judicial notice that cigars were not drugs or medicine and properly excluded expert opinions stating the contrary). Courts may take judicial notice of their own records. See, e.g., Jarosz v. Palmer, 436 Mass. 526, 530 (2002). But see Commonwealth v. Berry, 463 Mass. 800, 804 n.6 (2012) (appellate court will not take judicial notice of contents of police report included in trial court file where report was not introduced into evidence or considered by motion judge and was not made part of record on appeal).

***Criminal Cases*.** The defendant's constitutional right to trial by jury means that the "trier of fact, judge or jury, cannot be compelled to find against the defendant as to any element of the crime." Commonwealth v. Pauley, 368 Mass. 286, 291 (1975). Although the court may take judicial notice of an adjudicative fact in a criminal case, see Commonwealth v. Green, 408 Mass. 48, 50 & n.2 (1990), "[t]he proper practice in a criminal trial is to submit all factual issues to the jury, including matters of which the judge may take judicial

notice." Commonwealth v. Kingsbury, 378 Mass. 751, 755 (1979), citing Fed. R. Evid. 201(g) (currently codified at Fed. R. Evid. 201[f]).

Subsection (d). This subsection is derived from the principle, grounded in due process considerations, that a party has a right to notice of matters that the court will adjudicate. See Department of Revenue v. C.M.J., 432 Mass. 69, 76 n.15 (2000), and cases cited.

Subsection (e). The first sentence of this subsection, which is taken verbatim from Fed. R. Evid. 201(f), reflects Massachusetts practice. It is consistent with and follows from the principle set forth in Section 201(c). The second sentence is derived from Commonwealth v. Kingsbury, 378 Mass. 751, 754–755 (1979), and Commonwealth v. Finegan, 45 Mass. App. Ct. 921, 923 (1998), where the courts noted that any fact that is the subject of judicial notice in a criminal case must be given to the jury for its determination. See generally United States v. Bello, 194 F.3d 18, 22–26 (1st Cir. 1999) (explaining relationship between Fed. R. Evid. 201[b] and Fed. R. Evid. 201[g], currently codified at Fed. R. Evid. 201[f]).

Section 202. Judicial Notice of Law

(a) Mandatory. A court shall take judicial notice of

(1) the General Laws of the Commonwealth, public acts of the Massachusetts Legislature, the common law of Massachusetts, rules of court, the contents of the Code of Massachusetts Regulations, and Federal statutes, and

(2) the contents of Federal regulations and the laws of foreign jurisdictions that are brought to the court's attention.

(b) Permissive. A court may take judicial notice of the contents of Federal regulations and the laws of foreign jurisdictions not brought to its attention, legislative history, municipal charters, and charter amendments.

(c) Not Permitted. A court is not permitted to take judicial notice of municipal ordinances, town bylaws, special acts of the Legislature, or regulations not published in the Code of Massachusetts Regulations.

NOTE

Subsections (a)(1) and (2). These subsections are derived from 44 U.S.C. § 1507 (contents of the Federal Register shall be judicially noticed); G. L. c. 30A, § 6 (regulations published in the Code of Massachusetts Regulations shall be judicially noticed); and G. L. c. 233, § 70 ("The courts shall take judicial notice of the law of the United States or of any state, territory or dependency thereof or of a foreign country whenever the same shall be material."). See also Cohen v. Assessors of Boston, 344 Mass. 268, 269 (1962); Ralston v. Commissioner of Agric., 334 Mass. 51, 53–54 (1956); Mastrullo v. Ryan, 328 Mass. 621, 622 (1952); Brodsky v. Fine, 263 Mass. 51, 54 (1928).

The party which seeks to have the court notice or apply any foreign law has the burden of bringing it to the court's attention. See Mass. R. Crim. P. 39(b) ("The court shall upon request take judicial notice of the law of the United States or of any state, territory, or dependency thereof or of a foreign country whenever it shall be material."); Mass. R. Civ. P. 44.1 ("A party who intends to raise an issue concerning the law of the United States or of any state, territory or dependency thereof or of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining such law, may consider any relevant

material or source, including testimony, whether or not submitted by a party or admissible under Rule 43. The court's determination shall be treated as a ruling on a question of law.").

Subsection (b). This subsection is derived from G. L. c. 43B, § 12; Blue Hills Cemetery, Inc. v. Board of Registration in Embalming & Funeral Directing, 379 Mass. 368, 375 n.10 (1979), citing Pereira v. New England LNG Co., 364 Mass. 109, 122 (1973) (notice of legislative history is permissive); and New England Trust Co. v. Wood, 326 Mass. 239, 243 (1950) (notice of charters and charter amendments of cities and towns).

Subsection (c). Courts "will not take judicial cognizance of municipal ordinances, or of special acts of the Legislature" (citations omitted). Brodsky v. Fine, 263 Mass. 51, 54 (1928). Furthermore, "[t]he general rule in Massachusetts is that courts do not take judicial notice of regulations [not included in the Code of Massachusetts Regulations]; they must be put in evidence" (citations and quotations omitted). Peters v. Haymarket Leasing, Inc., 64 Mass. App. Ct. 767, 775 n.11 (2005). Printed copies of legislative acts and resolves and attested copies of municipal ordinances, bylaws, rules, and regulations are admissible. G. L. c. 233, § 75.

ARTICLE III. INFERENCES, PRIMA FACIE EVIDENCE, AND PRESUMPTIONS

Section 301. Civil Cases

(a) Scope. This section applies to all civil actions and proceedings, except as otherwise specifically provided by a statute, the common law, a rule, or a regulation.

(b) Inferences. An inference is a step in reasoning that the fact finder may make from evidence that has been accepted as believable. A fact may be inferred even though the relationship between the basic fact and the inferred fact is not necessary or inescapable, so long as it is reasonable and possible.

(c) Prima Facie Evidence. Where a statute or regulation provides that a fact or group of facts is prima facie evidence of another fact at issue, the party against whom the prima facie evidence is directed has the burden of production to rebut or meet such prima facie evidence. If that party fails to come forward with evidence to rebut or meet the prima facie evidence, the fact at issue is to be taken by the fact finder as established. Where evidence is introduced sufficient to warrant a finding contrary to the fact at issue, the fact finder is permitted to consider the prima facie evidence as bearing on the fact at issue, but it must be weighed with all other evidence to determine whether a particular fact has been proved. Prima facie evidence does not shift the burden of persuasion, which remains throughout the trial on the party on whom it was originally cast.

(d) Presumptions. A presumption imposes on the party against whom it is directed the burden of production to rebut or meet that presumption. The extent of that burden may be defined by statute, regulation, or the common law. If that party fails to come forward with evidence to rebut or meet that presumption, the fact is to be taken by the fact finder as established. If that party comes forward with evidence to rebut or meet the presumption, the presumption shall have no further force or effect. A presumption does not shift the burden of persuasion, which remains throughout the trial on the party on whom it was originally cast.

NOTE

Subsection (b). This subsection is derived from Commonwealth v. Dinkins, 440 Mass. 715, 720–721 & n.8 (2004), and DeJoinville v. Commonwealth, 381 Mass. 246, 253 n.13 (1980). "In this formulation, 'possible' is not a lesser alternative to 'reasonable.' Rather, the two words function in a synergistic manner: each raises the standard imposed by the other." Commonwealth v. Dinkins, 440 Mass. at 721. "[W]e have permitted, in carefully defined circumstances, a jury to make an inference based on an inference to come to a conclusion of guilt or innocence. But we require that each inference must be a reasonable and logical conclusion from the prior inference; we have made clear that a jury may not use conjecture or guesswork to choose between alternative inferences." Commonwealth v. Dostie, 425 Mass. 372, 376 (1997). See, e.g., Commonwealth v. White, 452 Mass. 133, 136 (2008) (concluding that there was sufficient evidence connecting the defendant to a gun found at the crime scene, the court observed that "[w]e do not require that every inference be premised on an independently proven fact"). For a lengthy list of inferences, see W.G. Young, J.R. Pollets, & C. Poreda, Annotated Guide to Massachusetts Evidence § 301 (2017–2018 ed.). See also Model Jury Instructions for Use in the District Court § 3.03 (Mass. Cont. Legal Educ. 2003).

Subsection (c). This subsection is derived from Burns v. Commonwealth, 430 Mass. 444, 450–451 (1999); Ford Motor Co. v. Barrett, 403 Mass. 240, 242–243 (1988); and Cook v. Farm Serv. Stores, Inc., 301 Mass. 564, 566 (1938). For a list of statutes that involve prima facie evidence, see W.G. Young, J.R. Pollets, & C. Poreda, Annotated Guide to Massachusetts Evidence § 301 (2017–2018 ed.). See also Model Jury Instructions for Use in the District Court § 3.03 (Mass. Cont. Legal Educ. 2003).

Subsection (d). This subsection is based on the predominant approach in Massachusetts whereby a presumption shifts the burden of production and disappears when the opposing party meets its burden by offering evidence to rebut the presumption. However, the disappearance of the presumption does not prevent the fact finder from drawing an inference from one or more basic facts that is consistent with the original presumption. See Standerwick v. Zoning Bd. of Appeals of Andover, 447 Mass. 20, 34–35 (2006), quoting Epstein v. Boston Hous. Auth., 317 Mass. 297, 302 (1944) (in the context of the statutory provision that an abutter is presumed to have standing in cases arising under G. L. c. 40A, the court observed that "[a] presumption does not shift the burden of proof; it is a rule of evidence that aids the party bearing the burden of proof in sustaining that burden by 'throw[ing] upon his adversary the burden of going forward with evidence.'"); Jacobs v. Town Clerk of Arlington, 402 Mass. 824, 826–827 (1988) (rebuttable presumption of death). The quantum of evidence required to rebut the presumption may vary. See Yazbek v. Board of Appeal on Motor Vehicle Liab. Policies & Bonds, 41 Mass. App. Ct. 915, 916 (1996).

In civil cases, presumptions ordinarily require a party against whom the presumption is directed to come forward with some evidence to rebut the presumption; they ordinarily impose a burden of production, not persuasion, on that party. What has been termed an irrebuttable or conclusive presumption is not a rule of evidence, but rather a rule of substantive law designed to address a social policy, and cannot be rebutted by evidence. W.G. Young, J.R. Pollets, & C. Poreda, Annotated Guide to Massachusetts Evidence § 301 (2017–2018 ed.), citing Commonwealth v. Clerk-Magistrate of the W. Roxbury Div. of the Dist. Ct. Dep't, 439 Mass. 352, 354–356 (2003), and Commonwealth v. Dunne, 394 Mass. 10, 18 (1985). See G. L. c. 152, § 32(e); Carey's Case, 66 Mass. App. Ct. 749, 755–758 (2006).

A presumption may give rise to a constitutional question even in civil cases. See, e.g., Care & Protection of Erin, 443 Mass. 567, 571 (2005) ("[I]n cases that involve severing parental rights, the presumption that a child, who had been in the care of the department for more than one year, would have her best interests served by granting a petition for adoption or dispensing with the need for parental consent to adoption, violates the parents' due process rights because it shifts the burden to the parent affirmatively to prove fitness and to prove that the best interests of the child would be served by maintaining parental rights."). For presumptions governing child custody cases, see G. L. c. 208, §§ 31 and 31A; G. L. c. 209, § 38; G. L. c. 209A; and G. L. c. 209C, §§ 6 and 10(b). See also Custody of Kali, 439 Mass. 834, 844 (2003) ("The required considerations of G. L. c. 209C, § 10[a] . . . do [not] create a presumption that the caretaker with whom the child is primarily residing will be awarded permanent custody."); Della Corte v. Ramirez, 81 Mass.

App. Ct. 906, 907 (2012) (presumption of parentage applies to child of same-sex couple who were married at time of child's birth). For a further list of presumptions, see W.G. Young, J.R. Pollets, & C. Poreda, Annotated Guide to Massachusetts Evidence § 301 (2017–2018 ed.). See also Model Jury Instructions for Use in the District Court § 3.07 (Mass. Cont. Legal Educ. 2003).

Section 302. Criminal Cases

(a) Scope. This section governs the operation of inferences, prima facie evidence, and presumptions in criminal cases.

(b) Inferences. The jury generally may draw inferences in a criminal case in the same manner as in a civil case.

(c) Prima Facie Evidence. Prima facie evidence means that proof of the first fact permits, but does not require, the fact finder, in the absence of competing evidence, to find that the second fact is true beyond a reasonable doubt. Where there is contrary evidence, the first fact continues to constitute some evidence of the fact to be proved, remaining throughout the trial probative on issues to which it is relevant.

(d) Presumptions. The term "presumption" should not be used in connection with the Commonwealth's burden of proof.

> **(1)** The defendant cannot be required to satisfy the burden of disproving a fact that is essential to a finding or verdict of guilty.
>
> **(2)** The defendant may be required to satisfy a burden of production.

NOTE

Subsection (a). Constitutional principles restrict the manner in which concepts such as inferences, prima facie evidence, and presumptions are permitted to operate in criminal cases. "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). "[I]t is constitutionally impermissible to shift to a defendant the burden of disproving an element of a crime charged." Commonwealth v. Moreira, 385 Mass. 792, 794 (1982). Likewise, "[d]ue process requires that the State disprove beyond a reasonable doubt those 'defenses' that negate essential elements of the crime charged." Commonwealth v. Robinson, 382 Mass. 189, 203 (1981). Therefore, a conclusive or mandatory presumption or inference in any form which has the effect of relieving the jury of the duty of finding a fact essential to proof of the defendant's guilt on a criminal charge beyond a reasonable doubt based on evidence offered at trial, or which imposes on a defendant a burden of persuasion as to such a fact, conflicts with the presumption of innocence and violates due process. See Sandstrom v. Montana, 442 U.S. 510, 523–524 (1979); Patterson v. New York, 432 U.S. 197, 210 (1977); Commonwealth v. Stokes, 374 Mass. 583, 589–590 (1978). Further, "[a] permissive inference cannot have the effect of reducing the Commonwealth's burden to prove a crime beyond a reasonable doubt." Commonwealth v. Littles, 477 Mass. 382, 388 (2017).

Subsection (b). This subsection is derived from DeJoinville v. Commonwealth, 381 Mass. 246, 253 (1980), and Gagne v. Commonwealth, 375 Mass. 417, 422–423 (1978). While a jury generally may draw inferences in a criminal case in the same manner as in a civil case, drawing an inference in a criminal case is not a substitute for the separate determination of whether the defendant's guilt has been established beyond a

reasonable doubt. See Commonwealth v. Waite, 422 Mass. 792, 805–806 (1996); Commonwealth v. Little, 384 Mass. 262, 267 (1981).

Cross-Reference: Section 301(b), Civil Cases: Inferences.

Subsection (c). This subsection is derived from Commonwealth v. Maloney, 447 Mass. 577, 581 (2006). See also Commonwealth v. Chappee, 397 Mass. 508, 520 (1986); Commonwealth v. Pauley, 368 Mass. 286, 291–292 (1975).

There are numerous statutes that designate certain evidence as having prima facie effect. See, e.g., G. L. c. 22C, § 39 (certificate of chemical analysis of narcotics); G. L. c. 46, § 19 (birth, marriage, or death certificate); G. L. c. 90, § 24(4) (court record of a prior conviction if accompanied by other documentation); G. L. c. 185C, § 21 (report of inspector in housing court); G. L. c. 233, § 79F (certificate of public way); G. L. c. 269, § 11C (firearm with obliterated serial number).

> "Such provisions serve to identify evidence that the Commonwealth may introduce to meet its burden and which, while just as probative as other evidence, is less burdensome to produce. They do not, however, alter the Commonwealth's substantive burden of proof, render admissible any evidence that previously was inadmissible, or render sufficient any evidence that necessarily was insufficient beforehand." (Citation omitted.)

Commonwealth v. Maloney, 447 Mass. at 581–582. Such statutes may be unconstitutional unless there is a "strong, logical connection" between the basic fact and the inferred fact. Commonwealth v. Littles, 477 Mass. 382, 385–386 (2017) (failure to make good on dishonored check within two days cannot be prima facie evidence of intent to defraud).

Subsection (d). This subsection is derived from Commonwealth v. Moreira, 385 Mass. 792, 797 (1982), where the Supreme Judicial Court stated that "[t]he word 'presumption' must be given an explanation consistent with the meaning of inference. The safer course, perhaps, is to avoid the use of the word 'presumption,' in any context which includes the burden of proof in criminal cases." See also Commonwealth v. McInerney, 373 Mass. 136, 149 (1977) (explaining the problems that arise when the terms "presumption" and "inference" are used interchangeably). Additionally, in instructing a jury, the judge should explain that inferences operate only permissively, and that the jury are not required to accept any fact based on prima facie evidence. See Commonwealth v. Niziolek, 380 Mass. 513, 521–522 (1980); Commonwealth v. Pauley, 368 Mass. 286, 291–292 (1975). See also Commonwealth v. Corriveau, 396 Mass. 319, 340 (1985).

Subsection (d)(1). This subsection is derived from Commonwealth v. Moreira, 385 Mass. 792, 794–797 (1982), and Commonwealth v. McDuffee, 379 Mass. 353, 363–364 (1979). See also In re Winship, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

Subsection (d)(2). This subsection is derived from Commonwealth v. Cabral, 443 Mass. 171, 179 (2005), and cases cited. See id. ("[W]here a defendant asserts an affirmative defense, he takes on a burden of production, because the Commonwealth has no burden of disproving an affirmative defense unless and until there is evidence supporting such defense" [citation and quotation omitted].). This principle is illustrated by Commonwealth v. Vives, 447 Mass. 537, 541 (2006), where the court explained that

> "[t]he Commonwealth's burden to disprove the affirmative defense of honest and reasonable claim arises once the defendant has met his own burden of production. Thus, if any view of the evidence would support a factual finding that the defendant was acting as creditor to the victim's debtor, the defendant has met his burden of production and it is incumbent on the Commonwealth to disprove the defense." (Citation and quotation omitted.)

The evidence supporting an affirmative defense "may be contained in the Commonwealth's case, the defendant's case, or the two in combination." Commonwealth v. Galvin, 56 Mass. App. Ct. 698, 699 (2002),

citing Commonwealth v. Rodriguez, 370 Mass. 684, 688 n.5 (1976). In determining whether sufficient evidence supports an affirmative defense, the evidence must be viewed in the light most favorable to the defendant. Id.

In Commonwealth v. Vives, 447 Mass. at 541 n.3, the court also made it clear that a defendant may be required to carry the burden of production as to an affirmative defense that relates directly to an element of the crime. Commonwealth v. Dorvil, 472 Mass. 1, 13 (2015) (where there is some evidence that a parent used reasonable force in disciplining a minor child, the Commonwealth bears the burden of disproving at least one prong of the parental privilege), citing Commonwealth v. Glacken, 451 Mass. 163, 167 (2008). See, e.g., Commonwealth v. Rodriguez, 370 Mass. at 687–688 (in prosecution for assault and battery, Commonwealth has no duty to affirmatively disprove that the defendant acted in self-defense until there is some evidence in the case to warrant such a finding).

Firearm: Defense of License. In a prosecution of a firearm charge, the defendant must give the Commonwealth notice that he or she intends to raise the defense of license and produce "some evidence" of a license, at which time the burden shifts to the Commonwealth to prove the absence of a license beyond a reasonable doubt. Commonwealth v. Gouse, 461 Mass. 787, 806 (2012). However, when the charge results from alleged illegal possession of a firearm by a coventurer, the defendant must give notice of the defense but is not required to produce any evidence of the existence of the codefendant's firearm license, as he or she has no better access to that information than the Commonwealth. Commonwealth v. Humphries, 465 Mass. 762, 771 (2013).

Lack of Criminal Responsibility. In Commonwealth v. Lawson, 475 Mass. 806 (2016), the Supreme Judicial Court discussed the presumption of sanity:

> "[T]he 'presumption of sanity' is not truly a presumption but rather an inference that the defendant is probably criminally responsible because most people are criminally responsible for their acts. Where a defendant proffers a defense of lack of criminal responsibility and there is some evidence that supports it, this inference, standing alone, cannot support a finding that a defendant is criminally responsible beyond a reasonable doubt. Although the Commonwealth may not rely on 'the presumption of sanity' to establish criminal responsibility, the Commonwealth need not offer expert testimony in every case and may rely instead on the circumstances of the offense and all that the defendant did and said before, during, and after the offense to prove the defendant's criminal responsibility."

Id. at 807.

ARTICLE IV. RELEVANCY AND ITS LIMITS

Section 401. Test for Relevant Evidence

Evidence is relevant if

(a) it has any tendency to make a fact more or less probable than it would be without the evidence and

(b) the fact is of consequence in determining the action.

NOTE

This section is derived from Commonwealth v. Schuchardt, 408 Mass. 347, 350 (1990), and is nearly identical to Fed. R. Evid. 401. See also Commonwealth v. Kennedy, 389 Mass. 308, 310 (1983) (citing with approval Proposed Mass. R. Evid. 401). Massachusetts law accords relevance a liberal definition. See Commonwealth v. Fayerweather, 406 Mass. 78, 83 (1989) ("rational tendency to prove an issue in the case"); Commonwealth v. Vitello, 376 Mass. 426, 440 (1978) ("renders the desired inference more probable than it would be without the evidence"). Compare Commonwealth v. Scesny, 472 Mass. 185, 198–199 (2015) (testimony that witness was "pretty certain" defendant had been a patron at a bar was relevant and properly admitted), with Commonwealth v. Caruso, 476 Mass. 275, 291 (2017) ("without evidence that the defendant had accessed [the information depicted in the admitted screenshots of the defendant's computer, the screenshots] had no tendency to affect the probability of any material fact"). The concept of relevancy has two components: (1) the evidence must have some tendency (probative value) to prove or disprove a particular fact, and (2) that particular fact must be material to an issue (of consequence) in the case. Harris-Lewis v. Mudge, 60 Mass. App. Ct. 480, 485 (2004).

To be admissible, it is not necessary that the evidence be conclusive of the issue. Commonwealth v. Ashley, 427 Mass. 620, 624–625 (1998). It is sufficient if the evidence constitutes a link in the chain of proof. Commonwealth v. Arroyo, 442 Mass. 135, 144 (2004). "Evidence must go in by piecemeal, and evidence having a tendency to prove a proposition is not inadmissible simply because it does not wholly prove the proposition. It is enough if in connection with other evidence it helps a little." Commonwealth v. Tucker, 189 Mass. 457, 467 (1905).

> "The general pattern of our cases on the alleged remoteness in time or space of particular evidence indicates two general principles. If the evidence has some probative value, decisions to admit the evidence and to leave its weight to the jury have been sustained. The exclusion on the ground of remoteness of relevant evidence has generally not been sustained. The cases have recognized a range of discretion in the judge." (Citations and footnote omitted.)

DeJesus v. Yogel, 404 Mass. 44, 47 (1989). To be relevant, evidence must not be too remote in time from the date of the crime. See, e.g., Commonwealth v. Corliss, 470 Mass. 443, 450–451 (2015) (judge was warranted in reasoning that sixteen-month interval between shooting and time witness saw defendant loading bullets into a firearm was not too remote because a person would retain knowledge of how to use a firearm). See also Crowe v. Ward, 363 Mass. 85, 88–89 (1973) (admissibility of weather reports as proof of conditions at some distance away from the reported observations).

Reliance is placed upon the trial judge's discretion to exclude evidence whose probative value is "substantially outweighed" by risk of unfair prejudice, confusion, or waste of time. Commonwealth v. Bonds, 445 Mass. 821, 831 (2006). Although omitted in a number of cases, a proper explanation of this balancing test includes the term "substantially." See Note to Section 403, Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons.

Section 402. General Admissibility of Relevant Evidence

Relevant evidence is admissible unless any of the following provides otherwise:

(a) the United States Constitution,

(b) the Massachusetts Constitution,

(c) a statute, or

(d) other provisions of the Massachusetts common law of evidence.

Irrelevant evidence is not admissible.

NOTE

This section is derived from Commonwealth v. DelValle, 443 Mass. 782, 793 (2005), and Commonwealth v. Owen, 57 Mass. App. Ct. 538, 547 (2003). Unless relevant, evidence will not be admitted because it does not make a fact in dispute more or less probable than it would be without the evidence. See Commonwealth v. Seabrooks, 425 Mass. 507, 512 n.7 (1997). But the converse is not true, which is to say that not all relevant evidence will be admitted. See Commonwealth v. Vitello, 376 Mass. 426, 440 (1978) ("all relevant evidence is admissible unless barred by an exclusionary rule"); Poirier v. Plymouth, 374 Mass. 206, 210 (1978) (same).

Relevant evidence may be excluded for any number of reasons. See, e.g., G. L. c. 233, § 20 (evidence of a private conversation between spouses is inadmissible); Commonwealth v. Kater, 432 Mass. 404, 416–417 (2000) (hypnotically aided testimony is not admissible); Commonwealth v. Harris, 371 Mass. 462, 467–468 (1976) (constitutional mandate forbids admission of a coerced confession regardless of its relevance); Commonwealth v. Kartell, 58 Mass. App. Ct. 428, 432 (2003) (relevant evidence excluded on grounds it was too remote). "Alleged defects in the chain of custody usually go to the weight of the evidence and not its admissibility." Commonwealth v. Viriyahiranpaiboon, 412 Mass. 224, 230 (1992); Section 403, Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons (relevant evidence may be excluded if its probative value is substantially outweighed by the risk of unfair prejudice, confusion, etc.). There may be circumstances where portions of documentary evidence should be excluded or redacted to protect personal privacy. See Matter of the Enforcement of a Subpoena, 436 Mass. 784, 794 (2002).

For an illustration of the rule barring the admission of irrelevant evidence, see Commonwealth v. Hampton, 91 Mass. App. Ct. 852, 854–855 (2017) (use of adult pornography "wholly irrelevant" to prove charges of sexual assault on child).

Cross-Reference: Note "Address of Witness" to Section 501, Privileges Recognized Only as Provided.

Section 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

NOTE

This section is derived from Ruszcyk v. Secretary of Pub. Safety, 401 Mass. 418, 423 (1988) (adopting the principles expressed in Proposed Mass. R. Evid. 403). See Commonwealth v. Bonds, 445 Mass. 821, 831 (2006); Gath v. M/A-Com, Inc., 440 Mass. 482, 490–491 (2003); Commonwealth v. Beausoleil, 397 Mass. 206, 217 (1986); Commonwealth v. Cruz, 53 Mass. App. Ct. 393, 407–408 (2001).

This section states the general rule that all relevant evidence may be excluded when its probative value is "substantially outweighed," not simply outweighed, by the danger of unfair prejudice, confusion of the issues, misleading the jury, being unnecessarily time consuming, or needless presentation of cumulative evidence. See Commonwealth v. Crayton, 470 Mass. 228, 249 & n.27 (2014) (acknowledging this as general rule and explaining that more exacting standard is applicable when relevant evidence consists of prior bad act evidence under Section 404[b]). See also Commonwealth v. Kindell, 84 Mass. App. Ct. 183, 187–188 (2013) (measure of prejudice is not simply whether evidence is adverse to party opposed to it, but

instead whether it is unfairly prejudicial). While a majority of the cases stand for the proposition that relevant evidence may be excluded if its probative value is "substantially" outweighed by its prejudicial effect—see, e.g., Commonwealth v. Bonds, 445 Mass. at 831; Commonwealth v. Stroyny, 435 Mass. 635, 641 (2002); Commonwealth v. Otsuki, 411 Mass. 218, 236 (1991)—others state that the probative value must be merely outweighed by the prejudicial effect. See, e.g., Commonwealth v. Rosario, 444 Mass. 550, 557 (2005); Commonwealth v. Reynolds, 429 Mass. 388, 395 (1999). These latter cases, however, rely on cases which include the term "substantial" when explaining the balancing test. See, e.g., Commonwealth v. Chalifoux, 362 Mass. 811, 816 (1973) (relied on by cases which Commonwealth v. Rosario, 444 Mass. at 556–557, relied on); Commonwealth v. Otsuki, 411 Mass. at 236 (relied on by Commonwealth v. Reynolds, 429 Mass. at 395).

Unfair Prejudice. "[T]rial judges must take care to avoid exposing the jury unnecessarily to inflammatory material that might inflame the jurors' emotions and possibly deprive the defendant of an impartial jury." Commonwealth v. Berry, 420 Mass. 95, 109 (1995). See, e.g., Commonwealth v. Bishop, 461 Mass. 586, 596–597 (2012) ("before a judge admits evidence that a defendant used [a racial slur] to describe a man of color, the judge must be convinced that the probative weight of such evidence justifies this risk"). Unfair prejudice also results when the trier of fact uses properly admitted evidence for an impermissible purpose, for example by relying on the truth of an out-of-court statement that was admitted for a nonhearsay purpose or, when evidence of a person's prior bad act is admitted under Section 404(b), by considering that evidence as indicating that person's propensity to commit such acts. See, e.g., Commonwealth v. Rosario, 430 Mass. 505, 509–510 (1999); Commonwealth v. Fidalgo, 74 Mass. App. Ct. 130, 133 (2009).

In balancing probative value against risk of prejudice, the fact that the evidence goes to a central issue in the case weighs in favor of admission. See Commonwealth v. Martinez, 476 Mass. 186, 194–195 (2017) (audio-video recording of news broadcast not unfairly prejudicial where judge explained that it was not admitted for its truth, required extensive redactions, and provided limiting instructions as to its use); Gath v. M/A-Com, Inc., 440 Mass. 482, 490–491 (2003). Unfair prejudice does not mean that the evidence sought to be excluded is particularly probative evidence harmful to the opponent of the evidence. An illustrative weighing of probative value against unfair prejudice arises regarding the admissibility of photographs of the victim (especially autopsy) or the crime scene. See generally Commonwealth v. Bell, 473 Mass. 131, 142–145 (2015); Commonwealth v. Zhan Tang Huang, 87 Mass. App. Ct. 65, 77–78 (2015); Commonwealth v. Prashaw, 57 Mass. App. Ct. 19, 24–25 (2003). Evidence of a defendant's prior bad act may be unfairly prejudicial and therefore inadmissible to prove the crime charged, but it may be admissible for other purposes (e.g., common plan, pattern of conduct, identity, absence of accident, motive). See Commonwealth v. Holloway, 44 Mass. App. Ct. 469, 475 (1998). See also Commonwealth v. Fidalgo, 74 Mass. App. Ct. 130, 133–134 (2009) (evidence that the defendant had been a passenger in three prior automobile accidents over the past nine years in which she had claimed injuries and sought damages was not relevant in a prosecution of the defendant for filing a false motor vehicle insurance claim because it showed nothing about the character of the prior claims and yet had the potential for prejudice since the case was essentially a credibility contest). The effectiveness of limiting instructions in minimizing the risk of unfair prejudice should be considered in the balance. Commonwealth v. Dunn, 407 Mass. 798, 807 (1990). See also Section 404(b), Character Evidence; Crimes or Other Acts: Crimes, Wrongs, or Other Acts.

Confusion of Issues and Misleading the Jury. The trial judge has discretion to exclude relevant evidence if it has potential for confusing and misleading the fact finder. Commonwealth v. Rosa, 422 Mass. 18, 25 (1996); Commonwealth v. Beausoleil, 397 Mass. 206, 217 (1986); Lally v. Volkswagen Aktiengesellschaft, 45 Mass. App. Ct. 317, 332 (1998) (admissibility of a test, experiment, or reenactment requires consideration of "whether the evidence is relevant, the extent to which the test conditions are similar to the circumstances surrounding the accident, and whether the [experiment, demonstration, or reenactment] will confuse or mislead the jury" [quotation and citation omitted]).

Unnecessarily Time Consuming. The trial judge has discretion to exclude evidence if it is unduly time consuming. Commonwealth v. Cruz, 53 Mass. App. Ct. 393, 407–408 (2001).

Cumulative Evidence. The trial judge has discretion to exclude evidence if it is merely cumulative. Commonwealth v. Bonds, 445 Mass. 821, 831 (2006). See Fitchburg Gas & Elec. Light Co. v. Department of Telecomm. & Energy, 440 Mass. 625, 641 (2004) (no error in excluding testimony that would be "merely cumulative of the uncontroverted evidence"); Commonwealth v. Taghizadeh, 28 Mass. App. Ct. 52, 60–61 (1989) (evidence that is relevant to an essential element of a crime, claim, or defense is not cumulative and subject to exclusion simply because an opposing party offers to stipulate to the fact at issue). See also Old Chief v. United States, 519 U.S. 172 (1997).

Courtroom Experiments and Demonstrations. In order to admit evidence of an in-court or out-of-court demonstration or experiment, the proponent must establish to the satisfaction of the judge that "the conditions or circumstances were in general the same in the illustrative case and the case in hand." Commonwealth v. Makarewicz, 333 Mass. 575, 592 (1956). See, e.g., Commonwealth v. Corliss, 470 Mass. 443, 454–456 (2015) (judge did not abuse his discretion by excluding video of perpetrator committing the offense with a superimposed height chart created by defense expert on grounds that under the circumstances it was misleading; judge did admit height chart as a separate exhibit, along with expert witness testimony about limitations of the surveillance video); Commonwealth v. McGee, 469 Mass. 1, 7 (2014) (judge did not abuse his discretion in permitting child witness, then six years old, to use a couch to demonstrate how victim was positioned as defendant killed her); Commonwealth v. Perryman, 55 Mass. App. Ct. 187, 192–193 (2002) (judge did not abuse her discretion in permitting jurors during trial to look through telescope used by police officer to spot defendant in alleged drug transaction).

Evidence of Similar Occurrences. Evidence of similar occurrences may be admitted if there is substantial identity between the occurrences and there is minimal danger of unfairness, jury confusion, or wasted time. See Denton v. Park Hotel, Inc., 343 Mass. 524, 527 (1962); Robitaille v. Netoco Community Theatre of N. Attleboro, Inc., 305 Mass. 265, 267–268 (1940). The nonoccurrence of an event may be admissible to rebut an allegation that a dangerous condition existed at a particular time. Haskell v. Boat Clinton-Serafina, Inc., 412 F.2d 896, 896–897 (1st Cir. 1969).

The requirement of substantial identity is not met when the other occurrence or occurrences "may have been the consequence of idiosyncratic circumstances" and therefore irrelevant to the case being tried. Read v. Mt. Tom Ski Area, Inc., 37 Mass. App. Ct. 901, 902 (1994); Robitaille v. Netoco Community Theatre of N. Attleboro, Inc., 305 Mass. at 266–267 (substantial identity in the circumstances is only the first element; "[u]nless a comparison of the circumstances and causes of the two injuries is made, the injury to another is without significance"). Evidence of similar occurrences may be admissible to show the following:

***Causation*.** Carter v. Yardley & Co., 319 Mass. 92, 94 (1946) (other instances of skin irritation caused by defendant's perfume properly admitted to show causation); Shea v. Glendale Elastic Fabrics Co., 162 Mass. 463, 464–465 (1894) (evidence that other people who worked in the defendant's mill, under similar conditions, became ill from lead poisoning was admissible to prove cause of the illness). But see Reil v. Lowell Gas Co., 353 Mass. 120, 135–136 (1967) (after an explosion at a gas plant, evidence of multiple fires at that plant and another plant owned by the defendant were inadmissible because those incidents "would have been little help in determining the cause of the explosion on [the date in question]").

***Notice*.** Santos v. Chrysler Corp., 430 Mass. 198, 202–205 (1999) (judge did not abuse her discretion in admitting the testimony of six Chrysler minivan owners regarding other braking incidents involving their minivans, as well as National Highway Transportation Safety Administration [NHTSA] vehicle owners' questionnaires submitted by the six owners to establish notice of defect); Elwell v. Del Torchio, 349 Mass. 766, 766 (1965) (Where the plaintiff was injured by a stairway railing giving way, "[t]here was no error in admitting the evidence of a similar accident occurring about a year before and disclosed to one of the defendants. Such testimony was relevant to show knowledge of the defect."). But see Crivello v. All-Pak Mach. Sys., 446 Mass. 729, 737–738 (2006) (evidence of prior accidents involving a bagging machine were properly excluded because the evidence did not establish that the defendants were aware of any accidents).

***Rebuttal of Claim of Impossibility*.** Griffin v. General Motors Corp., 380 Mass. 362, 365–366 (1980) (results of an experiment on the air filtration system of the same model car that was at issue in the case were

admissible to rebut the defendant's theory that it was impossible for fumes from the engine compartment to enter the passenger compartment).

***Absence of Complaint*.** Carrel v. National Cord & Braid Corp., 447 Mass. 431, 447–448 (2006) (absence of oral or written complaints concerning a bungee cord admissible to rebut questions regarding failure to conduct product testing); Silver v. New York Cent. R.R. Co., 329 Mass. 14, 19–21 (1952) (evidence that eleven other passengers in the plaintiff's train car did not complain about the temperature to a porter would be admissible if the other passengers were in a substantially similar situation, if the porter's duties included receiving such complaints and he was present to receive complaints on that day, and if it was unlikely that the other passengers complained to another employee); Schuler v. Union News Co., 295 Mass. 350, 352 (1936) (absence of complaints of illness after people ate at defendant's restaurant was admissible to rebut claim that the defendant's turkey sandwich caused the plaintiff's sickness).

***Absence of Dangerous Condition*.** Haskell v. Boat Clinton-Serafina, Inc., 412 F.2d 896, 896–897 (1st Cir. 1969) (evidence that no similar accidents had occurred was admissible to rebut a claim that the plaintiff slipped on a thick patch of slime on the deck of the ship). But see Marvin v. City of New Bedford, 158 Mass. 464, 467 (1893) (evidence that no accidents had occurred on a highway was inadmissible to prove that a defect in the road did not exist).

***Foreseeability*.** Whitaker v. Saraceno, 418 Mass. 196, 199 (1994) (previous occurrences of similar criminal acts on defendant's premises may be considered in determining whether the event in question was foreseeable).

Exclusion as a Sanction. See Section 103(g), Rulings on Evidence, Objections, and Offers of Proof: Exclusion as Sanction; Section 1102, Spoliation or Destruction of Evidence.

Constitutional Considerations. In a criminal case, the defendant has a constitutional right to present a complete defense; however, this right does not deprive the trial judge of discretion to exclude evidence that is repetitive, only marginally relevant, or that creates an undue risk of unfair prejudice or confusion of the issues. See Commonwealth v. Kartell, 58 Mass. App. Ct. 428, 433 n.2 (2003). See also Commonwealth v. Carroll, 439 Mass. 547, 552 (2003); Commonwealth v. Edgerly, 372 Mass. 337, 343 (1977); Commonwealth v. Strickland, 87 Mass. App. Ct. 46, 54–55 (2015).

Weapons Evidence. Evidence that the defendant possessed a weapon that could have been used to commit the crime is admissible to show that the defendant had the means to commit the crime. See, e.g., Commonwealth v. Barbosa, 463 Mass. 116, 122 (2012); Commonwealth v. Ashman, 430 Mass. 736, 744 (2000); Commonwealth v. Toro, 395 Mass. 354, 356 (1985). See also Commonwealth v. Vazquez, 478 Mass. 443, 449 (2017) (no abuse of discretion to admit evidence of prior possession of firearm absent definitive forensic evidence that it could not have been used in commission of the crime). The evidence need not establish that the defendant possessed the weapon at the time the crime was committed. See Commonwealth v. Corliss, 470 Mass. 443, 450–451 (2015) (sixteen months before murder); Commonwealth v. McLaughlin, 352 Mass. 218, 229–230 (1967) (approximately one year after murder). See also Commonwealth v. Holley, 478 Mass. 508, 532–534 (2017) (evidence of prior gun theft was relevant to show that defendant had means of committing the crime; risk that jury would use evidence to conclude that defendant "had a propensity to commit this particular crime was low" where type of crime charged in underlying matter was different); Commonwealth v. Brown, 477 Mass. 805, 820 (2017) (photographs taken a few weeks prior to the crime showing defendant brandishing firearm used in commission of the crime admissible). By contrast, evidence of a type of weapon unconnected to the crime is generally inadmissible. See Commonwealth v. Veiovis, 477 Mass. 472, 486 (2017) (error to admit evidence of spiked baseball bat because there was "no evidence" that the bat could have been used to commit the crime); Commonwealth v. Valentin, 474 Mass. 301, 305–308 (2016) (evidence of defendant's "ownership of weapons other than the weapon used in the shootings" had little or no relevance and portrayed the defendant "as someone who was likely to commit murder, the crime with which he was charged"). Evidence of a firearm not connected to the crime may be admissible for the limited purpose of demonstrating that the defendant had access to, and knowledge of, firearms. Commonwealth v. Holley, 478 Mass. at 533. However, the evidence should be excluded if its

probative value is outweighed by the danger of unfair prejudice to the defendant. See Commonwealth v. McGee, 467 Mass. 141, 157–158 (2014); Commonwealth v. Barbosa, 463 Mass. 116, 122–123 (2012).

Limiting Instruction. A limiting instruction to the jury as to the proper use of evidence that the defendant possessed a weapon that could have been used in the commission of the crime is not required. Commonwealth v. Holley, 478 Mass. at 533 n.25. In contrast, where a weapon could not have been used in the commission of the crime, a limiting instruction to the jury as to the proper use of the evidence is "often" required. Id.

Section 404. Character Evidence; Crimes or Other Acts

(a) Character Evidence.

(1) Prohibited Uses. Evidence of a person's character or a character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:

(A) a defendant may offer evidence, in reputation form only, of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) where the identity of the first aggressor or the first to use deadly force is in dispute, a defendant may offer evidence of specific incidents of violence allegedly initiated by the victim, or by a third party acting in concert with or to assist the victim, whether known or unknown to the defendant, and the prosecution may rebut the same with specific incidents of violence by the defendant; and

(C) a defendant may offer evidence known to the defendant 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 by the victim that caused reasonable apprehension of violence on the part of the defendant.

(3) Exceptions for a Witness. Evidence of a witness's character for truthfulness or untruthfulness may be admitted under Sections 607, 608, and 609.

(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. However, evidence of other bad acts is inadmissible where its probative value is outweighed by the risk of unfair prejudice to the defendant, even if not substantially outweighed by that risk. Evidence of such an act is not admissible in a criminal case against a defendant who was prosecuted for that act and acquitted.

NOTE

Subsection (a). This subsection is derived from Commonwealth v. Helfant, 398 Mass. 214, 224 (1986), and Commonwealth v. Bonds, 445 Mass. 821, 829 (2006). Massachusetts follows the universally recognized rule against "propensity" evidence, i.e., evidence of a person's character through reputation or specific acts (see Section 404[b]) offered to suggest that the person acted in conformity with that character or trait on the occasion in question is inadmissible. See Maillet v. ATF-Davidson Co., 407 Mass. 185, 187–188 (1990); Commonwealth v. Doherty, 23 Mass. App. Ct. 633, 636–637 (1987). See also Commonwealth v. Reddy, 85 Mass. App. Ct. 104, 108 (2014) (admission of unredacted Chapter 209A order that stated "THERE IS A SUBSTANTIAL LIKELIHOOD OF IMMEDIATE DANGER OF ABUSE" was error in prosecution for violation of order, as it constituted improper predictive or propensity evidence). In Figueiredo v. Hamill, 385 Mass. 1003, 1003–1005 (1982), for example, the Supreme Judicial Court explained the difference between evidence of habit (a regular way of doing things) and evidence of character (a general description of one's disposition), and held that evidence offered by the defendant that the decedent acted in a "habitually reckless manner" was inadmissible evidence of the decedent's character. There is a distinction between criminal profile evidence (evidence of whether the defendant shares characteristics common to individuals who commit a particular crime) and character evidence (traits personal to the defendant). Commonwealth v. Coates, 89 Mass. App. Ct. 728, 735 (2016) (holding that criminal profile evidence offered to show that defendant did not have pedophilic tendencies was irrelevant and inadmissible). The prosecution may not offer in its case-in-chief evidence that the defendant is a violent or dishonest person in order to demonstrate that the defendant has a propensity to commit the crime charged. Commonwealth v. Mullane, 445 Mass. 702, 708–709 (2006). See also Commonwealth v. Roe, 90 Mass. App. Ct. 801, 807–808 (2016) (even where normally inadmissible evidence of character may be admitted for permissible purpose, failure to guide jury on their use of this evidence through proper instruction is prejudicial error). But see Commonwealth v. Adjutant, 443 Mass. 649, 664 (2005), discussed in the notes to Section 404(a)(2)(B). As Justice Cardozo stated, "the law has set its face against the endeavor to fasten guilt upon him by proof of character or experience predisposing to an act of crime." People v. Zackowitz, 254 N.Y. 192, 197, 172 N.E. 466, 468 (1930).

While Section 404(a) applies in both civil and criminal cases, the exceptions in (2) apply only in criminal cases, while the exception in (3) applies in both civil and criminal cases.

Subsection (a)(2)(A). This subsection is derived from Commonwealth v. Nagle, 157 Mass. 554, 554–555 (1893), and Commonwealth v. Brown, 411 Mass. 115, 117–118 (1991). According to long-standing practice, the defendant may introduce evidence of his or her own good character—in reputation form only—to show that he or she is not the type of person to commit the crime charged. See Commonwealth v. Belton, 352 Mass. 263, 267–269 (1967). The defendant is limited to introducing reputation evidence of traits that are involved in the charged crime. Commonwealth v. Beal, 314 Mass. 210, 229–230 (1943).

The prosecution has the right to cross-examine for impeachment purposes the defendant's character witnesses on matters that are inconsistent with the character trait to which the witness has testified, including specific instances of bad conduct or criminal activity. See Commonwealth v. Oliveira, 74 Mass. App. Ct. 49, 53 (2009) (When, in a prosecution for assault and battery, the defendant testified to his character for peacefulness, the trial judge did not abuse her discretion by ruling that the Commonwealth was entitled to cross-examine the defendant based on his prior convictions for the same offenses involving the same victim to rebut his credibility as to his character, even though the Commonwealth's motion in limine to use these prior convictions for impeachment purposes had been denied prior to trial.). See also Section 405(a), Methods of Proving Character: By Reputation. The prosecution may also present rebuttal evidence of the defendant's bad character in reputation form. Commonwealth v. Maddocks, 207 Mass. 152, 157 (1910).

Subsection (a)(2)(B). This subsection is derived from Commonwealth v. Adjutant, 443 Mass. 649, 664 (2005); Commonwealth v. Pring-Wilson, 448 Mass. 718, 737 (2007); and Commonwealth v. Chambers, 465 Mass. 520, 529–530 (2013). Where a claim of self-defense is asserted and the identity of the first aggressor is in dispute, trial courts have discretion to admit a defendant's evidence of specific incidents of violence

allegedly initiated by the victim even if unknown to the defendant. Commonwealth v. Adjutant, 443 Mass. at 664. The Adjutant rule does not permit evidence of the victim's participation in athletic activities such as boxing or martial arts on the issue of whether the victim was the first aggressor, although such activities may, if known to the defendant, be relevant to a claim of self-defense based on the defendant's reasonable fear of the victim. Commonwealth v. Amaral, 78 Mass. App. Ct. 557, 559 (2011). If known to the defendant, the specific act evidence goes to the defendant's state of mind, Commonwealth v. Simpson, 434 Mass. 570, 577 (2001); if the defendant was not aware of the violent acts of the victim, the evidence goes merely to the propensity of the victim to attack. Commonwealth v. Adjutant, 443 Mass. at 661–662. See generally id. at 665 (courts "favor the admission of concrete and relevant evidence of specific acts over more general evidence of the victim's reputation for violence"). The rule announced in Commonwealth v. Adjutant is a "new common-law rule of evidence" to be applied prospectively only. Id. at 667. See also Commonwealth v. Clemente, 452 Mass. 295, 304–305 (2008) (declining to apply the Adjutant rule retrospectively). Judicial discretion to admit evidence of specific acts of violence on the question of who was the first aggressor extends to third parties acting in concert with or to assist the victim. Commonwealth v. Lopes, 89 Mass. App. Ct. 560, 564 (2016). Where the identity of either the initial aggressor or the first person to use or threaten deadly force is not in dispute, evidence of the victim's history of violence is not admissible. See Commonwealth v. Vargas, 475 Mass. 338, 346–348 (2016) (victim's history of violence inadmissible where both defendant and prosecution witnesses were "consistent in their portrayal of the victim as the initial aggressor").

If the defendant introduces evidence of specific instances of the victim's violent conduct to help establish the identity of the first aggressor, the prosecution may rebut by introducing evidence of the victim's propensity for peacefulness. Commonwealth v. Adjutant, 443 Mass. at 666 n.19. See Commonwealth v. Lapointe, 402 Mass. 321, 325 (1988). The Commonwealth is also permitted to rebut such evidence by introducing specific instances of the defendant's prior violent acts. Commonwealth v. Morales, 464 Mass. 302, 310–311 (2013). In such cases, as in traditional Adjutant-type cases, the judge must exercise discretion and determine whether the probative value of the proposed testimony about who was the first to use deadly force is substantially outweighed by its prejudicial effect. Commonwealth v. Chambers, 465 Mass. 520, 531 (2013).

Cross-Reference: Section 412, Sexual Behavior or Sexual Reputation (Rape-Shield Law).

Subsection (a)(2)(C). This subsection is derived from Commonwealth v. Sok, 439 Mass. 428, 434–435 (2003), and Commonwealth v. Fontes, 396 Mass. 733, 735–736 (1986). The evidence may be offered to prove the defendant's state of mind and the reasonableness of his or her actions in claiming to have acted in self-defense so long as the defendant knew about it prior to the incident in question. See Commonwealth v. Edmonds, 365 Mass. 496, 502 (1974).

Subsection (a)(3). This subsection is derived from Commonwealth v. Daley, 439 Mass. 558, 563 (2003). See Notes to Sections 607, Who May Impeach a Witness; 608, A Witness's Character for Truthfulness or Untruthfulness; and 609, Impeachment by Evidence of Conviction of Crime.

Subsection (b). This subsection is derived from Commonwealth v. Crayton, 470 Mass. 228 (2014); Commonwealth v. Helfant, 398 Mass. 214, 224–225 (1986); and G. L. c. 233, § 23F. "[W]hile evidence of other . . . wrongful behavior may not be admitted to prove the character or propensity of the accused as enhancing the probability that he committed the offence[,] . . . it is admissible for other relevant probative purposes." Commonwealth v. Tobin, 392 Mass. 604, 613 (1984), quoting Commonwealth v. Chalifoux, 362 Mass. 811, 815–816 (1973). Compare Commonwealth v. Valentin, 474 Mass. 301, 307–308 (2016) (admission of evidence concerning defendant's ownership of weapons other than weapon used to commit crime was improper because it "portrayed him as someone who was likely to commit murder, the crime which was charged"), with Commonwealth v. Rutherford, 476 Mass. 639, 649 (2017) (uncharged conduct involving possession of weapons permissible to show defendant's state of mind; prejudicial impact limited by prompt and thorough limiting instruction), and Commonwealth v. McGee, 467 Mass. 141, 156 (2014) (firearm that could not have been used to shoot victim, but that was offered to establish that defendant was

familiar with firearms, was admissible only if accompanied by limiting instruction that it could not be taken as propensity evidence).

Thus, the prosecution may not offer proof of the defendant's other bank robberies to paint the defendant as a "bank robber" or criminal type; but if the modus operandi of a prior bank robbery functions as an identifying feature because it is so distinctive as to be like a signature, it may be admitted to connect the defendant to the bank robbery which shares the same modus operandi. See Commonwealth v. Jackson, 428 Mass. 455, 459–460 (1998). See also Commonwealth v. Rakes, 478 Mass. 22, 42–44 (2017) (evidence of defendant's prior incarceration, including certificate of parole, VAX transportation sheet, and booking sheet page with attached photographs, along with his statement that he "wasn't about to do any more time," admissible to prove defendant's identity and motive to kill victim); Commonwealth v. Brown, 477 Mass. 805, 820 (2017) (evidence of armed robbery occurring earlier in the day introduced to prove coventurer's intent to participate in subsequent armed robbery later that evening); Commonwealth v. Veiovis, 477 Mass. 472, 482–486 (2017) (where evidence showed that unidentified perpetrator "enjoyed cutting the victims up," amputation drawings from defendant's home admissible to show identity, state of mind, and motive; drawings were not modus operandi evidence); Commonwealth v. Oberle, 476 Mass. 539, 550–552 (2017) (allowing previous domestic violence incident by defendant against victim to be admitted in prosecution for subsequent domestic violence to show nature of relationship between the two, and to show intent, motive, and absence of mistake or accident); Commonwealth v. Miller, 475 Mass. 212, 229–230 (2016) (evidence of domestic violence committed by defendant against his girlfriend, which led to confrontation between defendant and murder victim, properly admitted to show "contentious nature" of relationship between defendant and victim, which provided motive for killing); Commonwealth v. Mazariego, 474 Mass. 42, 56 (2016) (history of bringing prostitutes to location relevant to show intent, similarity in location of past encounters, absence of mistake, and level of involvement in planning crime); Commonwealth v. Forte, 469 Mass. 469, 480 (2014) (instances of aggressive conduct in hours preceding murder to illustrate angry state of mind); Commonwealth v. Akara, 465 Mass. 245, 267 (2013) (use of gang affiliation for nonpropensity purposes); Commonwealth v. Robidoux, 450 Mass. 144, 158 (2007) (to present full picture of events surrounding incident at issue); Commonwealth v. O'Laughlin, 446 Mass. 188, 208–209 (2006) (motive); Commonwealth v. Mullane, 445 Mass. 702, 708–710 (2006) (knowledge); Commonwealth v. Walker, 442 Mass. 185, 201–203 (2004) (plan, common scheme, or course of conduct); Commonwealth v. Mendes, 441 Mass. 459, 466 (2004) (motive); Commonwealth v. Sullivan, 436 Mass. 799, 809 (2002) (intent); Commonwealth v. Bianchi, 435 Mass. 316, 322 (2001) (evidence of prior assault before crime); Commonwealth v. Leonard, 428 Mass. 782, 787–788 (1999) (identity/modus operandi); Commonwealth v. Cordle, 404 Mass. 733, 744 (1989) (knowledge and motive); Commonwealth v. Bradshaw, 86 Mass. App. Ct. 74, 76 (2014) (in prosecution for rape of child, defendant's statement that he was attracted to young boys was admissible for limited purpose of revealing his motive or intent). See further Dahms v. Cognex Corp., 455 Mass. 190, 201 (2009) (trial judge did not err when, after careful consideration, he admitted evidence of female employee's clothing, speech, and conduct, which was admissible in context of sexually hostile work environment and not barred as irrelevant character and propensity evidence), and Commonwealth v. Source One Assocs., Inc., 436 Mass. 118, 128–129 (2002) (trial judge properly allowed evidence of telephone calls similar to ones at issue at trial—but which occurred after period of time at issue—for purposes of showing that defendants were familiar with using ruses and false pretenses to obtain personal financial information). Prior bad acts involving someone other than the victim may be admissible if connected in time, place, or other relevant circumstances. Commonwealth v. Robertson, 88 Mass. App. Ct. 52, 55 (2015).

For cases involving the defense of entrapment, compare Commonwealth v. Buswell, 468 Mass. 92, 104–105 (2014) (admissibility of prior bad acts when defense is entrapment), with Commonwealth v. Denton, 477 Mass. 248, 252 (2017) (risk of prejudice may require exclusion if prior bad acts are too remote in time).

It is not a foundational requirement for the admissibility of other bad act evidence under Section 404(b) that the Commonwealth show either that the evidence is necessary or that there is no alternative way to prove its case. Commonwealth v. Copney, 468 Mass. 405, 411–413 (2014).

Evidence of prior crimes or other bad acts is not admissible unless, as a matter of conditional relevance—see Section 104(b), Preliminary Questions: Relevance That Depends on a Fact—the judge is

satisfied that a reasonable jury could find that the event took place. Commonwealth v. Leonard, 428 Mass. 782, 785–786 (1999).

The evidence must be probative of a subsidiary fact at issue and not be too remote in time. Commonwealth v. Butler, 445 Mass. 568, 574 (2005); Commonwealth v. Trapp, 396 Mass. 202, 206–207 (1985). The same standards govern the admission of subsequent bad acts. Commonwealth v. Centeno, 87 Mass. App. Ct. 564, 566–567 (2015). See also Commonwealth v. Crayton, 470 Mass. 228, 248–252 (2014) (in prosecution for possession of child pornography on library computer, abuse of discretion to admit hand-drawn, pornographic sketches of children found in defendant's jail cell ten months after charged event, where primary factual issue was identity of person who used the library computer to view child pornography).

Due to the "inherent prejudice" associated with evidence of other bad acts, even when such evidence is relevant for a proper purpose other than propensity, the evidence should be excluded whenever "the risk of unfair prejudice outweighs its probative value." Commonwealth v. Crayton, 470 Mass. at 249 & n.27. See Commonwealth v. Woollam, 478 Mass. 493, 500–501 (2017) (where offered to establish motive in prosecution for first-degree murder, "testimony regarding the changes in the defendant once he began using drugs" was "more prejudicial than probative" where it included statement that defendant had become "a little more violent"). This is a more exacting standard than the standard set forth in Section 403, Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons.

The prohibition against propensity evidence in specific act form stems from the belief that not only does such evidence have low probative value and carry the distinct risk of undue prejudice, it will also inevitably lead to proliferation of issues and distract the attention of the fact finder from the main event. See Commonwealth v. Clifford, 374 Mass. 293, 298 (1978). As the Appeals Court has observed, "all cases where prior bad acts are offered invite consideration of the potency of this type of evidence, the risk that it may be misused, and the importance, in jury trials, of delivering careful limiting instructions." Commonwealth v. Gollman, 51 Mass. App. Ct. 839, 845 (2001), rev'd on other grounds, 436 Mass. 111, 113–115 (2002) (extensive discussion). See Commonwealth v. Roe, 90 Mass. App. Ct. 801, 807 (2016) (conviction reversed where witness testified to prior bad act ruled inadmissible in earlier motion in limine and judge failed to give full and prompt curative instruction). See generally Peter W. Agnes, Jr., Guided Discretion in Massachusetts Evidence Law: Standards for the Admissibility of Prior Bad Acts Against the Defendant, 13 Suffolk J. Trial & App. Advoc. 1 (2008).

Even if the evidence of another bad act is found to be more probative than unfairly prejudicial, it may be barred by the collateral estoppel principles of Article 12 of the Massachusetts Declaration of Rights if the defendant was prosecuted for the prior act and acquitted. See Commonwealth v. Dorazio, 472 Mass. 535, 547–548 (2015).

The corroboration requirement of G. L. c. 277, § 63, is not satisfied without independent corroborating evidence of the "specific criminal act at issue" and cannot be satisfied with only evidence of uncharged sexual misconduct. Commonwealth v. White, 475 Mass. 724, 736–738 (2016).

Cross-Reference: Section 105, Limited Admissibility; Section 403, Grounds for Excluding Relevant Evidence; Section 405, Methods of Proving Character; Section 406, Routine Practice of Business; Individual Habit; Section 611(b)(2), Manner and Order of Interrogation and Presentation: Scope of Cross-Examination: Bias and Prejudice.

Section 405. Methods of Proving Character

(a) By Reputation. Except as provided in (b) and (c), when evidence of a person's character or a character trait is admissible, it may be proved by testimony about the person's reputation only. On cross-examination of the character witness, the court may allow impeachment by an inquiry into relevant specific instances of the person's conduct.

(b) By Specific Instances of Conduct. When a person's character or a character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

(c) By Violent Character of the Victim. See Section 404(a)(2), Character Evidence; Crimes or Other Acts: Character Evidence: Exceptions for a Defendant or Victim in a Criminal Case.

NOTE

Subsection (a). This subsection is derived from Commonwealth v. Roberts, 378 Mass. 116, 129 (1979), and Commonwealth v. Piedra, 20 Mass. App. Ct. 155, 160 (1985). Character may only be introduced through evidence of general reputation, except as provided by G. L. c. 233, § 21 (evidence of person's prior conviction is admissible to impeach his or her credibility), and Section 609, Impeachment by Evidence of Conviction of Crime. See Commonwealth v. Binkiewicz, 342 Mass. 740, 755 (1961). Unlike Federal law, general reputation cannot be proven by evidence of personal opinions or isolated acts. Commonwealth v. Walker, 442 Mass. 185, 198–199 (2004); Commonwealth v. Benjamin, 430 Mass. 673, 678 n.6 (2000). Reputation evidence must be based on one's reputation in the community or at that person's place of work or business. Commonwealth v. Walker, 442 Mass. at 198. See G. L. c. 233, § 21A (work or business); Commonwealth v. Dockham, 405 Mass. 618, 631 (1989) (community). A witness's testimony must be based on the witness's knowledge of the person's reputation in the community, not of the opinions of a limited number of people. Commonwealth v. Gomes, 11 Mass. App. Ct. 933, 933–934 (1981); Commonwealth v. LaPierre, 10 Mass. App. Ct. 871, 871 (1980). Contrast Commonwealth v. Walker, 442 Mass. at 197–199 (declining to adopt Proposed Mass. R. Evid. 405[a], which would permit character witnesses to testify not only about the defendant's reputation in the community, but also about their own opinion of the defendant's character).

A witness who testifies to a person's reputation is then subject to cross-examination for impeachment purposes "as to his awareness of rumors or reports of prior acts of misconduct by the [person], including prior arrests or convictions, that are inconsistent or conflict with the character trait to which the witness has testified." Commonwealth v. Montanino, 27 Mass. App. Ct. 130, 136 (1989). The prosecution may also present rebuttal evidence of a defendant's bad reputation. Commonwealth v. Maddocks, 207 Mass. 152, 157 (1910).

Subsection (b). This subsection is derived from Care & Protection of Martha, 407 Mass. 319, 325 n.6 (1990). "[P]ast parental conduct [is] relevant to the issue of current parental fitness where that conduct [is] not too remote, especially where the evidence support[s] the continuing vitality of such conduct." Adoption of Larry, 434 Mass. 456, 469 (2001). For example, a person's prior criminal history as maintained by the Commissioner of Probation (a Criminal Activity Record Information report) is admissible where character is directly at issue, as in child custody and adoption cases. See Custody of Vaughn, 422 Mass. 590 (1996) (domestic violence); Care & Protection of Frank, 409 Mass. 492 (1991) (substance abuse); Custody of Two Minors, 396 Mass. 610, 621 (1986) ("prior patterns of parental neglect or misconduct"). Specific act evidence may be admitted in those cases where character is directly at issue, such as negligent entrustment actions, see Leone v. Doran, 363 Mass. 1, 13–14, modified on other grounds, 363 Mass. 886 (1973); negligent hiring actions, see Foster v. Loft, Inc., 26 Mass. App. Ct. 289, 290–291 (1988); and when a defendant raises the defense of entrapment, see Commonwealth v. Buswell, 468 Mass. 92, 104–105 (2014).

Subsection (c). See Notes to Section 404(a)(2), Character Evidence; Crimes or Other Acts: Character Evidence: Exceptions for a Defendant or Victim in a Criminal Case.

Section 406. Routine Practice of a Business; Habit of an Individual

(a) Routine Practice of a Business. Evidence of the routine practice of a business organization or of one acting in a business capacity, if established through sufficient proof, may be admitted to prove that on a particular occasion the organization or individual acted in accordance with the routine practice.

(b) Individual Habit. Evidence of an individual's personal habit is not admissible to prove action in conformity with the habit on a particular occasion.

NOTE

This section is derived from Palinkas v. Bennett, 416 Mass. 273, 276–277 (1993). "A habit is a regular response to a repeated situation with a specific type of conduct." Id. at 277. A trial judge has discretion in distinguishing between a routine practice of a business and a personal habit. Id.

Subsection (a). Evidence of a routine practice or custom of a business is admissible to prove that the business acted in conformity therewith. See, e.g., Commonwealth v. Torrealba, 316 Mass. 24, 30 (1944) (custom of selling goods with receipt); Santarpio v. New York Life Ins. Co., 301 Mass. 207, 210 (1938) (custom of submitting insurance applications); Prudential Trust Co. v. Hayes, 247 Mass. 311, 314–315 (1924) (custom of sending letters).

> "Massachusetts draws a distinction between evidence of personal habit and evidence of business habit or custom. Evidence of a person's habits is inadmissible to prove whether an act was performed in accordance with the habit. . . . [F]or the purpose of proving that one has or has not done a particular act, it is not competent to show that he has or has not been in the habit of doing other similar acts. Despite this rule, evidence of business habits or customs is admissible to prove that an act was performed in accordance with the habit. . . . The fact that a habit is done by only one individual does not bar it from being a business habit." (Quotation and citations omitted.)

Palinkas v. Bennett, 416 Mass. 273, 276 (1993). See Ladd v. Scudder Kemper Invs., Inc., 433 Mass. 240, 243 (2001) (business includes sole proprietorship); Mumford v. Coghlin, 249 Mass. 184, 188 (1924) (notary's procedure of protesting notes); Mayberry v. Holbrook, 182 Mass. 463, 465 (1903) (physician's records of rendering services). A person is competent to testify about a routine business practice if the person is familiar with the practice. O'Connor v. SmithKline Bio-Science Labs., Inc., 36 Mass. App. Ct. 360, 365 (1994). Cf. Section 601, Competency.

Subsection (b). Unlike Federal practice, evidence of an individual's personal habit is not admissible to prove action in conformity therewith. See Davidson v. Massachusetts Cas. Ins. Co., 325 Mass. 115, 122 (1949). See also Commonwealth v. Wilson, 443 Mass. 122, 138 (2004) (owner's personal, not business, habit of locking door would be inadmissible); Figueiredo v. Hamill, 385 Mass. 1003, 1004–1005 (1982) (evidence that pedestrian accident victim habitually acted in reckless manner properly excluded).

Habit Versus Character. The distinction between habit and character is often difficult to make: habit "is the person's regular practice of meeting a particular kind of situation with a specific type of conduct," whereas character "is a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness." Figueiredo v. Hamill, 385 Mass. at 1004, quoting Advisory Committee Notes, Fed. R. Evid. 406.

Section 407. Subsequent Remedial Measures

(a) Prohibited Uses. When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.

(b) Exceptions. The court may admit this evidence for another purpose, such as impeachment or, if disputed, proving ownership, control, or the feasibility of precautionary measures.

NOTE

This section is derived from doCanto v. Ametek, Inc., 367 Mass. 776, 780 (1975), and Simmons v. Monarch Mach. Tool Co., 413 Mass. 205, 214 (1992), abrogated on other grounds by Vassallo v. Baxter Healthcare Corp., 428 Mass. 1, 20–23 (1998).

Subsection (a). Evidence of the following subsequent remedial measures has been excluded: sanding stairs or the street, Barnett v. Lynn, 433 Mass. 662, 666 n.5 (2001); National Laundry Co. v. Newton, 300 Mass. 126, 127 (1938); installation of a flashing light signal at a railroad crossing, Ladd v. New York, N.H. & H.R. Co., 335 Mass. 117, 120 (1956); repositioning a barrier across a sidewalk, Manchester v. City of Attleboro, 288 Mass. 492, 493 (1934); and precautions taken to avoid another collapse of a trench, Shinners v. Proprietors of Locks & Canals on Merrimack River, 154 Mass. 168, 169–171 (1891). The rule has been extended to exclude the results of a defendant's investigation into the causes of an accident. See Martel v. Massachusetts Bay Transp. Auth., 403 Mass. 1, 5 (1988).

Subsection (b). Evidence of a subsequent remedial measure is admissible to prove issues other than negligence. See Santos v. Chrysler Corp., 430 Mass. 198, 207–208 (1999) (manufacturer on notice of product defect); Schaeffer v. General Motors Corp., 372 Mass. 171, 175–176 (1977) (feasibility of giving adequate warnings); doCanto v. Ametek, Inc., 367 Mass. 776, 780–781 (1975) (feasibility of safety improvements); Reardon v. Country Club at Coonamessett, Inc., 353 Mass. 702, 704–705 (1968) (knowledge of the danger at time of accident); Finn v. Peters, 340 Mass. 622, 625 (1960) (ownership or control over the premises). Evidence of a preaccident remedial measure is also admissible for the same purposes. See doCanto v. Ametek, Inc., 367 Mass. at 780; Torre v. Harris-Seybold Co., 9 Mass. App. Ct. 660, 676 (1980).

When a party offers evidence of remedial measures to prove an issue other than negligence, the judge should determine whether it is relevant, see Section 402, General Admissibility of Relevant Evidence, and, if so, whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, see Section 403, Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reason. If the judge admits the evidence, the judge should, upon request, instruct the jury that the evidence cannot be considered as an admission of negligence or fault. See Section 105, Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purpose; Section 403, Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reason.

Section 408. Compromise Offers and Negotiations in Civil Cases

(a) Prohibited Uses. Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim:

(1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim or any other claim, and

(2) conduct or a statement made during compromise negotiations about the claim.

(b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or other state of mind, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

NOTE

This section is derived from Proposed Mass. R. Evid. 408, which was adopted in principle in Morea v. Cosco, Inc., 422 Mass. 601, 603–604 (1996). But see Zucco v. Kane, 439 Mass. 503, 510 (2003) ("even if we were to adopt the segment of [Proposed Mass. R. Evid. 408] pertaining to statements made during negotiations . . ."). "This rule is founded in policy, that there may be no discouragement to amicable adjustment of disputes, by a fear, that if not completed, the party amicably disposed may be injured" (quotation and citation omitted). Strauss v. Skurnik, 227 Mass. 173, 175 (1917).

Evidence that a defendant compromised or offered to compromise a claim arising from the same transaction with a third person not a party to the action is not admissible to prove the defendant's liability to the plaintiff. Murray v. Foster, 343 Mass. 655, 659–660 (1962); Ricciutti v. Sylvania Elec. Prods., Inc., 343 Mass. 347, 349 (1961). A closing agreement between the Internal Revenue Service and the plaintiff constitutes a settlement of a claim and is inadmissible on the question of liability. National Grid Holdings, Inc. v. Commissioner of Revenue, 89 Mass. App. Ct. 506, 520 (2016). In mitigation of damages, however, a defendant is entitled to the admission of evidence of a settlement amount between the plaintiff and a joint tortfeasor on account of the same injury, but such evidence is for the judge only and not the jury to consider. See Morea v. Cosco, Inc., 422 Mass. at 602–603.

Evidence of a compromise or offer to compromise may be admitted (with limiting instructions) for a purpose other than to prove liability or the invalidity of the claim, such as to impeach the credibility of a witness. See Zucco v. Kane, 439 Mass. at 509–510; Cottam v. CVS Pharmacy, 436 Mass. 316, 327–328 (2002). For example, in an employment discrimination case, statements contained in settlement correspondence were properly admitted as probative of the employer's state of mind. Dahms v. Cognex Corp., 455 Mass. 190, 199 (2009).

There can be no offer to compromise a claim unless there is indication that there is a potential lawsuit. See Hurwitz v. Bocian, 41 Mass. App. Ct. 365, 372–373 (1996). Whether a particular conversation constitutes a settlement offer or admission may require the resolution of conflicting testimony and is a preliminary question for the trial judge. Marchand v. Murray, 27 Mass. App. Ct. 611, 615 (1989). See Section 104(a), Preliminary Questions: In General. A unilateral statement that a party will "take care of" a loss will be treated as an admission of liability, not an offer to compromise. See, e.g., Cassidy v. Hollingsworth, 324 Mass. 424, 425–426 (1949) (defendant's statement made after accident that "I guess I owe you a fender" held to be admission of liability); Bernasconi v. Bassi, 261 Mass. 26, 28 (1927) (defendant's statement "I fix it up, everything," held to be admission of liability); Dennison v. Swerdlove, 250 Mass. 507, 508–509 (1925) (defendant's statement immediately after automobile accident that he would "adjust the damage to your car" was an admission of fault). An expression of sympathy does not qualify as either an offer to compromise or an admission of liability. See Section 409, Expressions of Sympathy in Civil Cases; Offers to Pay Medical and Similar Expenses.

Admissions made on the face of settlement documents are admissible. Zucco v. Kane, 439 Mass. at 510–511. Where, however, the parties "understood at [the time of the negotiations] that what was said at that time was said without prejudice to either party," admissions of fact will not be admissible at trial (quotation omitted). Garber v. Levine, 250 Mass. 485, 490 (1925). However, evidence of conduct or statements

made during such negotiations on collateral matters are admissible for their truth. See Wagman v. Ziskind, 234 Mass. 509, 510–511 (1920); Harrington v. Lincoln, 70 Mass. 563, 567 (1855); Dickinson v. Dickinson, 50 Mass. 471, 474–475 (1845). Cf. G. L. c. 233, § 23D (admissibility of benevolent statements, writings, or gestures relating to accident victims); Section 514, Mediation Privilege (under G. L. c. 233, § 23C, any communications made in course of mediation proceedings and in presence of mediator are not admissible, except where mediating labor disputes).

Cross-Reference: Section 403, Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons.

Section 409. Expressions of Sympathy in Civil Cases; Offers to Pay Medical and Similar Expenses

(a) Expressions of Sympathy in Civil Cases. Statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident and made to such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action.

(b) Payment of Medical and Similar Expenses. Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

(c) Medical Malpractice Claims. Any expression of benevolence, regret, apology, sympathy, commiseration, condolence, compassion, mistake, error, or a general sense of concern made by a health care provider, a facility, or an employee or agent of a health care provider or facility to the patient, a relative of the patient, or a representative of the patient, and that relates to an unanticipated outcome, shall be inadmissible as evidence in a medical malpractice action, unless the maker of the statement, or a defense expert witness, when questioned under oath during the litigation about facts and opinions regarding any mistakes or errors that occurred, makes a contradictory or inconsistent statement as to material facts or opinions, in which case the statements and opinions made about the mistake or error shall be admissible for all purposes.

NOTE

Subsection (a). This subsection is taken verbatim from G. L. c. 233, § 23D. See Gallo v. Veliskakis, 357 Mass. 602, 606 (1970); Casper v. Lavoie, 1 Mass. App. Ct. 809, 810 (1973). See also Denton v. Park Hotel, Inc., 343 Mass. 524, 528 (1962) (expressions of sympathy have "no probative value as an admission of responsibility or liability," and "[c]ommon decency should not be penalized by treating such statements as admissions").

Subsection (b). This subsection is derived from Gallo v. Veliskakis, 357 Mass. 602, 606 (1970), and Wilson v. Daniels, 250 Mass. 359, 364 (1924). This subsection is based on the public policy of encouraging a person to act "as a decent citizen with proper humane sensibilities" without having to admit liability (citations omitted). Lyons v. Levine, 352 Mass. 769, 769 (1967). Statements that accompany offers of payment are not excluded under this section if otherwise admissible. See Gallo v. Veliskakis, 357 Mass. at 606 (defendant's statements of sympathy and that he would take care of the medical bills were inadmissible because they "had no probative value as an admission of responsibility or liability" [citations omitted]). Cf. G. L. c. 231, § 140B (evidence of advanced payments to injured person by insurer is not admissible to prove liability).

Subsection (c). This subsection is taken nearly verbatim from G. L. c. 233, § 79L (effective November 4, 2012).

Section 410. Pleas, Offers of Pleas, and Related Statements

(a) Prohibited Uses. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

(1) a guilty plea that was later withdrawn or rejected,

(2) a nolo contendere plea,

(3) an admission to sufficient facts, or

(4) a statement made in connection with, and relevant to, any of the foregoing withdrawn or rejected pleas or admissions.

(b) Exception. The court may admit a statement described in Subsection (a)(4) in a criminal proceeding for perjury if the defendant made the statement under oath, on the record, and with counsel present.

NOTE

This section is taken from Mass. R. Crim. P. 12(f). Rule 12(f) bars the use in evidence in any criminal or civil proceeding of a withdrawn guilty plea, a withdrawn plea of nolo contendere, a withdrawn admission of sufficient facts, or a withdrawn offer of the same. See Mass. R. Crim. P. 12(f). But see Aetna Cas. & Sur. Co. v. Niziolek, 395 Mass. 737, 747–750 (1985) (guilty plea, not withdrawn, is an admission of material facts alleged in complaint or indictment and is admissible as evidence of an admission in subsequent civil case without having preclusive effect); Hopkins v. Medeiros, 48 Mass. App. Ct. 600, 613 (2000) ("An admission to sufficient facts may be introduced against the defendant in a subsequently litigated civil suit arising out of the same incident on the theory that the proceeding was the functional equivalent of a guilty plea, with the same degree of finality" [quotations and citation omitted].); Section 801(d)(2)(A), Definitions: Statements That Are Not Hearsay: An Opposing Party's Statement. Except in a prosecution for perjury, the bar applies to any statement made in the course of the plea negotiations as long as it is relevant to the negotiations. See Mass. R. Crim. P. 12(f).

Unlike Fed. R. Evid. 410, the statements in question need not have been made to an attorney for the prosecuting authority to qualify for exclusion. See Commonwealth v. Wilson, 430 Mass. 440, 442–443 (1999). Rule 12(f) excludes only statements made during "plea negotiations," not the apparently broader "plea discussions" referred to in Fed. R. Evid. 410. Id. at 443 (while statements to a detective could be excluded under Mass. R. Crim. P. 12[f], the statements were nonetheless admissible because they were not made during plea negotiations). On the issue of what constitutes plea negotiations, see Commonwealth v. Smiley, 431 Mass. 477, 482 n.3 (2000) (holding there were no plea negotiations where prosecutor made no promises, commitments, or offers and defendant did not give his statement only in consideration of a benefit offered by prosecutor), and Commonwealth v. Luce, 34 Mass. App. Ct. 105, 111–112 (1993) (meetings between defendant, counsel, and government officers did not constitute plea bargaining).

A refusal to plead guilty is not admissible when offered by the defendant to prove consciousness of innocence. See Commonwealth v. DoVale, 57 Mass. App. Ct. 657, 662–663 (2003).

Section 411. Insurance

Evidence that a person or entity was or was not insured against liability is not admissible to prove whether the person or entity acted negligently or otherwise wrongfully. But the court may admit evidence of insurance for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.

NOTE

The first sentence of this section is derived from Goldstein v. Gontarz, 364 Mass. 800, 807–814 (1974) (extensive discussion of principles and authorities), and Leavitt v. Glick Realty Corp., 362 Mass. 370, 372 (1972). The exclusion covers (1) evidence offered by the plaintiff that the defendant is insured, (2) evidence offered by the defendant that the plaintiff has received third-party compensation for an injury, (3) evidence offered by the defendant that he or she is not protected by insurance, and (4) evidence offered by the plaintiff that he or she has no resort to insurance or other coverage for the loss. Goldstein v. Gontarz, 364 Mass. at 808–810.

The second sentence of this section is derived from Fed. R. Evid. 411 and Proposed Mass. R. Evid. 411 and is consistent with Massachusetts law. Evidence of insurance coverage may be admissible where the issue of control over the covered premises is disputed because the jury could properly infer "that the defendants would not have deemed it prudent to secure indemnity insurance on [an area] not within their control, or for the careless management or defective condition of which they could not be held responsible." Perkins v. Rice, 187 Mass. 28, 30 (1904). A blanket insurance policy covering more than one location is not, however, admissible to show control. See Camerlin v. Marshall, 411 Mass. 394, 398 (1991).

Evidence of insurance coverage or lack thereof may be admissible to establish the bias of a witness. Goldstein v. Gontarz, 364 Mass. 800, 812 (1974). See Corsetti v. Stone Co., 396 Mass. 1, 16–21 (1985); McDaniel v. Pickens, 45 Mass. App. Ct. 63, 66–67 (1998); Commonwealth v. Danis, 38 Mass. App. Ct. 968, 968 (1995). See also Masters v. Khuri, 62 Mass. App. Ct. 467, 471–472 (2004); Harris-Lewis v. Mudge, 60 Mass. App. Ct. 480, 487–488 (2004).

Inadmissibility Due to Prejudicial Effect. Evidence of an insurance policy may still be excluded where its prejudicial effect substantially outweighs its probative value after contemplating the effectiveness of a limiting instruction. See Goldstein v. Gontarz, 364 Mass. 800, 812–813 (1974). See also Shore v. Shore, 385 Mass. 529, 530–532 (1982) (appropriate instructions could have cured possible prejudice from excluded evidence of insurance policy). But see McDaniel v. Pickens, 45 Mass. App. Ct. 63, 70 (1998) (raising but not reaching the issue of "whether jurors have attained to such a level of sophistication that they can take insurance and related things in stride when properly instructed" [citations omitted]).

Collateral Source Rule. Evidence of collateral source payments is generally not admissible to reduce the amount of damages recoverable, but may be admissible if probative of a relevant issue, such as impeaching the plaintiff's credibility or showing motive. See Corsetti v. Stone Co., 396 Mass. 1, 16–21 (1985); Savers Prop. & Cas. Ins. Co. v. Admiral Ins. Agency, Inc., 61 Mass. App. Ct. 158, 165–166 (2004), and cases cited; Rolanti v. Boston Edison Corp., 33 Mass. App. Ct. 516, 524–525 (1992).

The full amount of a medical or hospital bill is admissible as evidence of the reasonable value of the services rendered to the injured person, even where the amount actually paid by a private or public insurer is less than that amount. The actual amount paid by insurance is not admissible, but the defendant may offer evidence to establish the range of payments accepted by that provider for that particular service. Law v. Griffith, 457 Mass. 349, 353–354 (2010). See G. L. c. 233, § 79G. The court may instruct the jury that any amounts paid by insurance are subject to recoupment by the payor. Scott v. Garfield, 454 Mass. 790, 801

(2009). The amounts actually paid to the health providers by the health insurer must be redacted on medical bills admitted into evidence. Id.

Unless it is relevant for some other purpose, evidence of a settlement with another defendant is not admissible to reduce the amount of damages, but the court should make the appropriate deduction after the verdict. Morea v. Cosco, Inc., 422 Mass. 601, 603 (1996). In most cases, the verdict in a motor vehicle liability case will be reduced by the amount of any personal injury protection benefits received by the plaintiff. G. L. c. 90, § 34M. In a medical malpractice case, the defendant may, at a postverdict hearing, offer evidence to the court as to the amount of medical bills that have been covered by insurance. The amount of any such bills, less the amount of any premiums paid by the plaintiff for one year prior to the accrual of the cause of action, shall be deducted from the itemized verdict. This procedure does not apply to any payor who has subrogation rights based on any Federal law. G. L. c. 231, § 60G.

Section 412. Sexual Behavior or Sexual Reputation (Rape-Shield Law)

(a) Prohibited Uses. Except as otherwise provided, the following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

(1) evidence offered to prove that a victim engaged in other sexual behavior or

(2) evidence offered to prove a victim's sexual reputation.

(b) Exceptions. The court may admit the following evidence in a criminal case:

(1) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct;

(2) evidence of specific instances of a victim's recent sexual behavior if offered to prove that someone other than the defendant was the source of any physical feature, characteristic, or condition of the victim; and

(3) evidence whose exclusion would violate the defendant's constitutional rights.

(c) Procedure to Determine Admissibility.

(1) Motion. If a party intends to offer evidence under Subsection (b), the party must file a motion and an offer of proof.

(2) Hearing. Before admitting evidence under this section, the court must conduct a hearing, in open court, unless the judge makes appropriate findings to support courtroom closure. The judge must find that the weight and relevance (probative value) of the evidence is sufficient to outweigh its prejudicial effect to the victim. The court must make and file a written finding, but its finding must not be made available to the jury.

(d) Definition of "Victim." In this section, "victim" includes an alleged victim.

NOTE

Subsection (a). This subsection is derived from G. L. c. 233, § 21B, and Commonwealth v. Domaingue, 397 Mass. 693, 696–700 (1986). Evidence of a victim's sexual conduct cannot be introduced at a trial for any of the crimes on this nonexhaustive list: G. L. c. 265, §§ 13B, 13F, 13H, 22, 22A, 23, 24, and 24B, and

G. L. c. 272, § 29A. Evidence in the form of reputation or opinion is not admissible to prove the complainant's reputation for unchastity. See Commonwealth v. Joyce, 382 Mass. 222, 227–228 (1981) (the rape-shield statute "reverses the common law rule under which evidence of the complainant's general reputation for unchastity was admissible" [citation omitted]). Note that the cases use the terms "victim" and "complainant" interchangeably.

"The rape-shield statute is principally designed to prevent defense counsel from eliciting evidence of the victim's promiscuity as part of a general credibility attack." Commonwealth v. Fitzgerald, 412 Mass. 516, 523 (1992). "The policy rationale for this law is that evidence of the victim's prior sexual conduct might divert attention from the alleged criminal acts of the defendant, inappropriately putting the victim on trial" (citations omitted). Commonwealth v. Houston, 430 Mass. 616, 621 (2000). In Commonwealth v. Parent, 465 Mass. 395, 404–405 (2013), the Supreme Judicial Court held that the trial judge did not abuse her discretion in ruling that a witness who overheard the victim speaking on a cell phone could testify that the victim invited a boy to visit her on the evening of the alleged sexual assault but would not be permitted to testify that the victim was overheard promising to engage in oral sex.

Subsection (b)(1). This subsection is taken from G. L. c. 233, § 21B. The complainant's prior sexual activity with the defendant may be relevant to the issue of consent, particularly to show the complainant's emotion to that particular defendant. Commonwealth v. Grieco, 386 Mass. 484, 488 (1982). Cf. Commonwealth v. Fionda, 33 Mass. App. Ct. 316, 321–322 (1992) (provocative conversation and kissing on prior occasion not probative of consent to intercourse on later occasion).

Subsection (b)(2). This subsection is taken from G. L. c. 233, § 21B. Prior acts with another person may be relevant to establishing an alternative cause for the complainant's physical condition. See, e.g., Commonwealth v. Fitzgerald, 402 Mass. 517, 521–522 (1988), S.C., 412 Mass. 516, 521–525 (1992) (presence of sperm where defendant underwent a vasectomy); Commonwealth v. Cardoza, 29 Mass. App. Ct. 645, 648–649 (1990) (presence of foreign pubic hair not belonging to defendant should have been admitted).

Subsection (b)(3). This subsection is derived from Commonwealth v. Joyce, 382 Mass. 222, 227–229 (1981). The Supreme Judicial Court has stated that

> "[a] defendant's constitutional right to put forth his full defense outweighs the interests underlying the rape-shield statute, however, only if he shows that the theory under which he proceeds is based on more than vague hope or mere speculation, and he may not engage in an unbounded and freewheeling cross-examination in which the jury are invited to indulge in conjecture and supposition" (quotations and citations omitted).

Commonwealth v. Thevenin, 33 Mass. App. Ct. 588, 592–593 (1992).

"Where evidence of bias is available by other means, no evidence of the complainant's prior sexual history should be admitted." Commonwealth v. Gagnon, 45 Mass. App. Ct. 584, 589 (1998). See also Commonwealth v. Pyne, 35 Mass. App. Ct. 36, 38 (1993), citing Commonwealth v. Elder, 389 Mass. 743, 751 nn.11–12 (1983). Cf. Commonwealth v. Stockhammer, 409 Mass. 867, 875 (1991) (specific act evidence may be used to demonstrate the complainant's bias or motive to fabricate). Evidence may be used to show that the complainant made prior false allegations of rape or abuse. See Commonwealth v. Bohannon, 376 Mass. 90, 94–95 (1978) (evidence admissible where witness was the complainant at trial, consent was central issue, complainant's testimony was inconsistent and confused, and there was independent basis for concluding that prior allegations were false). Cf. Commonwealth v. Talbot, 444 Mass. 586, 590–591 (2005); Commonwealth v. Blair, 21 Mass. App. Ct. 625, 626–629 (1986). A defendant may introduce evidence that a complainant has been subjected to past sexual abuse to explain the complainant's inappropriate knowledge of sexual matters. See Commonwealth v. Ruffen, 399 Mass. 811, 814–817 (1987). See also Commonwealth v. Beaudry, 445 Mass. 577, 580–586 (2005). A trial judge has discretion to admit evidence of a complainant's prior conviction for a sexual offense, but must take into consideration the objectives of the rape-shield statute. See Commonwealth v. Harris, 443 Mass. 714, 723–728 (2005) (harmonizing G. L. c. 233, §§ 21 and 21B). "The judge must determine whether the weight and relevance of the proffered evidence of bias or motive to lie is sufficient to outweigh its prejudicial effect to the victim" (internal

citation omitted). Commonwealth v. Noj, 76 Mass. App. Ct. 194, 198–199 (2010). See also Commonwealth v. Thomas, 89 Mass. App. Ct. 422, 425–427 (2016) (no error in excluding rape victim's prior convictions for "prostitution-related offenses" where "nothing about the facts" gave victim motive to lie, and case did not involve consent defense).

Conversely, "[i]n the exercise of this discretion a trial judge should consider the important policies underlying the rape-shield statute. He should exclude evidence of specific instances of a complainant's sexual conduct in so far [sic] as that is possible without unduly infringing upon the defendant's right to show bias." Commonwealth v. Joyce, 382 Mass. 222, 231 (1981).

Subsection (c). This subsection is derived from G. L. c. 233, § 21B; Commonwealth v. Jones, 472 Mass. 707, 720–731 (2015); and Commonwealth v. Harris, 443 Mass. 714, 721 (2005). See Commonwealth v. Cortez, 438 Mass. 123, 129–130 (2002); Commonwealth v. Joyce, 382 Mass. 222, 232–233 (1981) (Braucher, J., concurring).

In Commonwealth v. Jones, 472 Mass. 707 (2015), the Supreme Judicial Court held that the Sixth Amendment right to a public trial applies to a rape-shield hearing. Despite the language of G. L. c. 233, § 21B, before closing the courtroom, the court must make case-specific findings in accordance with the four-part test articulated in Waller v. Georgia, 467 U.S. 39, 48 (1984):

> "[1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; [2] the closure must be no broader than necessary to protect that interest; [3] the trial court must consider reasonable alternatives to closing the proceeding; and [4] it must make findings adequate to support the closure."

Cross-Reference: Section 403, Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reason; Note "Validity of Claim of Privilege" to Section 511(b), Privilege Against Self-Incrimination: Privilege of a Witness.

Section 413. First Complaint of Sexual Assault

(a) Admissibility of First Complaint. Testimony by the recipient of a complainant's first complaint of an alleged sexual assault regarding the fact of the first complaint and the circumstances surrounding the making of that first complaint, including details of the complaint, is admissible for the limited purpose of assisting the jury in determining whether to credit the complainant's testimony about the alleged sexual assault, not to prove the truth of the allegations.

(b) Admissibility of Additional Reports of a Sexual Assault Under an Alternative Evidentiary Basis. When otherwise admissible testimony or evidence other than the first complaint includes or implies that a report of a sexual assault was made, it may be admitted only if the trial judge determines that (1) it serves an evidentiary purpose other than to corroborate the testimony of the alleged victim and (2) its probative value outweighs its prejudicial effect.

NOTE

Subsection (a). This subsection is taken nearly verbatim from Commonwealth v. King, 445 Mass. 217, 218–219 (2005), cert. denied, 546 U.S. 1216 (2006). In Commonwealth v. King, the Supreme Judicial Court replaced the doctrine of "fresh complaint" with that of "first complaint." Id. at 241–248. See also Commonwealth v. Aviles, 461 Mass. 60, 71 (2011) (reaffirming the first complaint doctrine and explaining that it is not an "evidentiary rule" but rather a "body of governing principles to guide a trial judge on the admissibility of first complaint evidence").

> "The doctrine seeks to balance the interest of two competing concerns: that a complainant (who . . . may be still a child) has her credibility fairly judged on the specific facts of the case rather than unfairly by misguided stereotypical thinking; and that the defendant receive a trial that is free from irrelevant and potentially prejudicial testimony."

Commonwealth v. Arana, 453 Mass. 214, 228 (2009).

> "Under the new doctrine . . . the recipient of a complainant's first complaint of an alleged sexual assault may testify about the fact of the first complaint and the circumstances surrounding the making of that first complaint. The witness may also testify about the details of the complaint. The complainant may likewise testify to the details of the first complaint (i.e., what she told the first complaint witness), as well as why the complaint was made at that particular time. Testimony from additional complaint witnesses is not admissible."

Commonwealth v. King, 445 Mass. at 218–219.

The first complaint rule not only applies to statements of the complaining witness, as a "neutral" rule of evidence, it is applicable whenever the credibility of an allegation of sexual assault is at issue. Therefore, the first complaint doctrine is available to the defendant in a sexual assault prosecution who claims to have been sexually assaulted by the complainant, because "such a defendant faces the same credibility obstacle in proving his or her defense as the Commonwealth faces in proving the indictment." Commonwealth v. Mayotte, 475 Mass. 254, 260 (2016).

***Role of the Trial Judge*.** The following sections of this Note amplify the doctrinal framework set forth in the guideline. Regarding this "body of governing principles," the Supreme Judicial Court has explained that the trial judge "is in the best position to determine the scope of admissible evidence, keeping in mind the underlying goals of the first complaint doctrine, our established first complaint jurisprudence, and our guidelines for admitting or excluding relevant evidence." Commonwealth v. Aviles, 461 Mass. 60, 73 (2011). The exercise of discretion as to whether evidence is admissible under the first complaint doctrine is fact specific and requires the trial judge to conduct a careful and thorough analysis based on the principles set forth in this Note. "Once a judge has carefully and thoroughly analyzed these considerations, and has decided that proposed first complaint evidence is admissible, an appellate court shall review that determination under an abuse of discretion standard." Id.

***Applicability of First Complaint Doctrine*.** The first complaint doctrine is not applicable to cases in which neither the fact of a sexual assault nor the consent of the complainant is at issue. Commonwealth v. King, 445 Mass. 217, 247 (2005).

> "First complaint testimony, including the details and circumstances of the complaint, will be considered presumptively relevant to a complainant's credibility in most sexual assault cases where the fact of the assault or the issue of consent is contested. However, where neither the occurrence of a sexual assault nor the complainant's consent is at issue [i.e., identity of the perpetrator], the evidence will serve no corroborative purpose and will not be admissible under the first complaint doctrine."

Id.

***Identifying the First Complaint*.** That the complainant's first report of a sexual assault is abbreviated in nature does not change its status as the first complaint. See Commonwealth v. Stuckich, 450 Mass. 449, 455–456 (2008). A victim's report of a sexual assault may qualify as a first complaint even if it does not include the identity of the perpetrator. Commonwealth v. Asenjo, 477 Mass. 599, 603 (2017). A first complaint witness is not disqualified from testifying where the alleged victim previously disclosed only physical abuse to that witness. Commonwealth v. Rivera, 83 Mass. App. Ct. 581, 584 (2013). While ordinarily there will be only one first complaint witness, two first complaint witnesses may testify in circumstances "where each witness testifies to disclosures years apart concerning different periods of time and escalating levels of abuse, which constitute different and more serious criminal acts committed over a lengthy period." Commonwealth v. Kebreau, 454 Mass. 287, 288–289 (2009). See Commonwealth v. Aviles, 461 Mass. 60, 71 n.9 (2011) (distinguishing Kebreau and limiting first complaint to initial disclosure of "touching" where subsequent disclosure of rape could have been disclosed by complainant as part of her first complaint); Commonwealth v. Lewis, 91 Mass. App. Ct. 651, 659–661 (2017) (two first complaints admissible where each complaint concerned a separately charged rape, and each piece of evidence was carefully limited to the facts of one rape). The fact that the complainant tells someone that he or she is upset, unhappy, or scared is not a first complaint. See Commonwealth v. Murungu, 450 Mass. 441, 446 (2008). "Law enforcement officials, as well as investigatory, medical, or social work professionals, may testify to the complaint only where they are in fact the first to have heard of the assault, and not where they have been told of the alleged crime after previous complaints or after an official report." Commonwealth v. King, 445 Mass. at 243.

The first complaint evidence could be in the form of a recorded 911 emergency telephone call, a letter, or a G. L. c. 209A abuse prevention complaint affidavit; a live witness is not required. Commonwealth v. Stuckich, 450 Mass. at 455–456; Commonwealth v. Lewis, 91 Mass. App. Ct. at 661–662.

***Limiting Instruction Required*.** Whenever first complaint evidence is admitted, whether through the complainant or the first complaint witness, the court must give the jury a limiting instruction. Commonwealth v. King, 445 Mass. 217, 219, 247–248 (2005). The instruction must be given contemporaneously with the first complaint testimony and again during the final instruction. Id. at 248.

***Determination of Who Is the First Complaint Witness*.** The determination of who is the first complaint witness is a preliminary question of fact for the trial judge. Commonwealth v. Stuckich, 450 Mass. 449, 455–456 (2008). See Section 104(a), Preliminary Questions: In General.

***Scope of the Doctrine*.** The first complaint doctrine applies only if the complainant is available for cross-examination about the first complaint. Commonwealth v. King, 445 Mass. 217, 247 n.27 (2005). "The timing by the complainant in making a complaint will not disqualify the evidence, but is a factor the jury may consider in deciding whether the first complaint testimony supports the complainant's credibility or reliability." Id. at 219. The first complaint doctrine applies even to cases in which there is a percipient witness (in addition to the victim) to the sexual assault. See Commonwealth v. Hartnett, 72 Mass. App. Ct. 467, 470 (2008). An alleged victim's inability to recall the details of the first complaint goes to the weight and not the admissibility of the testimony by the first complaint witness. See Commonwealth v. Wallace, 76 Mass. App. Ct. 411, 415 (2010).

The first complaint witness may "testify to the details of the complaint itself. By details, we mean that the witness 'may testify to the complainant's statements of the facts of the assault.'" Commonwealth v. King, 445 Mass. at 244, quoting Commonwealth v. Quincy Q., 434 Mass. 859, 874 (2001). The witness

> "may testify to the circumstances surrounding the initial complaint, [including] his or her observations of the complainant during the complaint; 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" (citation omitted).

Id. at 246.

Complete congruence between the testimony of the complainant and the testimony of the first complaint witness is not required; the first complaint witness cannot fill in missing elements in the Common-

wealth's case. Under Section 403, the trial judge has discretion to exclude details absent from the complainant's testimony. Commonwealth v. Rivera, 83 Mass. App. Ct. 581, 586 nn.5–6 (2013).

The alleged victim is permitted to testify to what he or she told the first complaint witness and why the complaint was made (1) when the first complaint witness or a court-approved substitute first complaint witness testifies at trial to those details, (2) when the first complaint witness is deceased, or (3) when the judge decides there is a compelling reason for the absence of the first complaint witness that is not the Commonwealth's fault. Commonwealth v. King, 445 Mass. at 245 & n.24.

A statement that qualifies as a spontaneous utterance by the victim reporting the assault also constitutes first complaint evidence such that an additional first complaint witness should not be permitted to testify, even if what that witness has to offer is more detailed or complete. Commonwealth v. McGee, 75 Mass. App. Ct. 499, 502–503 (2009); Commonwealth v. Davis, 54 Mass. App. Ct. 756, 765 (2002).

***Substitution of a Witness*.** Where feasible, the first person told of the alleged sexual assault should be the initial or first complaint witness to testify. Commonwealth v. King, 445 Mass. 217, 243–244 (2005). In Commonwealth v. Murungu, 450 Mass. 441, 445–448 (2008), the Supreme Judicial Court identified two exceptions to the first complaint doctrine. A person other than the first recipient of information from the complainant is allowed to testify as the first complaint witness (1) if the victim's disclosure to the "first person does not constitute a complaint," or (2) if the victim complains first to an individual who "has an obvious bias or motive to . . . distort the victim's remarks." Id. at 446. The court explained that in Commonwealth v. King, it had not "set forth an exhaustive list of appropriate substitutions." Id. at 445. "Other exceptions are permissible based on the purpose and limitations of the first complaint doctrine." Id. See also Commonwealth v. Hanino, 82 Mass. App. Ct. 489, 491 (2012) (feigning).

Even when the complainant has disclosed information about the sexual assault to a person with no obvious bias against the complainant, the trial judge has discretion to allow the Commonwealth to substitute another witness as the first complaint witness in circumstances "where [that person] is unavailable, incompetent, or too young to testify meaningfully . . . ." Commonwealth v. King, 445 Mass. at 243–244. See, e.g., Commonwealth v. Roby, 462 Mass. 398, 407–408 (2012) (where two child victims initially first told each other about defendant's inappropriate touching, it was proper to allow first adult [and first noncomplainant] told about the sexual assaults to testify as first complaint witness); Commonwealth v. Thibeault, 77 Mass. App. Ct. 419, 421–423 (2010) (child's mother could be substituted as witness for child's father where father was first person to whom child complained but he appeared to have fled the Commonwealth and could not be located at time of trial).

***Impeachment of First Complaint Witness*.** The court has discretion to permit the Commonwealth to impeach the first complaint witness by means of prior inconsistent statements in circumstances in which the court determines that the witness is feigning a lack of memory as to significant details of the first complaint. See Commonwealth v. Hanino, 82 Mass. App. Ct. 489, 497–498 (2012) (testimony of two police officers regarding statements made to them by first complaint witness and inconsistent with witness's in-court testimony was admissible for limited purpose of impeaching witness's in-court testimony and thus was not impermissible, multiple complaint hearsay).

Subsection (b). This subsection is derived from Commonwealth v. Dargon, 457 Mass. 387, 399–400 (2010); Commonwealth v. Arana, 453 Mass. 214, 224–229 (2009); and Commonwealth v. Stuckich, 450 Mass. 449, 457 (2008).

> "Evidence of a subsequent complaint is not admissible simply because a separate evidentiary rule applies (e.g., the statement is not hearsay, or it falls within an exception to the hearsay rule). If independently admissible evidence . . . serves no purpose other than to repeat the fact of a complaint and therefore corroborate the complainant's accusations, it is inadmissible. However, if that evidence does serve a purpose separate and apart from the first complaint doctrine, the judge may admit it after careful balancing of the testimony's probative and prejudicial value." (Quotations and citations omitted.)

Commonwealth v. Dargon, 457 Mass. at 399–400. See also Commonwealth v. Santos, 465 Mass. 689, 700–701 (2013) (mother's description of son's appearance and demeanor after alleged sexual assault admissible to show victim's state of mind at the time); Commonwealth v. Parent, 465 Mass. 395, 403–404 (2013) (claim of fabrication alone is insufficient to open the door to the admission of multiple complaints); Commonwealth v. Aviles, 461 Mass. 60, 67 (2011) (testimony of both complainant and first complaint witness pertaining to subsequent disclosure, though not admissible under first complaint doctrine, was properly admitted to rebut the defendant's suggestion that complainant's accusations were fabricated); Commonwealth v. McCoy, 456 Mass. 838, 851 (2010) (admission of mother's testimony that she and victim had conversation about assault, even without details of conversation, was error when testimony did not serve "any additional purpose"); Commonwealth v. Starkweather, 79 Mass. App. Ct. 791, 799–803 (2011) (applying Dargon and Arana analysis to several aspects of police involvement and investigation); Commonwealth v. Monteiro, 75 Mass. App. Ct. 489, 495 (2009) (admission of testimony indicating that complainant had made reports of sexual abuse to his mother, the Department of Social Services, and the district attorney's office, without any more details, in circumstances where the father was the first complaint witness, was error). Contrast Commonwealth v. Santos, 465 Mass. at 701 (in a prosecution for rape, the judge did not abuse her discretion in allowing the Commonwealth to introduce testimony from the victim's mother, a non–first complaint witness, about the victim's appearance and demeanor to rebut the defense's theory that the incident was fabricated where the "testimony did not repeat any details of the event, was relevant, and not merely cumulative of the [first complaint witness's] testimony"); Commonwealth v. Lawton, 82 Mass. App. Ct. 528, 536–538 (2012) (victim's statements to SAIN [Sexual Abuse Intervention Network] interviewer not offered as additional complaint testimony, but were independently relevant to contradict impeachment of victim and to rebut defendant's theory of suggestibility).

The question whether testimony concerning multiple complaints is permissible "is fact-specific and requires, in the first analysis, a careful evaluation of the circumstances by the trial judge." Commonwealth v. Kebreau, 454 Mass. 287, 296 (2009). In Commonwealth v. Ramsey, 76 Mass. App. Ct. 844, 849 (2010), the Appeals Court explained that medical records that included statements by the alleged victim pointing to the defendant as the perpetrator of the sexual assault and statements of hospital personnel repeating the allegations, conclusory statements of rape, and a diagnosis of incest, which the judge found admissible under the hospital records exception to the hearsay rule, should not have been admitted at trial because the judge had not determined that the evidence served a purpose other than to corroborate the victim and had not carefully balanced its probative value and prejudicial effect.

> "In [Commonwealth v.] Arana, [453 Mass. 214, 227 (2009)], further evidence of complaint was admissible in order to rebut the defendant's allegation that the complainant fabricated the accusations to provide a basis for a civil lawsuit. In Commonwealth v. Kebreau, 454 Mass. 287, 299 (2009), such evidence was admissible because the defense exploited discrepancies in the testimony of one of the victims and had 'opened the door on cross-examination'; thus 'the Commonwealth was entitled to attempt to rehabilitate the witness.'"

Commonwealth v. Ramsey, 76 Mass. App. Ct. at 850 n.12. See also Commonwealth v. Saunders, 75 Mass. App. Ct. 505, 509 (2009) (defense counsel cross-examined victim about reports she allegedly made that someone other than defendant got her pregnant; this opened the door to permit the Commonwealth to offer evidence of statements made by the victim about the defendant's conduct to persons other than the first complaint witness).

SAIN Evidence. A SANE (sexual abuse nurse examiner) is permitted to testify about the SAIN (Sexual Abuse Intervention Network) evidence kit used in the examination of a person alleged to be the victim of a sexual assault and the sexual assault examination process, provided it is either to provide background for the nurse's testimony about the examination of the alleged victim or to lay a foundation for the admission of physical evidence. See Commonwealth v. Dargon, 457 Mass. 387, 398 n.13 (2010). On the other hand, in Commonwealth v. Monteiro, 75 Mass. App. Ct. 489, 493–494 (2009), the Appeals Court found that the inclusion of testimony from a police detective who watched a tape of the SAIN interview and who described the interview process and indicated that as a result he continued with his investigation was error because it

suggested that the SAIN interviews take place when persons are thought to be victims of sexual assault and implied that the detective found the complainant credible. In addition, the printed forms that are filled out by the SAIN interviewer (Forms 2 and 3) based on questions put to the alleged victim are not admissible, because the printing suggests that a sexual assault took place. See Commonwealth v. Dargon, 457 Mass. at 398 n.13.

Section 414. Industry and Safety Standards

Safety rules, governmental regulations or ordinances, and industry standards may be offered by either party in civil cases as evidence of the appropriate care under the circumstances.

NOTE

This section is derived from Torre v. Harris-Seybold Co., 9 Mass. App. Ct. 660, 671 (1980). Like the safety rules themselves, evidence of an employee's violation of his or her employer's safety rules is admissible as evidence of negligence. Lev v. Beverly Enters. Mass., Inc., 457 Mass. 234, 245 (2010). A company's or industry's "custom and practice," even when not embodied in a written policy, is also admissible. Commonwealth v. Angelo Todesca Corp., 446 Mass. 128, 137–138 (2006). A violation of such rules or regulations, while some evidence of negligence, is not conclusive. St. Germaine v. Prendergast, 411 Mass. 615, 620 (1992). The rule or regulation cannot, however, create a duty where none exists and is admissible only if the harm is of the kind intended to be prevented. Lev v. Beverly Enters. Mass., Inc., 457 Mass. at 246–247.

Cross-Reference: Section 803(17), Hearsay Exceptions; Availability of Declarant Immaterial: Statements of Facts of General Interest; Section 803(18), Hearsay Exceptions; Availability of Declarant Immaterial: Learned Treatises.

ARTICLE V. PRIVILEGES AND DISQUALIFICATIONS

INTRODUCTORY NOTE

(a) General Duty to Give Evidence. A privilege is an exception to the general duty of a witness to offer evidence. Commonwealth v. Corsetti, 387 Mass. 1, 5 (1982).

(b) Interpretation of Privileges. "Testimonial privileges are exceptions to the general duty imposed on all people to testify, and therefore must be strictly construed" (quotations and citations omitted). Commonwealth v. Oliveira, 438 Mass. 325, 330 (2002). See also Matter of a Grand Jury Subpoena, 430 Mass. 590, 593–594, 597–599 (2000); Commonwealth v. Corsetti, 387 Mass. 1, 5 (1982). In criminal cases, even statutory privileges may be pierced when necessary to preserve a defendant's constitutional rights. See Commonwealth v. Dwyer, 448 Mass. 122, 144 (2006).

(c) Most Privileges Are Not Self-Executing. Most privileges require "some action by the patient or client . . . to 'exercise' the privilege." Commonwealth v. Oliveira, 438 Mass. 325, 331 (2002) (psychotherapist-patient privilege). See Commonwealth v. Pelosi, 441 Mass. 257, 261 (2004) (social worker–client privilege); District Attorney for the Plymouth Dist. v. Board of Selectmen of Middleborough, 395 Mass. 629, 633–634 (1985) (attorney-client privilege); Commonwealth v. Brennan, 386 Mass. 772, 780 (1982) (privilege against self-incrimination). The Legislature can create a privilege that is automatic and that does not require any action on the part of the holder of the privilege. See Commonwealth v. Oliveira, 438 Mass. at 331 n.7 ("the sexual assault counsellor-victim privilege created by G. L. c. 233, § 20J . . . does not suggest that the victim need do anything to 'exercise' the privilege contained therein, or to 'refuse' to disclose the

communications, or to 'prevent' the counsellor from disclosing the communications."). See also Borman v. Borman, 378 Mass. 775, 787 (1979) (Code of Professional Responsibility applicable to lawyers is self-executing). In the case of a privilege that is not self-executing, it may be appropriate for the proponent of the privilege to temporarily assert the privilege pending notice to the party which holds the privilege. See Commonwealth v. Oliveira, 438 Mass. at 332 n.8.

(d) Confidentiality Versus Privilege. There is a distinction between a duty of confidentiality and an evidentiary privilege. See Commonwealth v. Vega, 449 Mass. 227, 229 n.7 (2007), citing Commonwealth v. Brandwein, 435 Mass. 623, 628 n.7 (2002). A duty of confidentiality obligates one, such as a professional, to keep certain information, often about a client or patient, confidential. It also may impose an obligation on a State agency. See G. L. c. 66A, §§ 1, 2. See also G. L. c. 233, § 20M (confidential communication between human trafficking victim and victim's caseworker).

"A provider's obligation to keep matters confidential may stem from a statute imposing such an obligation (oftentimes with a host of exceptions to that obligation), or may arise as a matter of professional ethics." Commonwealth v. Oliveira, 438 Mass. 325, 335 (2002). When a duty of confidentiality is set forth in a statute, there may or may not be an accompanying evidentiary privilege. See Commonwealth v. Vega, 449 Mass. at 233–234 (holding that G. L. c. 112, § 172, imposes a duty of confidentiality and creates an evidentiary privilege). Sometimes, the duty of confidentiality and the corresponding evidentiary privilege are set forth in separate statutes. See, e.g., G. L. c. 112, §§ 135A and 135B (social workers), and G. L. c. 112, § 129A, and G. L. c. 233, § 20B (psychologists and psychotherapists). In other cases, the duty of confidentiality and a privilege exist in the same statute. See Commonwealth v. Vega, 449 Mass. at 232, citing G. L. c. 233, § 20J (sexual assault counselors) and G. L. c. 233, § 20K (domestic violence counselors).

In some circumstances, when a provider breaches a duty of confidentiality, the absence of an accompanying evidentiary privilege may permit a party in litigation to gain access to the information or to offer it in evidence. See Commonwealth v. Brandwein, 435 Mass. at 628–629 (access to information improperly disclosed by a nurse in violation of her professional duty of confidentiality was not otherwise covered by an evidentiary privilege); Commonwealth v. Senior, 433 Mass. 453, 457 n.5 (2001) (noting the distinction between the confidentiality of medical and hospital records under G. L. c. 111, § 70, and the absence of a physician-patient privilege).

(e) Impounding Versus Sealing. In Pixley v. Commonwealth, 453 Mass. 827 (2009), the Supreme Judicial Court addressed the difference between impounding and sealing:

> "The terms 'impounded' and 'sealed' are closely related and often used interchangeably, but are meaningfully different. Under the Uniform Rules o[n] Impoundment Procedure 1708 (LexisNexis 2008), which governs impoundment in civil proceedings and guides practice in criminal matters as well, 'impoundment' means 'the act of keeping some or all of the papers, documents, or exhibits, or portions thereof, in a case separate and unavailable for public inspection.' Rule 1 of the Uniform Rules o[n] Impoundment Procedure. Consequently, an order of impoundment prevents the public, but not the parties, from gaining access to impounded material, unless otherwise ordered by the court. A document is normally ordered 'sealed' when it is intended that only the court have access to the document, unless the court specifically orders limited disclosure. Therefore, we directed in Commonwealth v. Martin, [423 Mass. 496, 505 (1996),] that the record of the in camera hearing 'should be kept, under seal.' Similarly, we ordered that privileged psychological or counseling records of an alleged victim of a sexual assault be 'retained in court under seal,' but permitted defense counsel to have access pursuant to a strict protective order. Commonwealth v. Dwyer, 448 Mass. 122, 146 (2006)."

Pixley v. Commonwealth, 453 Mass. at 836 n.12. Martin hearings are discussed in the Note to Section 511(b), Privilege Against Self-Incrimination: Privilege of a Witness. The Lampron-Dwyer protocol is summarized in Section 1108, Access to Third-Party Records Prior to Trial in Criminal Cases (Lampron-Dwyer Protocol).

(f) Examples of Relationships in Which There May Be a Duty to Treat Information as Confidential Even Though There Is No Testimonial Privilege. Examples include the following:

(1) Patient Medical Information. There is no doctor-patient privilege recognized under Massachusetts law. Bratt v. International Business Machs. Corp., 392 Mass. 508, 522–523 n.22 (1984). See also Commonwealth v. Senior, 433 Mass. 453, 456–457 (2001); Tower v. Hirschhorn, 397 Mass. 581, 588 (1986). However, physicians have a duty not to make out-of-court disclosures of medical information about the patient without the patient's consent, Alberts v. Devine, 395 Mass. 59, 67–68, cert. denied sub nom. Carroll v. Alberts, 474 U.S. 1013 (1985), unless disclosure is necessary to meet a serious danger to the patient or others. Id. A breach of doctor-patient confidentiality does not require exclusion of the evidence, Commonwealth v. Senior, 433 Mass. at 457 n.5, citing Schwartz v. Goldstein, 400 Mass. 152, 153 (1987), but may subject the offending doctor to an action for damages. Alberts v. Devine, 395 Mass. at 65–69.

(2) Student Records. "There is no privilege which would prevent the introduction of relevant school records in evidence at a trial." Commonwealth v. Beauchemin, 410 Mass. 181, 185 (1991). However, the Legislature has recognized that privacy interests are at stake. School records pertaining to specific individuals are not subject to disclosure under our public records law if disclosure "may constitute an unwarranted invasion of personal privacy." G. L. c. 4, § 7, Twenty-sixth (c). See also G. L. c. 66, § 10. Access to student records is also restricted under regulations promulgated by the State board of education pursuant to G. L. c. 71, § 34D. See Commonwealth v. Buccella, 434 Mass. 473, 477 (2001) (third persons may access "student records" only with written consent from student or student's parents unless an exception promulgated by regulation applies).

(3) Special Needs Student Records. Records of the clinical history and evaluations of students with special needs created or maintained in accordance with G. L. c. 71B "shall be confidential." G. L. c. 71B, § 3.

(4) News Sources and Nonpublished Information. Before ordering a reporter to divulge a source and the information gathered, a judge must "consider the effect of compelled disclosure on values underlying the First Amendment and art. 16." Petition for Promulgation of Rules Regarding the Protection of Confidential News Sources & Other Unpublished Info., 395 Mass. 164, 171 (1985). Accordingly, a judge must balance the public interest in the use of every person's evidence against the public interest in protecting the free flow of information. Matter of a John Doe Grand Jury Investigation, 410 Mass. 596, 599 (1991). See also Ayash v. Dana-Farber Cancer Inst., 443 Mass. 367, 403 n.33 (2005).

(5) Certain Documents, Records, and Reports. A nonexhaustive list of confidentiality statutes includes the following:

G. L. c. 4, § 6, Twenty-sixth (documents and records);

G. L. c. 6, § 167 et seq. (Criminal Offender Record Information [C.O.R.I.]);

G. L. c. 41, § 97D (reports of rape and sexual assault);

G. L. c. 66A, §§ 1, 2 (personal data held by Commonwealth agencies);

G. L. c. 111, §§ 70, 70E (hospital records);

G. L. c. 111, § 70F (HIV test results);

G. L. c. 111, § 70G (genetic testing);

G. L. c. 111B, § 11 (alcohol treatment);

G. L. c. 111E, § 18 (drug treatment);

G. L. c. 112, § 129A (psychologist-patient communications);

G. L. c. 119, § 51E (Department of Children and Families records);

G. L. c. 119, §§ 60–60A (juvenile records);

G. L. c. 123, §§ 36–36A (Department of Mental Health records);

G. L. c. 123B, § 17 (Department of Developmental Services records);

G. L. c. 127, § 29 (Department of Correction records);

G. L. c. 127, § 130 (parole board); and

G. L. c. 148, § 32 (fire insurance).

There are also numerous regulations (Code Mass. Regs.) which contain confidentiality requirements.

(6) Applicability of Federal Law. The Constitution of the United States or an act of Congress may govern the applicability of a privilege in Massachusetts State courts. See, e.g., 23 U.S.C. § 409 (protecting from disclosure in discovery or at trial and in Federal or State court proceedings information "compiled or collected" in connection with certain Federal highway safety programs); Pierce County v. Guillen, 537 U.S. 129, 146–148 (2003) (23 U.S.C. § 409 is a valid exercise of congressional power under the commerce clause and is binding on the States). Accord Boyd v. National R.R. Passenger Corp., 62 Mass. App. Ct. 783, 795–797 (2005). Access to records also may be restricted by Federal law. See, e.g., Commonwealth v. Nathaniel N., 54 Mass. App. Ct. 200, 206 (2002); Health Insurance Portability and Accountability Act (of 1996) (HIPAA), Pub. L. No. 104-191 (codified as amended at 42 U.S.C. § 1320d et seq.).

(g) Production of Presumptively Privileged Records from Nonparties Prior to Trial in Criminal Cases. Whenever a party in a criminal case seeks production of any records (privileged or nonprivileged) from nonparties prior to trial, Mass. R. Crim. P. 17(a)(2) must be satisfied. Commonwealth v. Lampron, 441 Mass. 265, 268 (2004). See also Commonwealth v. Odgren, 455 Mass. 171, 187 (2009). When Mass. R. Crim. P. 17(a)(2) has been satisfied and a nonparty has produced records to the court, the protocol set forth in Commonwealth v. Dwyer, 448 Mass. 122, 139–147 (2006), governs review or disclosure of presumptively privileged records by defense counsel. To reference the forms promulgated by the Supreme Judicial Court, see http://perma.cc/45WM-J4NE.

Cross-Reference: Section 1108, Access to Third-Party Records Prior to Trial in Criminal Cases (Lampron-Dwyer Protocol).

(h) Nonevidentiary Privileges. There are certain so-called privileges which concern nonevidentiary areas. Basically, they are defenses to suit and include the following:

(1) Immunity from Liability (Litigation Privilege). Written or oral communications made by a party, witness, or attorney prior to, in the institution of, or during and as a part of a judicial proceeding involving said party, witness, or attorney are absolutely privileged even if uttered maliciously or in bad faith. See Correllas v. Viveiros, 410 Mass. 314, 319–321 (1991); Sriberg v. Raymond, 370 Mass. 105, 108 (1976); Mezullo v. Maletz, 331 Mass. 233, 236 (1954). The absolute privilege applies to statements made in a letter by an employee to a former employer explaining that the reason for his or her resignation was sexual harassment and indicating an intention to pursue the matter with the Equal Employment Opportunity Commission (EEOC) and the Massachusetts Commission Against Discrimination (MCAD). Further, the absolute privilege extends to similar statements made in a subsequent filing with the EEOC. Visnick v. Caulfield, 73 Mass. App. Ct. 809, 812–813 (2009). The privilege protects speech and does not extend to conduct in furtherance of litigation, such as filing a lawsuit. Gillette Co. v. Provost, 91 Mass. App. Ct. 133, 140–143 (2017). The absolute privilege is based on the view that "it is more important that witnesses be free from the fear of civil liability for what they say than that a person who has been defamed by their testimony have a remedy." Aborn v. Lipson, 357 Mass. 71, 72 (1970). Accord Hoar v. Wood, 44 Mass. 193, 196–198 (1841) (same point with reference to statements by an attorney at trial). Contrast Kobrin v. Gastfriend, 443 Mass. 327, 342 n.17 (2005) (Anti-SLAPP statute, G. L. c. 231, § 59H, supersedes the common-law immunity against allegedly defamatory statements made by an expert witness called by the board of registration in medicine to testify against a medical doctor in a disciplinary proceeding).

A privilege attaches "[w]here a communication to a prospective defendant relates to a proceeding which is contemplated in good faith and which is under serious consideration." Sriberg v. Raymond, 370 Mass. at 109.

> "[A]n attorney's statements are privileged where such statements are made by an attorney engaged in his function as an attorney whether in the institution or conduct of litigation or in conferences and other communications preliminary to litigation. The litigation privilege recognized in our cases, however, would not appear to encompass the defendant attorneys' conduct in counselling and assisting their clients in business matters generally." (Citations, quotation, and footnote omitted.)

Kurker v. Hill, 44 Mass. App. Ct. 184, 192 (1998). See Harmon Law Offices, P.C. v. Attorney Gen., 83 Mass. App. Ct. 830, 838 (2013) (privilege not applicable because law firm failed to establish that documents sought by attorney general related to judicial proceedings contemplated or instituted by law firm).

(2) Legislative Deliberation Privilege. Conduct or speech by a member of the Legislature in the course of exercising the member's duties as a legislator is absolutely privileged and cannot be the basis of any criminal or civil prosecution. See Article 21 of the Massachusetts Declaration of Rights ("[t]he freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever"). This provision also establishes a privilege applicable to "the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office." Coffin v. Coffin, 4 Mass. 1, 27 (1808).

(3) Fair Report Privilege. The fair report privilege is a common-law rule that protects from liability the republisher of a newsworthy account of one person's defamation of another so long as it is fair and accurate. See Howell v. Enterprise Publ. Co., LLC, 455 Mass. 641, 650–651 (2010), and cases cited.

> "The privilege recognizes that (1) the public has a right to know of official government actions that affect the public interest, (2) the only practical way many citizens can learn of these actions is through a report by the news media, and (3) the only way news outlets would be willing to make such a report is if they are free from liability, provided that their report was fair and accurate."

ELM Med. Lab, Inc. v. RKO Gen., Inc., 403 Mass. 779, 782 (1989).

"The privilege is not absolute" and "may be 'be vitiated by misconduct on the newspapers' part, but that misconduct must amount to more than negligent, or even knowing, republication of an inaccurate official statement. To defeat the privilege, a plaintiff must either show that the publisher does not give a fair and accurate report of the official statement [or action], or malice.'" Howell v. Enterprise Publ. Co., LLC, 455 Mass. at 651 n.8, quoting Yohe v. Nugent, 321 F.3d 35, 44 (1st Cir. 2003). Newspapers are on "solid ground" when they report on "formal (as opposed to informal) governmental (as opposed to private) proceedings and actions." Howell v. Enterprise Publ. Co., LLC, 455 Mass. at 655–656. In such cases, "the privilege extends to reports of official actions based on information provided by nonofficial third-party sources." Id. at 658.

> "If, however, the source is an unofficial or anonymous one, a report based on that source runs a risk that the underlying official action will not be accurately and fairly described by the source, and therefore will not be protected by the privilege, or that the information provided will go beyond the bounds of the official action and into unprivileged territory" (footnote omitted).

Id. at 659. "Whether a report was fair and accurate is a matter of law to be determined by a judge unless there is a basis for divergent views" (citation omitted). Id. at 661.

(4) Communications with Board of Bar Overseers and Bar Counsel. In Bar Counsel v. Farber, 464 Mass. 784, 787 (2013), the Supreme Judicial Court interpreted S.J.C. Rule 4:01, § 9, to provide a complainant with "absolute immunity from any civil liability with respect to his complaint and its allegations and . . . with respect to testimony that the complainant may provide in the course of a proceeding before a hearing committee of the board." Id. at 787. The court further explained that the rule does not extend this immunity to statements made or testimony provided by the complainant "to a person or entity outside a bar discipline proceeding." Id. This is true even when the communication to someone outside a bar disciplinary proceeding is identical to the protected communication. Id. at 793.

(5) Legitimate Business Interest. There is a conditional privilege to publish defamatory matter if the publication is reasonably necessary to the protection or furtherance of a legitimate business interest. Bratt v. International Business Machs. Corp., 392 Mass. 508, 512–513 (1984). The business interest privilege applies to protect communications between two parties with a common interest in the subject matter of the communication. Downey v. Chutehall Constr. Co., 86 Mass. App. Ct. 660, 666 (2014).

Section 501. Privileges Recognized Only as Provided

Except as otherwise provided by constitution, statute, rules promulgated by the Supreme Judicial Court, or the common law, no person has a privilege to

(a) refuse to be a witness,

(b) refuse to disclose any matter,

(c) refuse to produce any object or writing, or

(d) prevent another from being a witness or disclosing any matter or producing any object or writing.

NOTE

This section, which is taken nearly verbatim from Proposed Mass. R. Evid. 501, reflects Massachusetts practice. Subsections (a), (b), and (c) follow the "longstanding principle that the public . . . has a right to every man's evidence" (quotations omitted). Matter of Roche, 381 Mass. 624, 633 (1980). See also G. L. c. 233, § 20 ("[a]ny person of sufficient understanding, although a party, may testify in any proceeding, civil or criminal, in court or before a person who has authority to receive evidence").

> "A witness may not decline to respond to a proper question on the ground that his answer might embarrass him (or another). . . . Nor can fear of harm to the witness generally be offered as an excuse for declining testimony. Relief of witnesses on this ground would encourage intimidation of those in possession of information and proclaim a sorry confession of weakness of the rule of law" (citation omitted).

Commonwealth v. Johnson, 365 Mass. 534, 543–544 (1974). Subsection (d) is derived from Commonwealth v. Edwards, 444 Mass. 526, 536 (2005) ("forfeiture by wrongdoing" doctrine adopted).

The Supreme Judicial Court has the power to create privileges under the common law. Babets v. Secretary of Human Servs., 403 Mass. 230, 234 (1988). However, the creation of a new privilege or the expansion of an existing privilege is usually left to the Legislature, which is better equipped to weigh competing social policies or interests. Matter of a Grand Jury Subpoena, 430 Mass. 590, 597–598 (2000).

Address of Witness. A party seeking to elicit information about the home or employment address of a witness must demonstrate that the information is relevant in accordance with Section 402, General Admissibility of Relevant Evidence. However, "the very starting point in exposing falsehood and bringing out the truth through cross-examination must necessarily be to ask the witness who he is and where he lives" (quotations and citation omitted). Smith v. Illinois, 390 U.S. 129, 131 (1968). Nonetheless, such evidence may be excluded if the trial judge makes a preliminary finding that any relevance is outweighed by the risks to the safety of the witness. See Commonwealth v. McGrath, 364 Mass. 243, 250–252 (1973). In a criminal case, the trial judge must weigh the safety concerns of the witness against the defendant's right to confrontation. See McGrath v. Vinzant, 528 F.2d 681, 685 (1st Cir. 1976). A witness's general concerns for privacy or personal safety, without more, are not sufficient to overcome the defendant's right to confrontation under Article 12 of the Massachusetts Declaration of Rights and the Sixth Amendment. See Commonwealth

v. Johnson, 365 Mass. 534, 544–547 (1974). See also Commonwealth v. Francis, 432 Mass. 353, 357 (2000) (In a murder case, Supreme Judicial Court relied on McGrath and upheld trial judge's ruling that "defense counsel could ask Rodriguez whether he was engaged in an occupation other than selling drugs, but not his specific employment or his employment address, and whether he now lived in western Massachusetts or in Connecticut, but not his city of residence or residential address. He also prohibited defense counsel from investigating these matters."); Commonwealth v. Righini, 64 Mass. App. Ct. 19, 25–26 n.5 (2005) (relying on reasoning of McGrath to explain why criminal defendants are ordinarily not entitled to obtain dates of birth of police witnesses). The existence of valid safety concerns on the part of a witness may be inherent in the nature of the criminal charges. Commonwealth v. Francis, 432 Mass. at 358 n.3.

Section 502. Attorney-Client Privilege

(a) Definitions. As used in this section, the following words shall have the following meanings:

(1) A "client" is a person, public officer, or corporation, association, or other entity, either public or private, who is rendered professional legal services by an attorney, or who consults an attorney with a view to obtaining professional legal services.

(2) A "representative of the client" may include the client's agent or employee.

(3) An "attorney" is a person who is authorized to practice law.

(4) A "representative of the attorney" is one used by the attorney to assist the attorney in providing professional legal services.

(5) A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is made to obtain or provide professional legal services to the client, and those reasonably necessary for the transmission of the communication.

(b) General Rule of Privilege. A client has a privilege to refuse to disclose and to prevent others from disclosing confidential communications made for the purpose of obtaining or providing professional legal services to the client as follows:

(1) between the client or the client's representative and the client's attorney or the attorney's representative,

(2) between the client's attorney and the attorney's representative,

(3) between those involved in a joint defense,

(4) between representatives of the client or between the client and a representative of the client, or

(5) among attorneys and their representatives representing the same client.

(c) Who May Claim the Privilege. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization whether or not in existence at the time the privilege is claimed. The attorney or the attorney's representative at the time

of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(d) Exceptions. The attorney-client privilege does not apply to the following:

(1) Furtherance of Crime or Fraud. If the services of the attorney were sought or obtained to commit or to plan to commit what the client knew or reasonably should have known was a crime or fraud;

(2) Claimants Through Same Deceased Client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) Breach of Duty or Obligation. As to a communication relevant to an issue of breach of duty between an attorney and client;

(4) Document Attested by an Attorney. As to a communication relevant to an issue concerning an attested document to which the attorney is an attesting witness;

(5) Joint Clients. As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any one of them to an attorney retained or consulted in common, when offered in an action between or among any of the clients; or

(6) Public Officer or Agency. [Privilege not recognized]

NOTE

Introduction. The Supreme Judicial Court has defined the attorney-client privilege as follows:

> "The classic formulation of the attorney-client privilege . . . is found in 8 J. Wigmore, Evidence § 2292 (McNaughton rev. ed. 1961): (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived. The purpose of the privilege is to enable clients to make full disclosure to legal counsel of all relevant facts . . . so that counsel may render fully informed legal advice with the goal of promot[ing] broader public interests in the observance of law and administration of justice." (Quotations and citations omitted.)

Commissioner of Revenue v. Comcast Corp., 453 Mass. 293, 303 (2009).

> "The existence of the privilege and the applicability of any exception to the privilege is a question of fact for the judge. The burden of proving that the attorney-client privilege applies to a communication rests on the party asserting the privilege. This burden extends not only to a showing of the existence of the attorney-client relationship but to all other elements involved in the determination of the existence of the privilege, including (1) the communications were received from a client during the course of the client's search for legal advice from the attorney in his or her capacity as such; (2) the communications were made in confidence; and (3) the privilege as to these communications has not been waived." (Citations omitted.)

Matter of the Reorganization of Elec. Mut. Liab. Ins. Co. (Bermuda), 425 Mass. 419, 421 (1997). This privilege is not self-executing. See District Attorney for the Plymouth Dist. v. Board of Selectmen of Middleborough, 395 Mass. 629, 633–634 (1985).

Subsection (a)(1). This subsection, which is taken nearly verbatim from Proposed Mass. R. Evid. 502(a)(1), reflects Massachusetts practice. The term "client" includes more than simply natural persons. See Mass. R. Prof. C. 1.13 (2015). See also Matter of a Grand Jury Investigation, 437 Mass. 340, 351–352 (2002); Bays v. Theran, 418 Mass. 685, 690 (1994).

An attorney-client relationship may be expressly created or implied as a matter of law. Cesso v. Todd, 92 Mass. App. Ct. 131, 135 (2017). An attorney-client relationship may be implied "when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance." DeVaux v. American Home Assur. Co., 387 Mass. 814, 817–818 (1983), quoting Kurtenback v. TeKippe, 260 N.W.2d 53 (Iowa 1977). See Cesso v. Todd, 92 Mass. App. Ct. at 135. The attorney-client privilege survives the death of the client. Matter of a John Doe Grand Jury Investigation, 408 Mass. 480, 483 (1990).

Subsection (a)(2). This subsection is derived from Ellingsgard v. Silver, 352 Mass. 34, 40 (1967) ("The attorney-client privilege may extend to communications from the client's agent or employee to the attorney."). The Supreme Judicial Court has yet to determine the scope of the privilege when the client is an organization such as a corporation. See Judge Rotenberg Educ. Ctr., Inc. v. Commissioner of the Dep't of Mental Retardation, 424 Mass. 430, 457 n.26 (1997) (attorney-client privilege not automatically extended to all employees of corporation who communicate with corporation's attorney). Cf. Messing, Rudavsky & Weliky, P.C. v. President & Fellows of Harvard College, 436 Mass. 347, 357 (2002) (a lawyer is barred from ex parte contact with employees of a corporation, under the rule of professional responsibility prohibiting a lawyer from communicating with a represented party in the absence of that party's counsel, only as to employees who exercise managerial responsibility with regard to the subject of pending litigation, those alleged to have committed wrongful actions at issue in the litigation, and employees with authority to make decisions about the course of litigation or having management authority sufficient to speak for and bind the corporation).

Subsection (a)(3). This subsection is derived from Barnes v. Harris, 61 Mass. 576, 576–577 (1851).

Subsection (a)(4). This subsection, which is taken nearly verbatim from Proposed Mass. R. Evid. 502(a)(4), reflects Massachusetts practice. In Foster v. Hall, 29 Mass. 89 (1831), the court explained that the attorney-client privilege applied to communications to members of the legal profession, and also to those who "facilitate the communication between attorney and client, as interpreters, agents, and attorneys' clerks" (citations omitted). Id. at 94.

Subsection (a)(5). This subsection is derived from Commissioner of Revenue v. Comcast Corp., 453 Mass. 293 (2009), and DaRosa v. City of New Bedford, 471 Mass. 446 (2015). In general, "information contained within a communication need not itself be confidential for the communication to be deemed privileged; rather the communication must be made in confidence—that is, with the expectation that the communication will not be divulged." Commissioner of Revenue v. Comcast Corp., 453 Mass. at 305. Thus, "[c]ommunications between an attorney and his client are not privileged, though made privately, if it is understood that the information communicated is to be conveyed to others." Peters v. Wallach, 366 Mass. 622, 627 (1975).

The Supreme Judicial Court, however, has recognized a derivative attorney-client privilege that "can shield communications of a third party employed to facilitate communication between the attorney and client and thereby assist the attorney in rendering legal advice to the client." Commissioner of Revenue v. Comcast Corp., 453 Mass. at 306, citing United States v. Kovel, 296 F.2d 918, 921–922 (2d Cir. 1961). See also Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc., 449 Mass. 609, 616 (2007). "The purpose of the derivative attorney-client privilege is to maintain the [attorney-client] privilege for

communications between the attorney and the client in circumstances where a third party's presence would otherwise constitute a waiver of the privilege." DaRosa v. City of New Bedford, 471 Mass. at 463–464.

But the derivative attorney-client privilege is "sharply limited in scope." DaRosa v. City of New Bedford, 471 Mass. at 463. "It attaches only when the third party's role is to clarify or facilitate communications between attorney and client, as where the third party functions as a translator between the client and the attorney, and is therefore nearly indispensable or serves some specialized purpose in facilitating the attorney-client communications" (quotations, citations, and brackets omitted). Id. "The privilege does not apply simply because 'an attorney's ability to represent a client is improved, even substantially, by the assistance' of an expert." Id., quoting Commissioner of Revenue v. Comcast Corp., 453 Mass. at 307.

> "In short, the derivative attorney-client privilege protects otherwise privileged communications between an attorney and client despite the presence of a third party where, without the assistance of the third party, what the client says would be 'Greek' to the attorney, either because the client is actually speaking in Greek or because the information provided by the client is so technical in nature that it might as well be spoken in Greek if there were not an expert to interpret it for the attorney."

DaRosa v. City of New Bedford, 471 Mass. at 463 (concluding that communications at issue failed to meet this test because, even if third party's analysis were "critical" to attorney's ability to effectively represent his client, third party was "translating" public record technical data, "*not* confidential communications from the client"). See also Commissioner of Revenue v. Comcast Corp., 453 Mass. at 309 (concluding that derivative attorney-client privilege did not apply because attorney's "purpose in consulting [third party] was to obtain advice about Massachusetts tax law, not to assist [attorney] with comprehending his client's information.").

Subsection (b). Subsections (b)(1), (2), (4), and (5) are derived from Proposed Mass. R. Evid. 502(b), which was cited with approval in Purcell v. District Attorney for the Suffolk Dist., 424 Mass. 109, 115 (1997) ("The attorney-client privilege applies only when the client's communication was for the purpose of facilitating the rendition of legal services."). See McCarthy v. Slade Assocs., Inc., 463 Mass. 181, 191 n.21 (2012) (privilege applies to confidential communications by attorney as well as client). Subsection (b)(3) is derived from Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc., 449 Mass. 609, 614–617 (2007), where the Supreme Judicial Court recognized the "common interest doctrine" and adopted the principle of the Restatement (Third) of the Law Governing Lawyers § 76(1) (2000), which states as follows:

> "If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged . . . that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication."

This principle expresses the component of the doctrine known as "joint defense agreements," "joint defense privilege," or "joint prosecution privilege." See also Proposed Mass. R. Evid. 502(b)(3). In Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc., 449 Mass. at 618, the Supreme Judicial Court explained that the common-interest doctrine depends on communications that are protected by the attorney-client privilege and is simply an exception to the waiver of the privilege. Thus, there is no requirement of a writing. Id. at 618. The court also explained that the legal interests of the parties do not have to be identical in order for the common-interest doctrine to apply. Parties will be deemed to have a common interest when they "share a sufficiently similar interest and attempt to promote that interest by sharing a privileged communication" (quotation and citation omitted). Id. at 619. Finally, the Supreme Judicial Court also noted that Section 76(2) of the Restatement is consistent with Massachusetts law. Id. at 614 n.4. Section 76(2) states that "[u]nless the clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between clients described in Subsection (1) in a subsequent adverse proceeding between them." Id., quoting Restatement (Third) of the Law Governing Lawyers § 76(2) (2000).

Subsection (c). This subsection, which is taken nearly verbatim from Proposed Mass. R. Evid. 502(c), reflects Massachusetts practice. See District Attorney for the Norfolk Dist. v. Magraw, 417 Mass. 169,

172–173 (1994). In the case of litigation between a corporation and its shareholders, the corporation may assert the privilege against a shareholder whose interests are opposed to the corporation's interests, because the privilege belongs to the corporation and not to the individual shareholders. See Chambers v. Gold Medal Bakery, Inc., 464 Mass. 383, 392 (2013); Clair v. Clair, 464 Mass. 205, 218 (2013). A law firm may claim the attorney-client privilege for communications between law firm attorneys and the firm's in-house counsel against a client who threatens a malpractice claim against the firm if (1) the law firm has designated an attorney or attorneys within the firm to represent the firm as in-house counsel; (2) the in-house counsel has not performed any work on the client matter at issue or a substantially related matter; (3) the time spent by the attorneys in these communications with in-house counsel is not billed to a client; and (4) the communications are made in confidence and kept confidential. RFF Family Partnership LLP v. Burns & Levinson LLP, 465 Mass. 702, 703 (2013).

Subsection (d)(1). This subsection is taken nearly verbatim from Proposed Mass. R. Evid. 502(d)(1), which the Supreme Judicial Court described as an adequate definition of the crime-fraud exception to the attorney-client privilege. Purcell v. District Attorney for the Suffolk Dist., 424 Mass. 109, 112 (1997). See also Mass. R. Prof. C. 1.6(b)(3) (2015). "Th[e] exception applies only if the client or prospective client seeks advice or assistance in furtherance of criminal conduct." Purcell v. District Attorney for the Suffolk Dist., 424 Mass. at 115. See Matter of a Grand Jury Investigation, 453 Mass. 453, 459 (2009) ("a client's communications to his lawyer threatening harm are privileged unless the crime-fraud exception applies").

Subsection (d)(2). This subsection, which is taken nearly verbatim from Proposed Mass. R. Evid. 502(d)(2), reflects Massachusetts practice. See Phillips v. Chase, 201 Mass. 444, 449 (1909).

Subsection (d)(3). This subsection, which is taken nearly verbatim from Proposed Mass. R. Evid. 502(d)(3), reflects Massachusetts practice. See Mass. R. Prof. C. 1.6(b) (2015); GTE Prods. Corp. v. Stewart, 421 Mass. 22, 32 (1995) (there are limits to the extent to which in-house counsel may disclose client confidences in pursuing a claim of wrongful discharge); Commonwealth v. Brito, 390 Mass. 112, 119 (1983) ("[T]rial counsel's obligation may continue to preserve confidences whose disclosure is not relevant to the defense of the charge of his ineffectiveness as counsel.").

Subsection (d)(4). This subsection, which is taken nearly verbatim from Proposed Mass. R. Evid. 502(d)(4), reflects Massachusetts practice. See Foster v. Hall, 29 Mass. 89, 98–99 (1831).

Subsection (d)(5). This subsection, which is taken nearly verbatim from Proposed Mass. R. Evid. 502(d)(5), reflects Massachusetts practice. See Beacon Oil Co. v. Perelis, 263 Mass. 288, 293 (1928); Thompson v. Cashman, 181 Mass. 36, 37 (1902).

Subsection (d)(6). In Suffolk Constr. Co. v. Division of Capital Asset Mgt., 449 Mass. 444, 450 (2007), the Supreme Judicial Court held that "confidential communications between public officers and employees and governmental entities and their legal counsel undertaken for the purpose of obtaining legal advice or assistance are protected under the normal rules of the attorney-client privilege." Thus, the Supreme Judicial Court rejected the proposed limitation on the attorney-client privilege for public employees and governmental entities found in Proposed Mass. R. Evid. 502(d)(6). Id. at 452 n.12. Additionally, the Supreme Judicial Court held that its decision in General Elec. Co. v. Department of Envtl. Protection, 429 Mass. 798, 801–806 (1999), which states that under the Massachusetts public records statute, G. L. c. 66, § 10, documents held by a State agency are not protected from disclosure under the attorney work-product doctrine, but rather enjoy the more limited protection of the so-called "deliberative process" exemption found in G. L. c. 4, § 7, Twenty-sixth (d), did not limit the applicability of the attorney-client privilege as to written communications between government officials and entities and their counsel.

> "With the attorney-client privilege, the principal focus is on encouraging the client to communicate freely with the attorney; with work-product, it is on encouraging careful and thorough preparation by the attorney. As a result, there are differences in the scope of the protection. For example, the privilege extends only to client communications, while work

> product encompasses much that has its source outside client communications. At the same time, the privilege extends to client-attorney communications whenever any sort of legal services are being provided, but the work-product protection is limited to preparations for litigation."

Suffolk Constr. Co. v. Division of Capital Asset Mgt., 449 Mass. at 456, quoting E.S. Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 477 (4th ed. 2001).

***Work-Product Doctrine*.** The work-product doctrine is not an evidentiary privilege, but rather a discovery rule which

> "protects a client's nonlawyer representatives, protecting from discovery documents prepared by a party's representative 'in anticipation of litigation.' The protection is qualified, and can be overcome if the party seeking discovery demonstrates 'substantial need of the materials' and that it is 'unable without undue hardship to obtain the substantial equivalent of the materials by other means.' There is a further limitation: the court is to 'protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.' This so-called 'opinion' work product is afforded greater protection than 'fact' work product."

Commissioner of Revenue v. Comcast Corp., 453 Mass. 293, 314 (2009), quoting Mass. R. Civ. P. 26(b)(3).

> "The work product doctrine, drawn from the well-known case of Hickman v. Taylor, 329 U.S. 495 (1947), is intended to enhance the vitality of an adversary system of litigation by insulating counsel's work from intrusions, inferences, or borrowings by other parties as he prepares for the contest. Originally developed in connection with civil litigation, the doctrine has been extended to criminal cases. United States v. Nobles, 422 U.S. 225, 238 (1974)." (Citations omitted.)

Ward v. Peabody, 380 Mass. 805, 817 (1980). It is codified in Massachusetts and applicable in both civil and criminal cases. See Mass. R. Civ. P. 26(b)(3); Mass. R. Crim. P. 14(a)(5). The protections afforded by the work-product doctrine can be waived by the attorney. Adoption of Sherry, 435 Mass. 331, 336 (2001). See also Matter of the Reorganization of Elec. Mut. Liab. Ins. Co. (Bermuda), 425 Mass. 419, 423 (1997) (no waiver when disclosure of work-product is due to inadvertence and adequate steps were taken to maintain the confidentiality of the information).

***Scope of the Work-Product Doctrine in the Public Records Context*.** In DaRosa v. City of New Bedford, 471 Mass. 446 (2015), the Supreme Judicial Court addressed the work-product doctrine as it applies to public records:

> "[O]pinion work product that was prepared in anticipation of litigation or for trial by or for a party or party representative is protected from discovery to the extent provided under Mass. R. Civ. P. 26(b)(3), even where the opinion work product has been made or received by a State or local government employee. So is fact work product that is prepared in anticipation of litigation or for trial where it is not a reasonably completed study or report, or, if it is reasonably completed, is interwoven with opinions or analysis leading to opinions. Other fact work product that has been made or received by a State or local government employee must be disclosed in discovery, even if it would be protected from discovery under rule 26(b)(3) were it not a public record."

DaRosa v. City of New Bedford, 471 Mass. at 462. If any work product is not a "public record" because it falls within the exemption found in G. L. c. 4, § 7, Twenty-sixth (d) (or any another exemption), the work product may not be ordered to be produced in discovery unless the third-party defendants have made the required showing of need to justify disclosure of this work product under Mass. R. Civ. P. 26(b)(3). Id. at 464.

Burden of Proof. Initially, the burden is on the party asserting the work-product doctrine to demonstrate that the document was prepared in anticipation of litigation. If that burden is met, the burden shifts to the party seeking access to the document to prove that it cannot obtain the substantial equivalent of the document without undue hardship. If the material is opinion work product, the party seeking access to it must

make, at a minimum, a "far stronger showing of necessity and unavailability by other means." Upjohn Co. v. United States, 449 U.S. 383, 402 (1981). See Commissioner of Revenue v. Comcast Corp., 453 Mass. 293, 315 (2009).

In Comcast Corp., the Supreme Judicial Court further explained that the phrase "in anticipation of litigation" has been defined by courts in two different ways: (1) whether the documents "are prepared 'primarily or exclusively to assist in litigation'—a formulation that would potentially exclude documents containing analysis of expected litigation, if their primary, ultimate, or exclusive purpose is to assist in making the business decision," and (2) whether the documents "were prepared 'because of' existing or expected litigation—a formulation that would include such documents, despite the fact that their purpose is not to 'assist in' litigation" (citation omitted). Id. at 316. In Comcast Corp., the Supreme Judicial Court adopted the second of these two formulations as the law in Massachusetts:

> "The 'because of' test 'appropriately focuses on both what should be eligible for the [r]ule's protection and what should not.' Thus, a document is within the scope of the rule if, 'in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared *because of* the prospect of litigation'" (citations omitted).

Id. at 316–317 ("a litigation analysis prepared so that a party can make an informed business decision is afforded the protections of the work-product doctrine"; additionally, memos prepared for counsel by the accountant that were not protected by the attorney-client privilege also fall within the scope of the opinion work-product doctrine).

Opinion work product relating to a different case is nonetheless entitled to work-product protection, although it may require a lesser showing to overcome the work-product rule. McCarthy v. Slade Assocs., Inc., 463 Mass. 181, 198 n.37 (2012).

Waiver. For issues relating to waiver, see Section 523, Waiver of Privilege.

Section 503. Psychotherapist-Patient Privilege

(a) Definitions. As used in this section, the following words shall have the following meanings:

(1) A "patient" is a person who, during the course of diagnosis or treatment, communicates with a psychotherapist.

(2) A "psychotherapist" is (A) a person licensed to practice medicine who devotes a substantial portion of his or her time to the practice of psychiatry; (B) a person who is licensed as a psychologist by the board of registration of psychologists or a graduate of, or student enrolled in, a doctoral degree program in psychology at a recognized educational institution, who is working under the supervision of a licensed psychologist; or (C) a person who is a registered nurse licensed by the board of registration in nursing whose certificate of registration has been endorsed authorizing the practice of professional nursing in an expanded role as a psychiatric nurse mental health clinical specialist.

(3) "Communications" includes conversations, correspondence, actions, and occurrences relating to diagnosis or treatment before, during, or after institutionalization, regardless of the patient's awareness of such conversations, correspondence, actions, and occurrences, and any records, memoranda, or notes of the foregoing.

(b) Privilege. Except as hereinafter provided, in any court proceeding and in any proceeding preliminary thereto, and in legislative and administrative proceedings, a patient shall have the privi-

lege of refusing to disclose, and of preventing a witness from disclosing, any communication, wherever made, between said patient and a psychotherapist relative to the diagnosis or treatment of the patient's mental or emotional condition. This privilege shall also apply to patients engaged with a psychotherapist in marital therapy, family therapy, or consultation in contemplation of such therapy. If a patient is incompetent to exercise or waive such privilege, a guardian shall be appointed to act in his or her behalf under this section. A previously appointed guardian shall be authorized to so act.

(c) Effect of Exercise of Privilege. Upon the exercise of the privilege granted by this section, the judge or presiding officer shall instruct the jury that no adverse inference may be drawn therefrom.

(d) Exceptions. The privilege granted hereunder shall not apply to any of the following communications:

(1) Disclosure to Establish Need for Hospitalization or Imminently Dangerous Activity. A disclosure made by a psychotherapist who, in the course of diagnosis or treatment of the patient, determines that the patient is in need of treatment in a hospital for mental or emotional illness or that there is a threat of imminently dangerous activity by the patient against himself or herself or another person, and on the basis of such determination discloses such communication either for the purpose of placing or retaining the patient in such hospital, provided, however, that the provisions of this section shall continue in effect after the patient is in said hospital, or placing the patient under arrest or under the supervision of law enforcement authorities;

(2) Court-Ordered Psychiatric Exam. A disclosure made to a psychotherapist in the course of a psychiatric examination ordered by the court, provided that such disclosure was made after the patient was informed that the communication would not be privileged, and provided further that such communications shall be admissible only on issues involving the patient's mental or emotional condition but not as a confession or admission of guilt;

(3) Patient Raises the Issue of Own Mental or Emotional Condition as an Element of Claim or Defense. A disclosure in any proceeding, except one involving child custody, adoption, or adoption consent, in which the patient introduces the patient's mental or emotional condition as an element of a claim or defense, and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between patient and psychotherapist be protected;

(4) Party Through Deceased Patient Raises Issue of Decedent's Mental or Emotional Condition as Element of Claim or Defense. A disclosure in any proceeding after the death of a patient in which the patient's mental or emotional condition is introduced by any party claiming or defending through, or as a beneficiary of, the patient as an element of the claim or defense, and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between patient and psychotherapist be protected;

(5) Child Custody and Adoption Cases. A disclosure in any case involving child custody, adoption, or the dispensing with the need for consent to adoption in which, upon a hearing in chambers, the judge, in the exercise of his or her discretion, determines that the psychother-

apist has evidence bearing significantly on the patient's ability to provide suitable care or custody, and that it is more important to the welfare of the child that the communication be disclosed than that the relationship between patient and psychotherapist be protected; provided, however, that in such cases of adoption or the dispensing with the need for consent to adoption, a judge shall first determine that the patient has been informed that such communication would not be privileged;

(6) Claim Against Psychotherapist. A disclosure in any proceeding brought by the patient against the psychotherapist, and in any malpractice, criminal, or license revocation proceeding, in which disclosure is necessary or relevant to the claim or defense of the psychotherapist; or

(7) Child Abuse or Neglect. A report to the Department of Children and Families of reasonable cause to believe that a child under the age of eighteen has suffered serious physical or emotional injury resulting from sexual abuse, pursuant to G. L. c. 119, § 51A.

(8) Exception. In criminal actions, such confidential communications may be subject to discovery and may be admissible as evidence, subject to applicable law.

NOTE

Subsection (a). This subsection is taken nearly verbatim from G. L. c. 233, § 20B.

Subsection (b). This subsection is taken nearly verbatim from G. L. c. 233, § 20B. The psychotherapist-patient privilege recognizes the critical role of confidentiality in this medical specialty. Usen v. Usen, 359 Mass. 453, 457 (1971). This privilege is not self-executing. Commonwealth v. Oliveira, 438 Mass. 325, 331 (2002).

***Scope of the Privilege*.** "The privilege gives the patient the right to refuse to disclose and to prevent another witness from disclosing any communication between patient and psychotherapist concerning diagnosis or treatment of the patient's mental condition." Commonwealth v. Clancy, 402 Mass. 664, 667 (1988). The privilege does not protect the facts of the hospitalization or treatment, the dates, or the purpose of the hospitalization or treatment, if such purpose does not implicate communications between the witnesses and the psychotherapist. Id. See Commonwealth v. Kobrin, 395 Mass. 284, 294 (1985) (holding, in context of grand jury investigation into Medicaid fraud, that patient diagnosis is not privileged but portions of records that "reflect patients' thoughts, feelings, and impressions, or contain the substance of the psychotherapeutic dialogue are protected").

The privilege is evidentiary and applies only "in any court proceeding and in any proceeding preliminary thereto and in legislative and administrative proceedings." G. L. c. 233, § 20B. See Commonwealth v. Brandwein, 435 Mass. 623, 628–630 (2002) (psychotherapist not prohibited by G. L. c. 233, § 20B, from informing police of statements made to her in her office by a client who confessed to a robbery and turned over a firearm).

Subsection (c). This subsection is taken verbatim from G. L. c. 233, § 20B.

Subsection (d)(1). This subsection is taken nearly verbatim from G. L. c. 233, § 20B(a). See Walden Behavioral Care v. K.I., 471 Mass. 150, 154 (2015).

Subsection (d)(2). This subsection is taken nearly verbatim from G. L. c. 233, § 20B(b). See Commonwealth v. Lamb, 365 Mass. 265, 270 (1974) (patient's communications to a psychotherapist in a court-

ordered evaluation may not be disclosed against the patient's wishes absent a warning that the communications would not be privileged). See also Commonwealth v. Harris, 468 Mass. 429, 452 (2014) (Lamb warnings given at the beginning of court-ordered competency evaluations should contain a warning that the results of the competency evaluation may be used against the defendant where the defendant offers evidence at trial in support of a defense of lack of criminal responsibility.).

In the absence of a court order, a Lamb-type warning is not required where the examiner is a diagnosing or treating psychotherapist of a patient involuntarily committed to a mental health facility pursuant to G. L. c. 123, § 12(b). Walden Behavioral Care v. K.I., 471 Mass. 150, 154 (2015). Contrast Department of Youth Servs. v. A Juvenile, 398 Mass. 516, 524–526 (1986).

Subsection (d)(3). This subsection is taken nearly verbatim from G. L. c. 233, § 20B(c). In Commonwealth v. Dung Van Tran, 463 Mass. 8, 20–21 (2012), the Supreme Judicial Court found that the defendant did not put his mental or emotional condition in issue where "the defense was not that the defendant was incapable of forming the intent necessary to support conviction but, rather, that he lacked the requisite intent to harm another." Id. at 20. The court held that the "Commonwealth may not introduce against a defendant statements protected by the psychotherapist-patient privilege on the ground that the defendant himself placed his mental or emotional condition in issue, unless the defendant has at some point in the proceedings asserted a defense based on his mental or emotional condition, defect, or impairment." Id. at 21.

Subsection (d)(4). This subsection is taken nearly verbatim from G. L. c. 233, § 20B(d).

Subsection (d)(5). This subsection is taken nearly verbatim from G. L. c. 233, § 20B(e). Upon a party's assertion of the psychotherapist-patient privilege, the judge, and not a guardian ad litem, must inspect the psychotherapist's records in camera to determine whether the records are subject to the privilege. See P.W. v. M.S., 67 Mass. App. Ct. 779, 785–786 (2006). A judge may appoint a discovery master or additional guardian ad litem to assist in the process of reviewing records, but the judge must make the determination whether the privilege applies to the records. See id. at 786 & n.10.

Subsection (d)(6). This subsection is taken nearly verbatim from G. L. c. 233, § 20B(f).

Subsection (d)(7). This subsection is derived from G. L. c. 119, § 51A.

Subsection (d)(8). This subsection is derived from Commonwealth v. Dwyer, 448 Mass. 122, 145–146 (2006) (establishing protocol in criminal cases governing access to and use of material covered by statutory privilege). See Introductory Note to Article V, Privileges and Disqualifications.

Section 504. Spousal Privilege and Disqualification; Parent-Child Disqualification

(a) Spousal Privilege.

(1) General Rule. A spouse shall not be compelled to testify in the trial of an indictment, complaint, or other criminal proceeding brought against the other spouse.

(2) Who May Claim the Privilege. Only the witness-spouse may claim the privilege.

(3) Exceptions. This privilege shall not apply in civil proceedings, or in any prosecution for nonsupport, desertion, neglect of parental duty, or child abuse, including incest.

(b) Spousal Disqualification.

(1) General Rule. In any proceeding, civil or criminal, a witness shall not testify as to private conversations with a spouse occurring during their marriage.

(2) Exceptions. This disqualification shall not apply to

(A) a proceeding arising out of or involving a contract between spouses;

(B) a proceeding to establish paternity or to modify or enforce a support order;

(C) a prosecution for nonsupport, desertion, or neglect of parental duty;

(D) child abuse proceedings, including incest;

(E) any criminal proceeding in which a spouse has been charged with a crime against the other spouse;

(F) a violation of a vacate, restraining, or no-contact order or judgment issued by a Massachusetts court or a similar protection order from another jurisdiction;

(G) a declaration of a deceased spouse if the court finds that it was made in good faith and upon the personal knowledge of the declarant; or

(H) a criminal proceeding in which the private conversation reveals a bias or motive on the part of a spouse testifying against his or her spouse.

(c) Parent-Child Disqualification.

(1) Definitions. As used in this subsection, the following words shall have the following meanings:

(A) Minor Child. A "minor child" is any person under eighteen years of age.

(B) Parent. A "parent" is the natural or adoptive mother or father of the minor child referred to in Subsection (c)(1)(A).

(2) Disqualification. An unemancipated, minor child, living with a parent, shall not testify before a grand jury or at the trial of an indictment, complaint, or other criminal proceeding against said parent where the victim in such proceeding is not a member of said parent's family and does not reside in the said parent's household.

NOTE

Subsection (a)(1). This subsection is taken nearly verbatim from G. L. c. 233, § 20, Second.

The existence of the privilege depends on whether the spouse who asserts it is then married. The privilege applies even if the spouse was not married at the time of the events that are the subject of the criminal trial, and even if the spouse who asserts the privilege had testified in an earlier proceeding or trial. See Commonwealth v. DiPietro, 373 Mass. 369, 382 (1977). There is no common-law privilege, similar to the spousal privilege, applicable to unmarried cohabitants. Commonwealth v. Diaz, 422 Mass. 269, 274 (1996).

The privilege not to testify against a spouse applies regardless of whether the proposed testimony would be favorable or unfavorable to the other spouse. Commonwealth v. Maillet, 400 Mass. 572, 578 (1987). The privilege is broad and it applies even though a spouse is called to give testimony concerning "persons other than the spouse." Matter of a Grand Jury Subpoena, 447 Mass. 88, 97 (2006).

The privilege applies to testimony at trial and not to testimony before a grand jury. See Matter of a Grand Jury Subpoena, 447 Mass. at 99. (court finds it unnecessary to "decide whether, or to what extent, the spousal privilege may be invoked in pretrial [or posttrial] proceedings"). But see Commonwealth v. Szerlong, 457 Mass. 858, 864 (2010) (spousal privilege applied at pretrial hearing on motion in limine). The court should conduct a voir dire, outside the presence of the jury, and may inquire of the witness whether he or she will assert the privilege or otherwise refuse to testify. Id. at 864 n.10, citing Commonwealth v. Fisher, 433 Mass. 340, 350 (2001). However, a "spouse cannot be forced to testify regarding [his or] her reasons for doing so." Id. The privilege does not apply to posttrial evidentiary hearings where the spouse is not a defendant. Commonwealth v. Cotto, 471 Mass. 97, 118–119 (2015).

Subsection (a)(2). This subsection is derived from Commonwealth v. Spencer, 212 Mass. 438, 451 (1912). See also Commonwealth v. Stokes, 374 Mass. 583, 595 (1978).

A spouse may testify against the other spouse if he or she is willing to do so. Commonwealth v. Saltzman, 258 Mass. 109, 110 (1927). The defendant-spouse has no standing to object to his or her spouse's testimony. Commonwealth v. Stokes, 374 Mass. at 595. When a spouse decides to waive the privilege and testify against his or her spouse in a criminal proceeding, the judge should be satisfied, outside the presence of the jury, that the waiver is knowing and voluntary. Id. at 595 n.9.

Subsection (a)(3). This subsection is derived from G. L. c. 233, § 20, Second, and G. L. c. 273, § 7. See Three Juveniles v. Commonwealth, 390 Mass. 357, 361 (1983) (privilege inapplicable in civil proceedings), cert. denied, 465 U.S. 1068 (1984).

Subsection (b)(1). This subsection is derived from G. L. c. 233, § 20, First.

The disqualification, unlike the privilege, bars either spouse from testifying to private conversations with the other, even where both spouses wish the communication to be revealed. Gallagher v. Goldstein, 402 Mass. 457, 459 (1988). "The contents of private conversations are absolutely excluded, but the statute does not bar evidence as to the fact that a conversation took place" (citations omitted). Id. The disqualification survives the death of a spouse, see Dexter v. Booth, 84 Mass. 559, 561 (1861), except in civil cases subject to G. L. c. 233, § 65 ("In any action or other civil judicial proceeding, a declaration of a deceased person shall not be inadmissible in evidence as hearsay or as private conversation between husband and wife, as the case may be, if the court finds that it was made in good faith and upon the personal knowledge of the declarant."). See Section 504(b)(2)(G), Spousal Privilege and Disqualification; Parent-Child Disqualification: Spousal Disqualification: Exceptions.

Whether a conversation was "private" is a question of preliminary fact for the trial judge. Commonwealth v. Stokes, 374 Mass. 583, 595 (1978). Where children are present, "[i]t is for the trial judge to determine whether the conversation was overheard by the children and whether the children were 'of sufficient intelligence at the time to pay attention, and to understand what was being said.'" Id., quoting Freeman v. Freeman, 238 Mass. 150, 161 (1921). In the absence of an objection, evidence of private conversations is admissible and may be given its full probative value. Id. at 595 n.8. However, if there is an objection, the conversation is excluded even if neither spouse objects to the conversation being admitted. Gallagher v. Goldstein, 402 Mass. at 461; Commonwealth v. Salyer, 84 Mass. App. Ct. 346, 354 (2013). The conversation remains private, and thus inadmissible, even if one of the spouses discloses the conversation to a third party. Commonwealth v. Garcia, 476 Mass. 822, 827 (2017).

The disqualification applies only to conversations, not to other types of communications. For example, written communications are not included. Commonwealth v. Szczuka, 391 Mass. 666, 678 n.14 (1984). A spouse is not barred from testifying that a conversation took place, and, as a result, that he or she did something. See Sampson v. Sampson, 223 Mass. 451, 458–459 (1916). The disqualification does not bar

a third person who overheard the "private conversation" from testifying to its contents. Commonwealth v. O'Brien, 377 Mass. 772, 774–775 (1979). See also Martin v. Martin, 267 Mass. 157, 159 (1929).

"[W]ords constituting or accompanying abuse, threats, or assaults of which the other spouse is the victim" are not regarded as private conversation for the purpose of the disqualification. Commonwealth v. Gillis, 358 Mass. 215, 218 (1970). See also Commonwealth v. Foxworth, 473 Mass. 149, 159–160 (2015). Complaints and exclamations of pain and suffering are also not private conversations for the purpose of the disqualification. Commonwealth v. Jardine, 143 Mass. 567, 567–568 (1887).

The disqualification depends upon the existence of the marriage at the time of the communication; it does not prohibit testimony by a spouse as to communications made prior to the marriage. Commonwealth v. Azar, 32 Mass. App. Ct. 290, 304 (1992), remanded for new trial on other grounds, 435 Mass. 675 (2002). See also Commonwealth v. Barronian, 235 Mass. 364, 366 (1920).

The Supreme Judicial Court has left open whether the disqualification would bar testimony of a spouse when husband and wife are jointly engaged in criminal activity. Commonwealth v. Walker, 438 Mass. 246, 254 n.4 (2002).

The defendant's constitutional right to confront witnesses may trump the statutory disqualification. "To determine whether the [marital] disqualification should yield to the invoked constitutional rights [in a criminal case the court] look[s] to whether the evidence at issue if admitted might have had a significant impact on the result of the trial" (quotations and citations omitted). Commonwealth v. Perl, 50 Mass. App. Ct. 445, 453 (2000) (upholding exclusion of private conversations which would have been cumulative of other evidence).

"Where [G. L. c. 233, § 20] confers a testimonial privilege, the language of the statute is to be strictly construed." Matter of a Grand Jury Subpoena, 447 Mass. 88, 90 (2006).

Subsection (b)(2)(A). This subsection is derived from G. L. c. 233, § 20, First.

Subsection (b)(2)(B). This subsection is derived from G. L. c. 233, § 20, First. Spousal disqualification does not apply in any Chapter 209C action. See G. L. c. 209C, § 16(c). It also does not apply to any action to establish paternity, support, or both under the Massachusetts Uniform Interstate Family Support Act (Chapter 209D), or to enforce a child support or alimony order. See G. L. c. 209D, § 3-316(h).

Subsection (b)(2)(C). This subsection is derived from G. L. c. 233, § 20, First.

Subsection (b)(2)(D). This subsection is derived from G. L. c. 233, § 20, First. See Commonwealth v. Burnham, 451 Mass. 517, 521–522 (2008) (the statutory exception to the applicability of the marital disqualification in child abuse cases applies to both civil and criminal proceedings).

Subsection (b)(2)(E). This subsection is derived from G. L. c. 233, § 20, First.

Subsection (b)(2)(F). This subsection is derived from G. L. c. 233, § 20, First.

Subsection (b)(2)(G). This subsection is taken nearly verbatim from G. L. c. 233, § 65.

Subsection (b)(2)(H). This subsection is derived from Commonwealth v. Sugrue, 34 Mass. App. Ct. 172, 175–178 (1993), where the Appeals Court explained that the criminal defendant's constitutional right to confrontation and to a fair trial outweighed the public policy behind the spousal disqualification.

Subsection (c)(1)(A). This subsection is derived from G. L. c. 4, § 7, Forty-eighth.

Subsection (c)(1)(B). This subsection is derived from G. L. c. 233, § 20, Fourth.

Subsection (c)(2). This subsection is derived from G. L. c. 233, § 20, Fourth. The statutory disqualification does not prohibit the child from testifying in a civil case, including but not limited to a divorce or custody case.

The Supreme Judicial Court has declined to recognize a testimonial privilege that parents could exercise to avoid being compelled to testify in criminal proceedings about confidential communications with their children. See Matter of a Grand Jury Subpoena, 430 Mass. 590, 590–591 (2000) ("the Legislature, in the first instance, is the more appropriate body to weigh the relative social policies and address whether and how such a privilege should be created").

Section 505. Domestic Violence Victims' Counselor Privilege

(a) Definitions. The definitions that follow apply to this section unless the context clearly requires otherwise.

(1) Abuse. "Abuse" means causing or attempting to cause physical harm; placing another in fear of imminent physical harm; or causing another to engage in sexual relations against his or her will by force, threat of force, or coercion.

(2) Confidential Communication. A "confidential communication" is information transmitted in confidence by and between a victim and a domestic violence victims' counselor by a means which does not disclose the information to a person other than a person present for the benefit of the victim, or to those to whom disclosure of such information is reasonably necessary to the counseling and assisting of such victim. The term "information" includes, but is not limited to, reports, records, working papers, or memoranda.

(3) Domestic Violence Victims' Counselor. A "domestic violence victims' counselor" is a person who is employed or volunteers in a domestic violence victim's program; who has undergone a minimum of twenty-five hours of training; who reports to and is under the direct control and supervision of a direct service supervisor of a domestic violence victims' program; and whose primary purpose is the rendering of advice, counseling, or assistance to victims of abuse.

(4) Domestic Violence Victims' Program. A "domestic violence victims' program" is any refuge, shelter, office, safe home, institution or center established for the purpose of offering assistance to victims of abuse through crisis intervention, medical, legal, or support counseling.

(5) Victim. A "victim" is a person who has suffered abuse and who consults a domestic violence victims' counselor for the purpose of securing advice, counseling, or assistance concerning a mental, physical, or emotional condition caused by such abuse.

(b) Privilege. A domestic violence victims' counselor shall not disclose confidential communications between the counselor and the victim of domestic violence without the prior written consent of the victim. Such confidential communication shall not be subject to discovery in any civil, legislative, or administrative proceeding without the prior written consent of the victim to whom such confidential communication relates, except as provided in Subsection (c).

(c) Exception. In criminal actions, such confidential communications may be subject to discovery and may be admissible as evidence, subject to applicable law.

NOTE

This section is derived from G. L. c. 233, § 20K; Commonwealth v. Dwyer, 448 Mass. 122, 143 n.25 (2006) (characterizing records prepared by domestic violence victims' counselor as privileged); and Commonwealth v. Tripolone, 425 Mass. 487, 489 (1997) (same). The specific provision in G. L. c. 233, § 20K, for in camera judicial review prior to an order allowing any discovery of material covered by the domestic violence victims' counselor privilege is different from the procedure recently established by the Supreme Judicial Court in Commonwealth v. Dwyer, 448 Mass. at 145–146. See Introductory Note to Article V, Privileges and Disqualifications.

Section 506. Sexual Assault Counselor–Victim Privilege

(a) Definitions. The definitions that follow apply to this section unless the context clearly requires otherwise.

(1) Rape Crisis Center. A "rape crisis center" is any office, institution, or center offering assistance to victims of sexual assault and the families of such victims through crisis intervention, medical, and legal counseling.

(2) Sexual Assault Counselor. A "sexual assault counselor" is a person who (A) is employed by or is a volunteer in a rape crisis center; (B) has undergone thirty-five hours of training; (C) reports to and is under the direct control and supervision of a licensed social worker, nurse, psychiatrist, psychologist, or psychotherapist; and (D) has the primary purpose of rendering advice, counseling, or assistance to victims of sexual assault.

(3) Victim. A "victim" is a person who has suffered a sexual assault and who consults a sexual assault counselor for the purpose of securing advice, counseling, or assistance concerning a mental, physical, or emotional condition caused by such sexual assault.

(4) Confidential Communication. A "confidential communication" is information transmitted in confidence by and between a victim of sexual assault and a sexual assault counselor by a means which does not disclose the information to a person other than a person present for the benefit of the victim, or to those to whom disclosure of such information is reasonably necessary to the counseling and assisting of such victim. The term includes all information received by the sexual assault counselor which arises out of and in the course of such counseling and assisting, including, but not limited to, reports, records, working papers, or memoranda.

(b) Privilege. A confidential communication as defined in Subsection (a)(4) shall not be disclosed by a sexual assault counselor, is not subject to discovery, and is inadmissible in any criminal or civil proceeding without the prior written consent of the victim to whom the report, record, working paper, or memorandum relates. Nothing in this section shall be construed to limit the defendant's right of cross-examination of such counselor in a civil or criminal proceeding if such counselor testifies with such written consent.

(c) Exception. In criminal actions, such confidential communications may be subject to discovery and may be admissible as evidence, subject to applicable law.

NOTE

Subsection (a). This subsection is taken nearly verbatim from G. L. c. 233, § 20J.

Subsection (b). This subsection is taken nearly verbatim from G. L. c. 233, § 20J. See Commonwealth v. Dwyer, 448 Mass. 122, 143 n.25 (2006) (characterizing records prepared by sexual assault victims' counselor as privileged).

This privilege protects only confidential communications between the victim and the counselor and does not extend to the date, time, or fact of the communication. Commonwealth v. Neumyer, 432 Mass. 23, 29 (2000). The victim's testimony to the content of a privileged communication under this section does not constitute a waiver of the privilege unless the testimony is given with knowledge of the privilege and an intent to waive it. Id. at 35–36. See Section 523(b), Waiver of Privilege: Conduct Constituting Waiver.

Subsection (c). This subsection is derived from Commonwealth v. Dwyer, 448 Mass. 122, 145–146 (2006) (establishing protocol in criminal cases governing access to and use of material covered by privilege). See Introductory Note to Article V, Privileges and Disqualifications.

Section 507. Social Worker–Client Privilege

(a) Definitions. As used in this section, the following words shall have the following meanings:

(1) Client. A "client" is a person with whom a social worker has established a social worker–client relationship.

(2) Communications. "Communications" includes conversations, correspondence, actions, and occurrences regardless of the client's awareness of such conversations, correspondence, actions, and occurrences and any records, memoranda, or notes of the foregoing.

(3) [Reserved]

(4) Social Worker. As used in this section, a "social worker" is a social worker licensed pursuant to the provisions of G. L. c. 112, § 132, or a social worker employed in a State, county, or municipal governmental agency.

(b) Privilege. A client shall have the privilege of refusing to disclose and of preventing a witness from disclosing any communication, wherever made, between said client and a social worker relative to the diagnosis or treatment of the client's mental or emotional condition. If a client is incompetent to exercise or waive such privilege, a guardian shall be appointed to act in the client's behalf under this section. A previously appointed guardian shall be authorized to so act.

(c) Exceptions. The privilege in Subsection (b) shall not apply to any of the following communications:

(1) if a social worker, in the course of making a diagnosis or treating the client, determines that the client is in need of treatment in a hospital for mental or emotional illness or that there is a threat of imminently dangerous activity by the client against the client or another person, and on the basis of such determination discloses such communication either for the purpose of placing or retaining the client in such hospital; provided, however, that the provisions of this

section shall continue in effect after the client is in said hospital, or placing the client under arrest or under the supervision of law enforcement authorities;

(2) if a judge finds that the client, after having been informed that the communications would not be privileged, has made communications to a social worker in the course of a psychiatric examination ordered by the court; provided, however, that such communications shall be admissible only on issues involving the client's mental or emotional condition and not as a confession or admission of guilt;

(3) in any proceeding, except one involving child custody, adoption, or adoption consent, in which the client introduces his or her mental or emotional condition as an element of a claim or defense, and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between client and social worker be protected;

(4) in any proceeding after the death of a client in which the client's mental or emotional condition is introduced by any party claiming or defending through or as a beneficiary of the client as an element of the claim or defense, and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between client and social worker be protected;

(5) in the initiation of proceedings under G. L. c. 119, §§ 23(a)(3) and 24, or G. L. c. 210, § 3, or to give testimony in connection therewith;

(6) in any proceeding whereby the social worker has acquired the information while conducting an investigation pursuant to G. L. c. 119, § 51B;

(7) in any other case involving child custody, adoption, or the dispensing with the need for consent to adoption in which, upon a hearing in chambers, the judge, in the exercise of his or her discretion, determines that the social worker has evidence bearing significantly on the client's ability to provide suitable care or custody, and that it is more important to the welfare of the child that the communication be disclosed than that the relationship between client and social worker be protected; provided, however, that in such case of adoption or the dispensing with the need for consent to adoption, a judge shall determine that the client has been informed that such communication would not be privileged;

(8) in any proceeding brought by the client against the social worker and in any malpractice, criminal, or license revocation proceeding in which disclosure is necessary or relevant to the claim or defense of the social worker; or

(9) in criminal actions, such privileged communications may be subject to discovery and may be admissible as evidence, subject to applicable law.

NOTE

Subsections (a)(1)–(2). These subsections are taken nearly verbatim from G. L. c. 112, § 135.

Subsection (a)(4). This subsection is taken nearly verbatim from G. L. c. 112, §§ 135A and 135B. See Bernard v. Commonwealth, 424 Mass. 32, 35 (1996) (State police trooper employed as a peer counselor qualified as a social worker for purposes of this section).

Subsection (b). This subsection is taken nearly verbatim from G. L. c. 112, § 135B. See Commonwealth v. Pelosi, 441 Mass. 257, 261 n.6 (2004) (characterizing records prepared by clients' social worker as privileged; privilege is not self-executing).

Subsections (c)(1)–(8). These subsections are taken nearly verbatim from G. L. c. 112, § 135B.

The social worker–client privilege is set forth in G. L. c. 112, § 135B. General Laws c. 112, § 135A, addresses the general duty of confidentiality of certain social workers. See Commonwealth v. Pelosi, 441 Mass. 257, 261 n.6 (2004). The privilege is not self-executing. See Commonwealth v. Oliveira, 438 Mass. 325, 331 (2002).

Subsection (c)(9). This subsection is derived from Commonwealth v. Dwyer, 448 Mass. 122, 145–146 (2006) (establishing protocol in criminal cases governing access to and use of material covered by statutory privilege). See Introductory Note to Article V, Privileges and Disqualifications.

Section 508. Allied Mental Health or Human Services Professional Privilege

(a) Definitions. As used in this section, an "allied mental health and human services professional" is a licensed marriage and family therapist, a licensed rehabilitation counselor, a licensed mental health counselor, or a licensed educational psychologist.

(b) Privilege. Any communication between an allied mental health or human services professional and a client shall be deemed to be confidential and privileged.

(c) Waiver. This privilege shall be subject to waiver only in the following circumstances:

(1) where the allied mental health and human services professional is a party defendant to a civil, criminal, or disciplinary action arising from such practice in which case the waiver shall be limited to that action;

(2) where the client is a defendant in a criminal proceeding and the use of the privilege would violate the defendant's right to compulsory process and right to present testimony and witnesses in his or her behalf;

(3) when the communication reveals the contemplation or commission of a crime or a harmful act; and

(4) where a client agrees to the waiver, or in circumstances where more than one person in a family is receiving therapy, where each such family member agrees to the waiver.

(d) Mental Health Counselor Exception. With respect to a mental health counselor, the privilege does not apply to the following communications:

(1) if a mental health counselor, in the course of diagnosis or treatment of the client, determines that the client is in need of treatment in a hospital for mental or emotional illness or that there is a threat of imminently dangerous activity by the patient against himself or herself or another person and, on the basis of the determination, discloses the communication either for the

purpose of placing or retaining the client in the hospital, although this section shall continue in effect after the patient is in the hospital or placed under arrest or under the supervision of law enforcement authorities;

(2) if a judge finds that the client, after having been informed that a communication would not be privileged, has made a communication to a mental health counselor in the course of a psychiatric examination ordered by the court, although the communication shall be admissible only on issues involving the patient's mental or emotional condition and not as a confession or admission of guilt;

(3) in a proceeding, except one involving child custody, in which the client introduces his or her mental or emotional condition as an element of his or her claim or defense, and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between client and mental health counselor be protected;

(4) in a proceeding after the death of a client in which the client's mental or emotional condition is introduced by any party claiming or defending through or as beneficiary of the patient as an element of the claim or the defense and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between client and mental health counselor be protected;

(5) in the initiation of proceedings under G. L. c. 119, § 23(a)(3) or § 24, or G. L. c. 210, § 3, to give testimony in connection therewith;

(6) in a proceeding whereby the mental health counselor has acquired the information while conducting an investigation pursuant to G. L. c. 119, § 51B;

(7) in a case involving child custody, adoption, or the dispensing with the need for consent to adoption where, upon a hearing in chambers, the court exercises its discretion to determine that the mental health counselor has evidence bearing significantly on the client's ability to provide suitable care or custody, and it is more important to the welfare of the child that the communication be disclosed than that the relationship between client and mental health counselor be protected, although in the case of adoption or the dispensing with the need for consent to adoption, the court shall determine that the client has been informed that the communication should not be privileged; or

(8) in a proceeding brought by the client against the mental health counselor and in any malpractice, criminal, or license revocation proceeding in which disclosure is necessary or relevant to the claim or defense of the mental health counselor.

(e) Exception. In criminal actions, such privileged communications may be subject to discovery and may be admissible as evidence, subject to applicable law.

NOTE

Subsection (a). This subsection is taken nearly verbatim from G. L. c. 112, § 163. General Laws c. 112, § 165, outlines license eligibility. A licensed educational psychologist must also be certified as a school psychologist by the Massachusetts Department of Education. G. L. c. 112, § 163.

Subsections (b) and (c). These subsections are taken nearly verbatim from G. L. c. 112, § 172. See Commonwealth v. Vega, 449 Mass. 227, 231 (2007) (the statute creates an evidentiary privilege as well as a confidentiality rule).

These subsections do not prohibit a third-party reimburser from inspecting and copying any records relating to diagnosis, treatment, or other services provided to any person for which coverage, benefit, or reimbursement is claimed, so long as access occurs in the ordinary course of business and the policy or certificate under which the claim is made provides that such access is permitted. G. L. c. 112, § 172. Further, this section does not apply to access to such records pursuant to any peer review or utilization review procedures applied and implemented in good faith. G. L. c. 112, § 172.

Subsection (d). This subsection is taken nearly verbatim from G. L. c. 112, § 172A. General Laws c. 112, § 172A, deals with the evidentiary privilege held by clients of mental health providers in court proceedings, while G. L. c. 112, § 172, deals with the confidentiality requirement adhered to by mental health providers. The confidentiality requirement need not be invoked by the client to be in effect, but it can be waived under certain circumstances covered in G. L. c. 112, § 172.

General Laws c. 119, § 23(a)(3), deals with children who are without proper care due to the death or incapacity, unfitness, or unavailability of a parent or guardian. General Laws c. 119, § 24, involves petitions and testimony regarding abuse or neglect of children. General Laws c. 210, § 3, involves petitions for adoption. General Laws c. 119, § 51B, involves investigations regarding the abuse or neglect of children.

In the absence of a court order, a warning in accordance with Commonwealth v. Lamb, 365 Mass. 265, 270 (1974), is not required where the examiner is a diagnosing or treating psychotherapist of a patient involuntarily committed to a mental health facility pursuant to G. L. c. 123, § 12(b). Walden Behavioral Care v. K.I., 471 Mass. 150, 154 (2015). Contrast Department of Youth Servs. v. A Juvenile, 398 Mass. 516, 524–526 (1986) (Lamb warning required when department ordered psychiatrist to interview juvenile in its custody).

Cross-Reference: Section 503(d)(2), Psychotherapist-Patient Privilege: Exceptions: Court-Ordered Psychiatric Exam.

Subsection (e). This subsection is derived from Commonwealth v. Dwyer, 448 Mass. 122, 145–146 (2006) (establishing protocol in criminal cases governing access to and use of material covered by statutory privilege). See Introductory Note to Article V, Privileges and Disqualifications.

Section 509. Identity of Informer, Surveillance Location, and Protected Witness Privileges

(a) Identity of Informer. The identity of persons supplying the government with information concerning the commission of a crime may be privileged in both civil and criminal cases. The existence and validity of the privilege is determined in two stages:

(1) Stage One. The judge must first determine whether the Commonwealth has properly asserted the privilege by showing that disclosure would endanger the informant or otherwise impede law enforcement efforts. If such a finding is made, the judge must determine whether

the defendant has offered some evidence that the privilege should be set aside on grounds that it interferes with the defense.

(2) Stage Two. If the judge finds that the privilege has been properly asserted and that, if recognized, it would interfere with the defense, the judge must undertake a balancing test in order to determine whether disclosure of the informant's identity and information is sufficiently relevant and helpful to the defense. The judge must consider the crime charged, the possible defenses, the possible significance of the privileged testimony, and other relevant factors in balancing the public interest in the free flow of information and the individual's interest in preparing a defense. There is no privilege under this subsection when the identity of the informer has been disclosed by the government or by the informer, or the court determines that it is otherwise known.

(b) Surveillance Location. The exact location, such as the location of a police observation post, used for surveillance is privileged, except there is no privilege under this subsection when a defendant shows that revealing the exact surveillance location would provide evidence needed to fairly present the defendant's case to the jury.

(c) Protected Witness. The identity and location of a protected witness and any other matter concerning a protected witness or the Commonwealth's witness protection program is privileged in both civil and criminal cases, except there is no privilege as to the identity and location of the protected witness under this subsection when

(1) the prosecuting officer agrees to a disclosure after balancing the danger posed to the protected witness, the detriment it may cause to the program, and the benefit it may afford to the public or the person seeking discovery, or

(2) disclosure is at the request of a local, State, or Federal law enforcement officer or is in compliance with a court order in circumstances in which the protected witness is under criminal investigation for, arrested for, or charged with a felony.

(d) Who May Claim. These privileges may be claimed by the government.

NOTE

Subsection (a). This subsection is derived from Commonwealth v. Bonnett, 472 Mass. 827, 846–851 (2015), and Roviaro v. United States, 353 U.S. 53, 59–62 (1957); the last sentence is derived from Commonwealth v. Congdon, 265 Mass. 166, 175 (1928), and Pihl v. Morris, 319 Mass. 577, 579 (1946). See also Commonwealth v. Dias, 451 Mass. 463, 469 (2008) ("part of the balance [between the defendant's right to present a defense and the public interest in protecting the free flow of information] involves weighing the potential danger to the informant").

The showing that must be made by the defendant in Stage One in order to trigger the balancing test as part of Stage Two is "relatively undemanding" because "the details concerning privileged information sought by the defendant ordinarily are not in his or her possession." Commonwealth v. Bonnett, 472 Mass. at 847. In determining whether disclosure would be relevant and helpful to the defense, judges must consider whether "knowledge of the informant's identity can offer substantial aid to the defense even if the informant himself cannot provide testimony sufficiently relevant and reliable to be admitted at trial." Id. at 849.

"[T]he government is not required to disclose the identity of an informant who is a mere tipster and not an active participant in the offense charged." Commonwealth v. Brzezinski, 405 Mass. 401, 408 (1989), quoting United States v. Alonzo, 571 F.2d 1384, 1387 (5th Cir. 1978), cert. denied, 439 U.S. 847 (1978). Accord McCray v. Illinois, 386 U.S. 300, 308–309 (1967). See also Commonwealth v. Martin, 362 Mass. 243, 245 (1972) (trial judge "reasonably refused to permit inquiry about an informant who seems merely to have told the police where the defendants were living together"); Commonwealth v. McKay, 23 Mass. App. Ct. 966, 967 (1987) (trial judge was not required to order disclosure of the identity of two inmates who informed on the defendant, although their statements were disclosed and they were not called as witnesses at trial by the Commonwealth). When the informant "is an active participant in the alleged crime or the only nongovernment witness, disclosure [of the identity of the informant] usually has been ordered." Commonwealth v. Lugo, 406 Mass. 565, 572 (1990).

The privilege may expire. The public records statute, G. L. c. 66, § 10, provides an independent right of access to records and documents that were covered by the privilege if the reason for the privilege no longer exists. See, e.g., District Attorney for the Norfolk Dist. v. Flatley, 419 Mass. 507, 511–512 (1995) (discussing Bougas v. Chief of Police of Lexington, 371 Mass. 59, 66 [1976], and WBZ-TV4 v. District Attorney for the Suffolk Dist., 408 Mass. 595, 602–604 [1990]).

***Dual Sovereignty*.** If the identity of an informant is known only to Federal authorities, the judge may not rely on the independent sovereignty of the United States as justification for failing to order disclosure of the informant's identity if disclosure is otherwise appropriate under this subsection. The remedy for the Commonwealth's failure to comply with an order of disclosure in such a case is dismissal of the criminal charge. See Commonwealth v. Bonnett, 472 Mass. 827, 845 (2015), quoting Commonwealth v. Liebman, 379 Mass. 671, 675 (1980).

***Challenges to the Sufficiency of an Affidavit*.** When a defendant challenges the sufficiency of an affidavit in support of a search warrant, the court's review "begins and ends with the 'four corners of the affidavit.'" Commonwealth v. O'Day, 440 Mass. 296, 297 (2003), quoting Commonwealth v. Villella, 39 Mass. App. Ct. 426, 428 (1995). The defendant has the burden of establishing by a preponderance of the evidence that the affidavit contains false statements. See Commonwealth v. Nine Hundred & Ninety-two Dollars, 383 Mass. 764, 767, 769 (1981). Intentionally or recklessly omitted material may satisfy the defendant's burden. See Commonwealth v. Long, 454 Mass. 542, 552 (2009). A negligent misrepresentation by the affiant is not a basis for relief. See Commonwealth v. Amral, 407 Mass. 511, 520 (1990); Commonwealth v. Nine Hundred & Ninety-two Dollars, 383 Mass. at 771–772. If the affidavit contains false statements, the court must simply assess whether it establishes probable cause without reliance on the false statements. See Commonwealth v. Amral, 407 Mass. at 519. Cf. Commonwealth v. Nine Hundred & Ninety-two Dollars, 383 Mass. at 768 (leaving open whether suppression of evidence should be ordered under Article 14 of the Massachusetts Declaration of Rights when there has been a deliberately false, though nonmaterial, misstatement by the affiant).

Amral* Hearing*. In keeping with the "four corners rule," the court should not take any action simply based on an allegation that the affidavit contains false information. Only if the defendant makes an initial showing that "cast[s] a reasonable doubt on the veracity of material representations made by the affiant concerning a confidential informant" is the court required to act (citations omitted). Commonwealth v. Youngworth, 55 Mass. App. Ct. 30, 38 (2002), cert. denied, 538 U.S. 1064 (2003). The first step is to conduct an in camera hearing. See Commonwealth v. Ramirez, 416 Mass. 41, 53–54 (1993). The informant may be ordered to appear and submit to questions by the court at this "Amral hearing"; however, the identity of the informant is not revealed. The court has discretion to permit the prosecutor to attend this hearing. Neither the defendant nor defense counsel is permitted to attend. See Commonwealth v. Amral, 407 Mass. at 525. If the court is satisfied that the informant exists and that the defendant's allegations of false statements are not substantiated, there is no further inquiry. On the other hand, if the defendant makes "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit," the court must take the next step (citation omitted). Commonwealth v. Youngworth, 55 Mass. App. Ct. at 37–38. In this situation, the defendant is entitled to an evidentiary hearing and to the disclosure of the identity of the informant. The burden of proof at this hearing rests with the defendant to establish that the affiant presented the magistrate with false information pur-

posely or with reckless disregard for its truth. If it is shown that an affidavit in support of a warrant contains false information that was material to the determination of probable cause, suppression of the evidence is required. See Franks v. Delaware, 438 U.S. 154, 155–156 (1978); Commonwealth v. Amral, 407 Mass. at 519–520.

Entrapment Defense. Where a defendant seeks disclosure of otherwise privileged information to support an entrapment defense, the question is whether the defense has been "appropriately raised . . . by the introduction of some evidence of inducement by a government agent or one acting at his direction." Commonwealth v. Madigan, 449 Mass. 702, 707 (2007), quoting Commonwealth v. Miller, 361 Mass. 644, 651–652 (1972). "The types of conduct that possess the indicia of inducement include 'aggressive persuasion, coercive encouragement, lengthy negotiations, pleading or arguing with the defendant, repeated or persistent solicitation, persuasion, importuning, and playing on sympathy or other emotion.'" Id. at 708, quoting Commonwealth v. Tracy, 416 Mass. 528, 536 (1993). See Commonwealth v. Elias, 463 Mass. 1015, 1016 (2012) (where defendant's affidavit states facts sufficient to raise an entrapment defense if informant were an individual named in the affidavit, trial court may require the Commonwealth to affirm whether informant is that individual); Commonwealth v. Mello, 453 Mass. 760, 765 (2009) (reversing trial judge's order that Commonwealth must disclose the identity of an unnamed informant because the defendant's proffer showed no more than a solicitation; duty to disclose identity of an undercover police officer or unnamed informant does not carry over to a second unnamed informant unless the second informant participated in the first informant's inducement).

In Camera Hearing. Unless the relevancy and materiality of the information sought is readily apparent, the party seeking access to the information has the burden to provide the trial judge with the basis for ordering the disclosure. Commonwealth v. Swenson, 368 Mass. 268, 276 (1975). When it is not clear from the record whether disclosure of the informant's identity is required, the court has discretion to hold an in camera hearing to assist in making that determination. Commonwealth v. Dias, 451 Mass. 463, 472 n.15 (2008) ("The nature of the in camera hearing is left to the judge."). In exceptional circumstances, a motion for the disclosure of the identity of an informant may be based on an ex parte affidavit in order to safeguard the defendant's privilege against self-incrimination. However, in such a case, before any order of disclosure is made, the Commonwealth must be given a summary or redacted version of the defendant's affidavit and an opportunity to oppose the defendant's motion. Commonwealth v. Shaughessy, 455 Mass. 346, 357–358 (2009).

Subsection (b). This subsection is derived from Commonwealth v. Lugo, 406 Mass. 565, 570–574 (1990), and Commonwealth v. Rios, 412 Mass. 208, 210–213 (1992). It would be a violation of the defendant's right to confrontation to preserve the confidentiality of a surveillance site by permitting the trier of fact to hear testimony from a witness outside of a defendant's presence. Commonwealth v. Rios, 412 Mass. at 212–213.

Subsection (c). This subsection is derived from St. 2006, c. 48, § 1, inserting G. L. c. 263A, entitled "Witness Protection in Criminal Matters." As for the right of the defense to have access to a Commonwealth witness, see Commonwealth v. Balliro, 349 Mass. 505, 515–518 (1965).

Subsection (d). This subsection is derived from Commonwealth v. Johnson, 365 Mass. 534, 544 (1974).

Section 510. Religious Privilege

(a) Definitions. As used in this section, the following words shall have the following meanings:

(1) A "clergyman" includes a priest, a rabbi, an ordained or licensed minister of any church, or an accredited Christian Science practitioner.

(2) A "communication" is not limited to conversations, and includes other acts by which ideas may be transmitted from one person to another.

(3) "In his professional character" means in the course of discipline enjoined by the rules or practice of the religious body to which the clergyman belongs.

(b) Privilege. A clergyman shall not disclose a confession made to him in his professional character without the consent of the person making the confession. Nor shall a clergyman testify as to any communication made to him by any person seeking religious or spiritual advice or comfort, or as to his advice given thereon in the course of his professional duties or in his professional character, without the consent of such person.

(c) Child Abuse. Any clergyman shall report all cases of child abuse, but need not report information solely gained in a confession or similarly confidential communication in other religious faiths. Nothing shall modify or limit the duty of a clergyman to report a reasonable cause that a child is being injured when the clergyman is acting in some other capacity that would otherwise make him a reporter.

NOTE

Subsection (a)(1). This subsection is taken nearly verbatim from G. L. c. 233, § 20A. In Commonwealth v. Kebreau, 454 Mass. 287, 301 (2009), the Supreme Judicial Court noted that the privilege is strictly construed and applies only to communications where a penitent "seek[s] religious or spiritual advice or comfort." In Commonwealth v. Marrero, 436 Mass. 488, 495 (2002), the Supreme Judicial Court declined to include the manager of a "Christian rehabilitation center" for drug addicts and alcoholics, who was not an ordained or licensed minister, within the definition of "clergyman." The court also noted it was not an appropriate case to consider adopting the more expansive definition of "clergyman" found in Proposed Mass. R. Evid. 505(a)(1). Id.

Subsection (a)(2). This subsection is taken nearly verbatim from Commonwealth v. Zezima, 365 Mass. 238, 241 (1974), rev'd on other grounds, 387 Mass. 748 (1982).

Subsection (a)(3). This subsection is taken nearly verbatim from G. L. c. 233, § 20A. See Commonwealth v. Vital, 83 Mass. App. Ct. 669, 673–674 (2013) (a communication by the defendant to his pastor with a request that it be passed on to a person who was the alleged victim of a sexual assault by the defendant was not covered by the privilege because the defendant's purpose was not to receive "religious or spiritual advice or comfort," but instead to circumvent the terms of a restraining order).

Subsection (b). This subsection is taken nearly verbatim from G. L. c. 233, § 20A. It is a preliminary question of fact for the trial judge whether a communication to a clergyman is within the scope of the privilege. Commonwealth v. Zezima, 365 Mass. 238, 242 n.4 (1974), rev'd on other grounds, 387 Mass. 748 (1982). See Commonwealth v. Nutter, 87 Mass. App. Ct. 260, 264–265 (2015) (communication made after pastoral relationship had ended was not privileged).

Subsection (c). This subsection is taken nearly verbatim from G. L. c. 119, § 51A.

Section 511. Privilege Against Self-Incrimination

(a) Privilege of Defendant in Criminal Proceeding.

(1) Custodial Interrogation. A person has a right to refuse to answer any questions during a custodial interrogation.

(2) Refusal Evidence.

(A) No Court Order or Warrant. In the absence of a court order or warrant, evidence of a person's refusal to provide real or physical evidence, or to cooperate in an investigation ordered by State officials, is not admissible in any criminal proceeding, except to challenge evidence of cooperation elicited by the defendant.

(B) Court Order or Warrant. When State officials have obtained a court order or warrant for physical or real evidence, a person's refusal to provide the real or physical evidence is admissible in any criminal proceeding.

(3) Compelled Examination. A defendant has a right to refuse to answer any questions during a court-ordered examination for criminal responsibility.

(4) At a Hearing or Trial. A defendant has a right to refuse to testify at any criminal proceeding.

(b) Privilege of a Witness. Every witness has a right, in any proceeding, civil or criminal, to refuse to answer a question unless it is perfectly clear, from a careful consideration of all the circumstances, that the testimony cannot possibly have a tendency to incriminate the witness.

(c) Exceptions.

(1) Waiver by Defendant's Testimony. When a defendant voluntarily testifies in a criminal case, the defendant waives his or her privilege against self-incrimination to the extent that the defendant may be cross-examined on all relevant and material facts regarding that case.

(2) Waiver by Witness's Testimony. When a witness voluntarily testifies regarding an incriminating fact, the witness may thereby waive the privilege against self-incrimination as to subsequent questions seeking related facts in the same proceeding.

(3) Limitation. A waiver by testimony under Subsection (c)(1) or (c)(2) is limited to the proceeding in which it is given and does not extend to subsequent proceedings.

(4) Required Records. A witness may be required to produce required records because the witness is deemed to have waived his or her privilege against self-incrimination in such records. Required records, as used in this subsection, are those records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.

(5) Immunity. In any investigation or proceeding, a witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required may tend to incriminate the witness or subject him or her to a penalty or forfeiture if the witness has been granted immunity with respect to the transactions, matters, or things concerning which the witness is compelled, after having claimed his or her privilege

against self-incrimination, to testify or produce evidence by a justice of the Supreme Judicial Court, Appeals Court, or Superior Court.

(6) Foregone Conclusion. Where a defendant is ordered by the court to produce information, the act of production does not involve testimonial communication and therefore does not violate the defendant's privilege against self-incrimination if the facts communicated already are known to the government and add little or nothing to the sum total of the government's information.

(d) Use of Suppressed Statements. The voluntary statement of a defendant that has been suppressed because of a Miranda violation may nevertheless, in limited circumstances, be used for impeachment purposes.

NOTE

Subsection (a). The Fifth Amendment to the Constitution of the United States provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." Similarly, Article 12 of the Declaration of Rights of the Massachusetts Constitution provides that "[n]o subject shall . . . be compelled to accuse, or furnish evidence against himself." These provisions protect a person from the compelled production of testimonial communications. See Blaisdell v. Commonwealth, 372 Mass. 753, 758–759 (1977). See also Commonwealth v. Brennan, 386 Mass. 772, 776 (1982). When the privilege is applicable, it may be overcome only by an adequate grant of immunity or a valid waiver. Blaisdell v. Commonwealth, 372 Mass. at 761. Under both Article 12 and the Fifth Amendment, the privilege does not apply to a corporation. Hale v. Henkel, 201 U.S. 43, 74–75 (1906); Matter of a John Doe Grand Jury Investigation, 418 Mass. 549, 552 (1994). Whether the privilege exists, its scope, and whether it has been waived are preliminary questions for the court to decide under Section 104(a), Preliminary Questions: In General.

Subsection (a)(1). This subsection is derived from the Fifth Amendment to the United States Constitution and Miranda v. Arizona, 384 U.S. 436, 444 (1966). The Miranda doctrine, including its accompanying exclusionary rule, has been developed and explained in numerous decisions of the United States Supreme Court and the appellate courts of Massachusetts. See E.B. Cypher, Criminal Practice and Procedure § 7.13 et seq. (4th ed. 2014). "[E]vidence of a criminal defendant's postarrest, post-Miranda silence cannot be used for the substantive purpose of permitting an inference of guilt." Commonwealth v. Mahdi, 388 Mass. 679, 694 (1983). See Doyle v. Ohio, 426 U.S. 610, 619 (1976). The limited exceptions where evidence of a defendant's postarrest, post-Miranda silence may be admissible include to

> "explain[] why a police interview of the defendant abruptly ended [when] the jury would be confused without the explanation; rebut[] the defendant's suggestion at trial that some impropriety on the part of the police prevented him from completing his statement to them; and rebut[] a claim by the defendant that he had given the police at the time of his arrest the same exculpatory explanation as he was presenting to the jury at trial" (citations omitted).

Commonwealth v. Letkowski, 469 Mass. 603, 611–612 (2014).

***Preference for Recording Certain Custodial Interrogations*.** Where the prosecution presents evidence of an unrecorded confession or statement made during a custodial interrogation, a criminal defendant is entitled, upon request, to a jury instruction advising that the State's highest court has expressed a preference that a custodial interrogation in a place of detention be recorded "whenever practicable." Commonwealth v. DiGiambattista, 442 Mass. 423, 447 (2004). In such a case, the jury should be instructed to weigh the evidence of the defendant's statement "with great caution and care" and be advised that "the absence of a recording permits (but does not compel) them to conclude that the Commonwealth has failed to prove voluntariness beyond a reasonable doubt." Id. at 447–448. The defendant has the right to refuse to

have the interrogation recorded. Commonwealth v. Tavares, 81 Mass. App. Ct. 71, 73 (2011). The Commonwealth also has the right to introduce evidence that the defendant refused to have the interrogation recorded, even in circumstances where the defendant does not challenge the voluntariness of the statement or make an issue of the lack of a recording. Commonwealth v. DaSilva, 471 Mass. 71, 80 (2015). The defendant is entitled to a DiGiambattista instruction even where he or she requests a recording not be created or requests it be interrupted or ceased. Commonwealth v. Santana, 477 Mass. 610, 623–624 (2017). The DiGiambattista instruction may include reference to the defendant's decision not to have a custodial statement recorded. See Commonwealth v. Rousseau, 465 Mass. 372, 391–393 (2013). The Supreme Judicial Court has, however, stated that "the better practice is not to instruct juries that defendants have a 'right' to refuse recording." Commonwealth v. Alleyne, 474 Mass. 771, 785 (2016). The DiGiambattista rule does not apply when the police station interview of the defendant is noncustodial. See, e.g., Commonwealth v. Issa, 466 Mass. 1, 19–21 (2013).

Regarding situations where an interpreter is used to translate a defendant's custodial statements, in Commonwealth v. AdonSoto, 475 Mass. 497, 507 (2016), the Supreme Judicial Court stated, citing DiGiambattista, as follows: "We now announce a new protocol . . . . Going forward, and where practicable, we expect that all interviews and interrogations using interpreter services will be recorded."

Cross-Reference: Section 604, Interpreters.

Subsection (a)(2). This subsection is derived from Commonwealth v. Delaney, 442 Mass. 604, 609–611 (2004), and from Commonwealth v. Jones, 477 Mass. 307, 326–328 (2017). The privilege against self-incrimination, under both Federal and State law, protects only against the production of communications or testimony compelled by the government. See Bellin v. Kelley, 48 Mass. App. Ct. 573, 581 n.13 (2000), and cases cited. It does not prevent the government from forcing a person to produce real or physical evidence, such as fingerprints, photographs, lineups, blood samples, handwriting, and voice exemplars. Commonwealth v. Brennan, 386 Mass. 772, 776–777, 783 (1982) (standard field sobriety tests do not implicate the privilege). The privilege against self-incrimination does not forbid the compelled production of certain statements that are necessarily incidental to the production of real or physical evidence. See Commonwealth v. Burgess, 426 Mass. 206, 220 (1997). On the other hand, testimonial evidence which reveals a person's knowledge or thoughts concerning some fact is protected. Commonwealth v. Brennan, 386 Mass. at 778. In some respects, Article 12 provides greater protections than the Fifth Amendment. See Attorney Gen. v. Colleton, 387 Mass. 790, 796 (1982); Commonwealth v. Hughes, 380 Mass. 583, 595 (1980). Compare Braswell v. United States, 487 U.S. 99, 109, 117–118 (1988) (Fifth Amendment privilege not applicable to order requiring custodian of corporate records to produce them even though the records would tend to incriminate the custodian because he is only acting as a representative of the corporation when he responds to the order), with Commonwealth v. Doe, 405 Mass. 676, 678–680 (1989) (describing result in Braswell v. United States as a "fiction" and holding that the privilege under Article 12 is fully applicable to protect custodian of corporate records from duty to produce them in circumstances in which act of production would incriminate the custodian as well as the corporation). However, evidence that a defendant failed to take a breathalyzer test properly after consenting is admissible. See Commonwealth v. AdonSoto, 475 Mass. 497, 501 (2016) (no error to admit evidence of defendant's failure to perform breathalyzer test properly after giving consent where such evidence did not constitute evidence of refusal, and where the defendant's consent was all that was required for admissibility).

***Refusal Evidence*.** In Opinion of the Justices, 412 Mass. 1201, 1208 (1992), the Supreme Judicial Court opined that legislation permitting the Commonwealth to offer evidence of a person's refusal to take a breathalyzer test would violate the privilege against self-incrimination under Article 12 because such evidence reveals the person's thought processes, i.e., it indicates the person has doubts or concerns about the outcome of the test, and thus constitutes testimonial evidence, the admission of which into evidence would violate the privilege under Article 12 of the Massachusetts Declaration of Rights. Federal law and the law of most other States is to the contrary. See South Dakota v. Neville, 459 U.S. 553, 560–561 (1983). See also Commonwealth v. Conkey, 430 Mass. 139, 142 (1999) ("evidence admitted to show consciousness of guilt is always testimonial because it tends to demonstrate that the defendant knew he was guilty"). If evidence of the defendant's refusal to take a breathalyzer, or other alcohol-related test, is erroneously introduced at

trial, the defendant has the right to a jury instruction pursuant to Commonwealth v. Downs, 53 Mass. App. Ct. 195, 198 (2001), that jurors are not to consider the lack of any alcohol-test evidence during deliberations. Id. It is the defendant's decision whether a Downs instruction is given; the instruction cannot be given over the defendant's objection, and the judge should not give the instruction sua sponte. See Commonwealth v. Wolfe, 478 Mass. 142, 149–150 (2017).

The reasoning employed by the Supreme Judicial Court in Opinion of the Justices, 412 Mass. at 1208–1211, has been extended to other circumstances in which a person refuses to take a test, or to supply the police with real or physical evidence in the absence of a court order or warrant. See, e.g., Commonwealth v. Conkey, 430 Mass. at 141–143 (evidence of a defendant's failure to appear at a police station for fingerprinting); Commonwealth v. Hinckley, 422 Mass. 261, 264–265 (1996) (evidence of a defendant's refusal to turn over sneakers for comparison with prints at a crime scene is not admissible); Commonwealth v. McGrail, 419 Mass. 774, 779–780 (1995) (evidence of refusal to submit to field sobriety tests is not admissible); Commonwealth v. Zevitas, 418 Mass. 677, 683 (1994) (evidence of refusal to submit to a blood alcohol test under G. L. c. 90, § 24, is not admissible); Commonwealth v. Lydon, 413 Mass. 309, 313–315 (1992) (evidence of a defendant's refusal to let his hands be swabbed for the presence of gunpowder residue is not admissible). See also Commonwealth v. Buckley, 410 Mass. 209, 214–216 (1991) (a suspect may be compelled to provide a handwriting exemplar); Commonwealth v. Burke, 339 Mass. 521, 534–535 (1959) (defendant may be required to go to the courtroom floor and strike a pose for identification purposes). Contrast Commonwealth v. Delaney, 442 Mass. 604, 607–612 & n.8 (2004) (explaining that although a warrant involves an element of compulsion, it leaves the individual with no choice other than to comply unlike the compulsion that accompanies a police request for information or evidence during the investigative stage; therefore, the Commonwealth may offer evidence of a defendant's resistance to a warrant or court order without violating Article 12); Commonwealth v. Brown, 83 Mass. App. Ct. 772, 778–779 (2013) (statements by defendant while performing field sobriety tests expressing difficulty with or inability to do the test are admissible).

However, evidence of refusal may be admissible where the defendant "opens the door" by introducing evidence of cooperation. Commonwealth v. Jones, 477 Mass. 307, 326–328 (2017); Commonwealth v. Beaulieu, 79 Mass. App. Ct. 100, 104 (2001) (where defense counsel elicited testimony that defendant was not subjected to field sobriety test, Commonwealth was entitled to elicit testimony that defendant refused); Commonwealth v. Johnson, 46 Mass. App. Ct. 398, 405–406 (1999) (where defendant testified that he "did not disguise his voice" during identification procedure, Commonwealth was entitled to elicit testimony that defendant twice failed to show up for voice identification).

Cross-Reference: Section 525(b)(1), Comment upon or Inference from Claim of Privilege: Criminal Case; Section 613(a)(2), Prior Statements of Witnesses, Limited Admissibility: Prior Inconsistent Statement: Examining Other Witness; Section 613(a)(3), Prior Statements of Witnesses, Limited Admissibility: Prior Inconsistent Statement: Disclosure of Extrinsic Evidence.

Subsection (a)(3). This subsection is derived from the Fifth Amendment to the United States Constitution; Article 12 of the Massachusetts Declaration of Rights; G. L. c. 233, § 23B; and Blaisdell v. Commonwealth, 372 Mass. 753 (1977). At any stage of the proceeding, the trial judge may order a defendant to submit to an examination by one or more qualified physicians or psychologists under G. L. c. 123, § 15(a), on the issue of competency or criminal responsibility.

***Competency Examinations*.** A competency examination does not generally implicate a person's privilege against self-incrimination because it is concerned with whether the defendant is able to confer intelligently with counsel and to competently participate in the trial of his or her case, and not whether he or she is guilty or innocent. See Seng v. Commonwealth, 445 Mass. 536, 545 (2005). If the competency examination ordered by the court under G. L. c. 123, § 15(a), results in an opinion by the qualified physician or psychologist that the defendant is not competent, the court may order an additional examination by an expert selected by the Commonwealth. G. L. c. 123, § 15(a). "In the circumstances of a competency examination, G. L. c. 233, § 23B, together with the judge-imposed strictures of [Mass. R. Crim. P.] 14(b)(2)(B), protects the defendant's privilege against self-incrimination." Seng v. Commonwealth, 445 Mass. at 548.

Use of Statements Made During Competency Examinations in Connection with Criminal Responsibility. Generally, a patient's communications to a psychotherapist in a court-ordered evaluation under G. L. c. 123, § 15, may not be disclosed against the patient's wishes absent a warning that the communications would not be privileged. See Commonwealth v. Lamb, 365 Mass. 265, 270 (1974).

Criminal Responsibility Examinations. A defendant must give written notice to the Commonwealth if he or she intends at trial to raise his or her mental condition at the time of the alleged crime, or if he or she intends to introduce expert testimony on his or her mental condition at any stage of the proceeding. Mass. R. Crim. P. 14(b)(2)(A). Where a defendant's expert witness will rely on statements of the defendant as to his or her mental condition, the court, on its own motion or on motion of the Commonwealth, may order the defendant to submit to an examination by a court-appointed examiner in accordance with the terms and conditions set forth in Rule 14(b)(2)(B). This procedure adequately safeguards a defendant's privilege against self-incrimination. See Mass. R. Crim. P. 14(b)(2)(B); Blaisdell v. Commonwealth, 372 Mass. 753, 766–769 (1977). The results of a competency evaluation may be used against the defendant where the defendant offers evidence at trial in support of a defense of lack of criminal responsibility, thereby waiving the privilege; Lamb warnings given at the beginning of court-ordered competency evaluations should contain a warning to that effect. Commonwealth v. Harris, 468 Mass. 429, 452 (2014).

Rule 14(b)(2)(C) establishes a "reciprocal discovery process" to ensure that both the defendant's expert and the court-appointed examiner have "equal access to the information they collectively deem necessary to conduct an effective forensic examination and produce a competent report." Reporters' Notes to Mass. R. Crim. P. 14(b)(2)(C). See Commonwealth v. Hanright, 465 Mass. 639, 644 (2013) ("It is only fair that the Commonwealth have the opportunity to rebut the defendant's mental health evidence using the same resources that should be made available to defendant's medical expert."). Under the rule, within fourteen days of the court's designation of the court-appointed examiner, the defendant must make available to the examiner (1) all mental health records concerning the defendant in defense counsel's possession; (2) all medical records concerning the defendant in defense counsel's possession; and (3) all raw data from any tests or assessments administered or requested by the defendant's expert. Mass. R. Crim. P. 14(b)(2)(C)(i). This duty of production extends beyond the initial fourteen-day period. Mass. R. Crim. P. 14(b)(2)(C)(ii). The examiner also may request additional records under seal from "any person or entity" by following the procedure set forth in Rule 14(b)(2)(C)(iii); this same provision provides that if the court allows any part of an examiner's request, the defendant may make copies of the same records. At the conclusion of the court-ordered examination, the examiner must make available to the defendant all raw data from any tests or assessments administered to the defendant during the examination. Mass. R. Crim. P. 14(b)(2)(C)(iv). "By ensuring that the experts are working from a common, comprehensive set of records and objective, test-generated data, the rule advances the reliability and fairness of the examinations and the ensuing reports, and it promotes efficiency in the examination process." Reporters' Notes to Mass. R. Crim. P. 14(b)(2)(C).

Although Rule 14(b)(2)(C)(i) requires that the defendant produce only those mental health and medical records possessed by defense counsel, the rule "intends as wide a reach as is reasonably possible, covering every such record that the defense collected in the course of considering whether to assert this defense." Reporters' Notes to Mass. R. Crim. P. 14(b)(2)(C). Any concern that the defense "overlooked" or "chose not to collect" certain records is counterbalanced by the ability of the court-appointed examiner to request additional records. Id.

Subsection (a)(4). This subsection is derived from the Fifth Amendment to the United States Constitution; Article 12 of the Massachusetts Declaration of Rights; and G. L. c. 233, § 20, Third. Generally, in determining the existence of the privilege, the judge is not permitted to pierce the privilege. See Section 104(a), Preliminary Questions: In General. This privilege is not self-executing. See Commonwealth v. Brennan, 386 Mass. 772, 780 (1982).

Subsection (b). This subsection is derived from the Fifth Amendment to the United States Constitution; Article 12 of the Massachusetts Declaration of Rights; Wansong v. Wansong, 395 Mass. 154, 157–158 (1985) (civil proceeding); and Commonwealth v. Baker, 348 Mass. 60, 62–63 (1964) (criminal proceeding).

See also Lefkowitz v. Turley, 414 U.S. 70, 77 (1973) ("The [Fifth] Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."). The test used to determine whether an answer might incriminate the witness is the same under both Federal and State law. See Malloy v. Hogan, 378 U.S. 1, 11 (1964). See also Commonwealth v. Lucien, 440 Mass. 658, 665 (2004); Commonwealth v. Funches, 379 Mass. 283, 289 (1979). Also, under both Federal and State law, a public employee cannot be discharged or disciplined solely because the employee asserts his or her privilege against self-incrimination in response to questions by the public employer. Furtado v. Plymouth, 451 Mass. 529, 530 n.2 (2008). In Furtado, the Supreme Judicial Court interpreted the "criminal investigations" exception to G. L. c. 149, § 19B, which forbids the use of lie detector tests in the employment context except in very limited circumstances, as permitting a police chief to require a police officer under departmental investigation to submit to a lie detector test as a condition of his continued employment on grounds that there was an investigation of possible criminal activity, even though the police officer had been granted transactional immunity and could not be prosecuted criminally for that conduct. Id. at 532–538. Unlike other testimonial privileges, the privilege against self-incrimination should be liberally construed in favor of the person claiming it. Commonwealth v. Koonce, 418 Mass. 367, 378 (1994). This privilege is not self-executing. See Commonwealth v. Brennan, 386 Mass. 772, 780 (1982).

***Validity of Claim of Privilege*.** Whenever a witness or the attorney for a witness asserts the privilege against self-incrimination, the judge "has a duty to satisfy himself that invocation of the privilege is proper in the circumstances." Commonwealth v. Martin, 423 Mass. 496, 503 (1996). The mere assertion of the privilege is not sufficient. The witness or counsel must show "a real risk" that answers to the questions will tend to indicate "involvement in illegal activity," as opposed to "a mere imaginary, remote or speculative possibility of prosecution." Id. at 502. The witness is only required to "open the door a crack." Id. at 504–505, quoting In re Brogna, 589 F.2d 24, 28 n.5 (1st Cir. 1978). "A witness also is not entitled to make a blanket assertion of the privilege. The privilege must be asserted with respect to particular questions, and the possible incriminatory potential of each proposed question, or area which the prosecution might wish to explore, must be considered." Commonwealth v. Martin, 423 Mass. at 502. If, however, it is apparent that most, if not all, of the questions will expose the witness to self-incrimination, and there is no objection, it is not necessary for the witness to assert the privilege as to each and every question. Commonwealth v. Sueiras, 72 Mass. App. Ct. 439, 445–446 (2008).

Martin* Hearing*. In general, the judge's verification of the validity of the privilege should be based on information provided in open court. Commonwealth v. Alicea, 464 Mass. 837, 843 (2013). "Only in those rare circumstances where the information is inadequate to allow the judge to make an informed determination should the judge conduct an in camera Martin hearing." Commonwealth v. Jones, 472 Mass. 707, 728 (2015), quoting Pixley v. Commonwealth, 453 Mass. 827, 833 (2009). Neither the defendant nor counsel has a right to be present during a Martin hearing. Commonwealth v. Clemente, 452 Mass. 295, 318 (2008). If the judge rules that there is a valid basis for the witness to assert the privilege, the defendant has no right to call that witness. Pixley v. Commonwealth, 453 Mass. at 834. At the conclusion of a Martin hearing, the trial judge should seal the transcript or tape of the hearing, which may be reopened "only by an appellate court on appellate review." Id. at 836–837.

***Noncriminal Proceedings*.** "A person may not seek to obtain a benefit or to turn the legal process to his advantage while claiming the privilege as a way of escaping from obligations and conditions that are normally incident to the claim he makes." Mello v. Hingham Mut. Fire Ins. Co., 421 Mass. 333, 338 (1995) (party seeking to recover insurance benefits as a result of a fire loss properly had summary judgment entered against him for refusing to submit to an examination required by his policy on grounds that his answers to questions would tend to incriminate him). See also Department of Revenue v. B.P., 412 Mass. 1015, 1016 (1992) (in paternity case, court may draw adverse inference against party who asserts privilege and refuses to submit to blood and genetic marker testing); Wansong v. Wansong, 395 Mass. 154, 157–158 (1985) (dismissal of complaint for divorce without prejudice as discovery sanction); Adoption of Cecily, 83 Mass. App. Ct. 719, 727 (2013) (in termination of parental rights case, court may draw adverse inference against parent who invokes privilege, even though criminal charges are pending). In addition, the court has

discretion to reject claims by parties that they are entitled to continuances of administrative proceedings or civil trials until after a criminal trial because they will not testify for fear of self-incrimination. See Oznemoc, Inc. v. Alcoholic Beverages Control Comm'n, 412 Mass. 100, 105 (1992); Kaye v. Newhall, 356 Mass. 300, 305–306 (1969). Whenever a court faces a decision about the consequence of a party's assertion of the privilege in a civil case, "the judge's task is to balance any prejudice to the other civil litigants which might result . . . against the potential harm to the party claiming the privilege if he is compelled to choose between defending the civil action and protecting himself from criminal prosecution" (citations and quotations omitted). Wansong v. Wansong, 395 Mass. at 157.

The existence of the privilege against self-incrimination does not shield a witness, other than a defendant in a criminal case, from being called before the jury to give testimony. See Kaye v. Newhall, 356 Mass. at 305. The trial judge has discretion to deny a defense request for process to bring an out-of-State witness back for trial based on evidence that there is a factual basis for the witness to assert his or her privilege against self-incrimination and a representation by the witness's attorney that the witness will invoke his or her privilege if called to testify. Commonwealth v. Sanders, 451 Mass. 290, 294–295 (2008). The assertion of the privilege by a party or a witness in a civil case may be the subject of comment by counsel, and the jury may be permitted to draw an adverse inference against a party as a result. See Section 525(a), Comment upon or Inference from Claim of Privilege: Civil Case.

Subsection (c)(1). This subsection is derived from Jones v. Commonwealth, 327 Mass. 491, 493 (1951). In such a case, the cross-examination is not limited to the scope of direct examination and may include inquiry about any matters that may be made the subject of impeachment. See, e.g., G. L. c. 233, § 21; Commonwealth v. Seymour, 39 Mass. App. Ct. 672, 675 (1996).

Subsection (c)(2). This subsection is derived from Taylor v. Commonwealth, 369 Mass. 183, 189–191 (1975). Though a witness may waive the privilege against self-incrimination as to subsequent questions by voluntarily testifying regarding an "incriminating fact," if a question put to the witness poses "a real danger of legal detriment," i.e., the answer might provide another link in the chain of evidence leading to a conviction, the witness may still have a basis for asserting the privilege against self-incrimination. See Commonwealth v. Funches, 379 Mass. 283, 290–291 & nn.8–10 (1979). In Commonwealth v. King, 436 Mass. 252, 258 n.6 (2002), the Supreme Judicial Court explained the scope of this doctrine by stating that "[t]he waiver, once made, waives the privilege only with respect to the same proceeding; the witness may once again invoke the privilege in any subsequent proceeding." See Commonwealth v. Martin, 423 Mass. 496, 500–501 (1996) (waiver of privilege before grand jury does not waive privilege at trial); Commonwealth v. Borans, 388 Mass. 453, 457–458 (1983) (same). A voir dire hearing, held on the day of trial, is the same proceeding as the trial for purposes of the doctrine of waiver by testimony. Luna v. Superior Court, 407 Mass. 747, 750–751, cert. denied, 498 U.S. 939 (1990) (privilege could not be claimed at trial where witness had submitted incriminating affidavit in connection with pretrial motion and testified at pretrial hearing); Commonwealth v. Penta, 32 Mass. App. Ct. 36, 45–46 (1992) (witness who testified at motion to suppress, recanted that testimony in an affidavit, and testified at hearing on motion to reconsider could not invoke the privilege at trial). See also Commonwealth v. Judge, 420 Mass. 433, 445 n.8 (1995) (hearing on motion to suppress is same proceeding as trial for purposes of waiver by testimony).

The trial judge may be required to caution a witness exhibiting "ignorance, confusion, or panic . . . or other peculiar circumstances" in order for a voluntary waiver to be established. Taylor v. Commonwealth, 369 Mass. at 192. The proper exercise of this judicial discretion "involves making a circumstantially fair and reasonable choice within a range of permitted options." Lonergan-Gillen v. Gillen, 57 Mass. App. Ct. 746, 748–749 (2003). Ultimately, whether a voluntary waiver has occurred is a question of fact for the trial judge. See Commonwealth v. King, 436 Mass. at 258–259.

Subsection (c)(3). This subsection is derived from Taylor v. Commonwealth, 369 Mass. 183, 190–191 (1975). See also Commonwealth v. Martin, 423 Mass. 496, 500 (1996) (grand jury proceedings and the defendant's subsequent indictment are separate proceedings); Commonwealth v. Johnson, 175 Mass. 152, 153 (1900); Commonwealth v. Mandile, 17 Mass. App. Ct. 657, 662 (1984).

Subsection (c)(4). This subsection is derived from Stornanti v. Commonwealth, 389 Mass. 518, 521–522 (1983) ("The required records exception applies when three requirements are met: First, the purposes of the State's inquiry must be essentially regulatory; second, information is to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept; and third, the records themselves must have assumed 'public aspects' which render them at least analogous to public documents" [quotations and citation omitted].). See also Matter of Kenney, 399 Mass. 431, 438–441 (1987) (court notes that if the records in question are required to be kept by lawyers there is nothing incriminating about the fact that they exist and are in the possession of the lawyer required to produce them).

Subsection (c)(5). This subsection is derived from Article 12 of the Massachusetts Declaration of Rights; G. L. c. 233, § 20C; and Attorney Gen. v. Colleton, 387 Mass. 790, 796–801 (1982), quoting and citing Emery's Case, 107 Mass. 172, 185 (1871) (Article 12 requires transactional and not merely use or derivative use immunity to overcome the privilege against self-incrimination). See also G. L. c. 233, §§ 20D–20I (statutes governing the granting of immunity); Commonwealth v. Austin A., 450 Mass. 665, 669–670 (2008) (grant of immunity in Superior Court applicable to testimony in Juvenile Court). The Federal Constitution only requires use immunity to overcome the privilege against self-incrimination. See Kastigar v. United States, 406 U.S. 441 (1972). A conviction cannot be based solely on immunized testimony. There must be some corroborating evidence of at least one element of proof essential to convict the defendant. Commonwealth v. Resende, 476 Mass. 141, 152 (2017). See also G. L. c. 233, § 20I.

Subsection (c)(6). This subsection is taken nearly verbatim from Commonwealth v. Gelfgatt, 468 Mass. 512, 522–523 (2014), quoting Fisher v. United States, 425 U.S. 391, 410–411 (1976) ("for the exception to apply, the government must establish its knowledge of [1] the existence of the evidence demanded; [2] the possession or control of that evidence by the defendant; and [3] the authenticity of the evidence").

Subsection (d). This subsection is derived from Commonwealth v. Harris, 364 Mass. 236, 241–242 (1973), which permits statements obtained without a valid waiver of Miranda rights to be used for impeachment of a defendant who testifies at trial if the statements are voluntary and trustworthy. See Commonwealth v. Mahnke, 368 Mass. 662, 694–696 (1975) (statement obtained in violation of defendant's right to counsel admissible for impeachment). See also Commonwealth v. Mulgrave, 472 Mass. 170, 181 (2015) (general subject matter of defendant's responses during questioning admissible to impeach defendant's position that he was noncommunicative during booking process and thus unable to comprehend his Miranda rights); Commonwealth v. Rivera, 425 Mass. 633, 637–638 (1997) (defendant's prior inconsistent statements made at suppression hearing admissible to impeach his testimony at trial). A coerced or involuntary statement may not be used for any purpose, including impeachment. Commonwealth v. Harris, 364 Mass. at 241. See Commonwealth v. Durand, 457 Mass. 574, 590–591 (2010) (defendant's statements previously suppressed as involuntary not admissible on prosecution's redirect of police officer, even where cross-examination arguably opened the door). Evidence obtained in violation of a defendant's substantive constitutional rights, as opposed to violations of "prophylactic" Miranda rules, is not admissible for any purpose. Commonwealth v. Fini, 403 Mass. 567, 571 (1988) (statement obtained by warrantless electronic eavesdropping in private home in violation of Article 14 of the Massachusetts Declaration of Rights inadmissible for any purpose). Cf. Commonwealth v. Domaingue, 397 Mass. 693, 702 (1986) (transcript of warrantless recording of defendant's conversation made in restaurant could be used to refresh defendant's recollection without disclosing substance of defendant's statement).

Section 512. Jury Deliberations

See Section 606(b), Juror's Competency as a Witness: During an Inquiry into the Validity of a Verdict or Indictment.

Section 513. Medical Peer Review Privilege

(a) Definitions.

(1) As used in this section, "medical peer review committee" is a committee of a State or local professional society of health care providers, including doctors of chiropractic, or of a medical staff of a public hospital or licensed hospital or nursing home or health maintenance organization organized under G. L. c. 176G, provided the medical staff operates pursuant to written bylaws that have been approved by the governing board of the hospital or nursing home or health maintenance organization or a committee of physicians established pursuant to Section 12 of G. L. c. 111C for the purposes set forth in G. L. c. 111, § 203(f), which committee has as its function the evaluation or improvement of the quality of health care rendered by providers of health care services, the determination whether health care services were performed in compliance with the applicable standards of care, the determination whether the cost of health care services were performed in compliance with the applicable standards of care, determination whether the cost of the health care services rendered was considered reasonable by the providers of health services in the area, the determination of whether a health care provider's actions call into question such health care provider's fitness to provide health care services, or the evaluation and assistance of health care providers impaired or allegedly impaired by reason of alcohol, drugs, physical disability, mental instability, or otherwise; provided, however, that for purposes of Sections 203 and 204 of G. L. c. 111, a nonprofit corporation, the sole voting member of which is a professional society having as members persons who are licensed to practice medicine, shall be considered a medical peer review committee; provided, further, that its primary purpose is the evaluation and assistance of health care providers impaired or allegedly impaired by reason of alcohol, drugs, physical disability, mental instability, or otherwise.

(2) "Medical peer review committee" also includes a committee of a pharmacy society or association that is authorized to evaluate the quality of pharmacy services or the competence of pharmacists and suggest improvements in pharmacy systems to enhance patient care, or a pharmacy peer review committee established by a person or entity that owns a licensed pharmacy or employs pharmacists that is authorized to evaluate the quality of pharmacy services or the competence of pharmacists and suggest improvements in pharmacy systems to enhance patient care.

(b) Privilege.

(1) Proceedings, Reports, and Records of Medical Peer Review Committee. The proceedings, reports, and records of a medical peer review committee shall be confidential and shall be exempt from the disclosure of public records under Section 10 of G. L. c. 66, shall not be subject to subpoena or discovery prior to the initiation of a formal administrative proceeding pursuant to G. L. c. 30A, and shall not be subject to subpoena or discovery, or introduced into evidence, in any judicial or administrative proceeding, except proceedings held by the boards of registration in medicine, social work, or psychology or by the Department of Public Health pursuant to G. L. c. 111C, and no person who was in attendance at a meeting of a medical peer review committee shall be permitted or required to testify in any such judicial

or administrative proceeding, except proceedings held by the boards of registration in medicine, social work, or psychology or by the Department of Public Health pursuant to G. L. c. 111C, as to the proceedings of such committee or as to any findings, recommendations, evaluations, opinions, deliberations, or other actions of such committee or any members thereof.

(2) Work Product of Medical Peer Review Committee. Information and records which are necessary to comply with risk management and quality assurance programs established by the board of registration in medicine and which are necessary to the work product of medical peer review committees designated by the patient care assessment coordinator are subject to the protections afforded to materials subject to Subsection (b)(1), except that such information and records may be inspected, maintained, and utilized by the board of registration in medicine, including but not limited to its data repository and disciplinary unit. Such information and records inspected, maintained, or utilized by the board of registration in medicine shall remain confidential, and not subject to subpoena, discovery, or introduction into evidence, consistent with Subsection (b)(1), except that such records may not remain confidential if disclosed in an adjudicatory proceeding of the board of registration in medicine.

(c) Exceptions. There is no restriction on access to or use of the following, as indicated:

(1) Documents, incident reports, or records otherwise available from original sources shall not be immune from subpoena, discovery, or use in any such judicial or administrative proceeding merely because they were presented to such committee in connection with its proceedings.

(2) The proceedings, reports, findings, and records of a medical peer review committee shall not be immune from subpoena, discovery, or use as evidence in any proceeding against a member of such committee who did not act in good faith and in a reasonable belief that based on all of the facts the action or inaction on his or her part was warranted. However, the identity of any person furnishing information or opinions to the committee shall not be disclosed without the permission of such person.

(3) An investigation or administrative proceeding conducted by the boards of registration in medicine, social work, or psychology or by the Department of Public Health pursuant to G. L. c. 111C.

(d) Testimony Before Medical Peer Review Committee. A person who testifies before a medical peer review committee or who is a member of such committee shall not be prevented from testifying as to matters known to such person independent of the committee's proceedings, provided that, except in a proceeding against a witness in Subsection (c)(2), neither the witness nor members of the committee may be questioned regarding the witness's testimony before such committee, and further provided that committee members may not be questioned in any proceeding about the identity of any person furnishing information or opinions to the committee, opinions formed by them as a result of such committee proceedings, or about the deliberations of such committee.

(e) Non–Peer Review Records and Testimony. Records of treatment maintained pursuant to G. L. c. 111, § 70, or incident reports or records or information which are not necessary to comply

with risk management and quality assurance programs established by the board of registration in medicine shall not be deemed to be proceedings, reports, or records of a medical peer review committee; nor shall any person be prevented from testifying as to matters known by such person independent of risk management and quality assurance programs established by the board of registration in medicine.

NOTE

Introduction. The medical peer review privilege, unlike so many other privileges, is not based on the importance of maintaining the confidentiality between a professional and a client, but rather was established to promote rigorous and candid evaluation of professional performance by a provider's peers. See Beth Israel Hosp. Ass'n v. Board of Registration in Med., 401 Mass. 172, 182–183 (1987). This is accomplished by requiring hospitals and medical staffs to establish procedures for medical peer review proceedings, see G. L. c. 111, § 203(a), and by legal safeguards against the disclosure of the identity of physicians who participate in peer review and immunity to prevent such physicians from civil liability. See Ayash v. Dana-Farber Cancer Inst., 443 Mass. 367, 396, cert. denied, 546 U.S. 927 (2005).

Subsection (a)(1). This subsection is taken nearly verbatim from G. L. c. 111, § 1.

Subsection (a)(2). This subsection is taken nearly verbatim from G. L. c. 111, § 1. A licensed pharmacy is permitted to establish a pharmacy peer review committee:

> "A licensed pharmacy may establish a pharmacy peer review committee to evaluate the quality of pharmacy services or the competence of pharmacists and suggest improvements in pharmacy systems to enhance patient care. The committee may review documentation of quality-related activities in a pharmacy, assess system failures and personnel deficiencies, determine facts, and make recommendations or issue decisions in a written report that can be used for contiguous quality improvement purposes. A pharmacy peer review committee shall include the members, employees, and agents of the committee, including assistants, investigators, attorneys, and any other agents that serve the committee in any capacity."

G. L. c. 111, § 203(g).

Subsection (b). Both Subsection (b)(1), which is taken nearly verbatim from G. L. c. 111, § 204(a), and Subsection (b)(2), which is taken nearly verbatim from G. L. c. 111, § 205(b), "shield information from the general public and other third parties to the same extent, [but] only information protected by § 204(a) [Subsection (b)(1)] is shielded from the board [of registration in medicine] prior to the commencement of a G. L. c. 30A proceeding." Board of Registration in Med. v. Hallmark Health Corp., 454 Mass. 498, 508 (2009). "Determining whether the medical peer review privilege applies turns on the way in which a document was created and the purpose for which it was used, not on its content. Examining that content in camera will therefore do little to aid a judge . . . ." Carr v. Howard, 426 Mass. 514, 531 (1998). However, the peer review privilege does not prevent discovery into the process by which a given record or report was created in order to determine whether the information sought falls within the privilege. Id.

Subsection (b)(1). This subsection applies to "proceedings, reports and records of a medical peer review committee." G. L. c. 111, § 204(a). Material qualifies for protection under this subsection if it was created "by, for, or otherwise as a result of a 'medical peer review committee.'" Board of Registration in Med. v. Hallmark Health Corp., 454 Mass. 498, 509 (2009), quoting Miller v. Milton Hosp. & Med. Ctr., Inc., 54 Mass. App. Ct. 495, 499 (2002). See Carr v. Howard, 426 Mass. 514, 522 n.7 (1998) (asserting privilege of G. L. c. 111, § 204[a], [Subsection (b)(1)] requires evidence that materials sought "were not merely 'presented to [a] committee in connection with its proceedings,' . . . but were, instead, *themselves*, 'proceedings, reports and records' of a peer review committee under § 204(a)").

Subsection (b)(2). This subsection applies to materials that, while not necessarily "proceedings, reports and records" of a peer review committee, are nonetheless "necessary to comply with risk management and quality assurance programs established by the board and which are necessary to the work product of medical peer review committees." G. L. c. 111, § 205(b). Such materials include "incident reports required to be furnished to the [board] or any information collected or compiled by a physician credentialing verification service operated by a society or organization of medical professionals for the purpose of providing credentialing information to health care entities." Id. The protections afforded to materials covered by Subsection (b)(2) differ from those afforded by Subsection (b)(1) in that documents protected by Subsection (b)(2) "may be inspected, maintained and utilized by the board of registration in medicine, including but not limited to its data repository and disciplinary unit," and this subsection does not require that such access be conditioned on the commencement of a formal adjudicatory proceeding. G. L. c. 111, § 205(b).

Subsection (c). This subsection is taken nearly verbatim from G. L. c. 111, § 204(b), and Pardo v. General Hosp. Corp., 446 Mass. 1, 11–12 (2006), where the Supreme Judicial Court observed that

> "the privilege can only be invaded on some threshold showing that a member of a medical peer review committee did not act in good faith in connection with his activities as a member of the committee, for example did not provide the medical peer review committee with a full and honest disclosure of all of the relevant circumstances, but sought to mislead the committee in some manner."

In Pardo, the court held that the privilege was not overcome by the allegation that a member of the committee initiated an action for a discriminatory reason. Id. See also Vranos v. Franklin Med. Ctr., 448 Mass. 425, 447 (2007).

Subsection (d). This subsection is taken nearly verbatim from G. L. c. 111, § 204(c).

Subsection (e). This subsection is taken nearly verbatim from G. L. c. 111, § 205.

Section 514. Mediation Privilege

(a) Definition. For the purposes of this section, a "mediator" shall mean a person not a party to a dispute who enters into a written agreement with the parties to assist them in resolving their disputes and has completed at least thirty hours of training in mediation, and who either (1) has four years of professional experience as a mediator, (2) is accountable to a dispute resolution organization which has been in existence for at least three years, or (3) has been appointed to mediate by a judicial or governmental body.

(b) Privilege Applicable to Mediator Work Product. All memoranda and other work product prepared by a mediator and a mediator's case files shall be confidential and not subject to disclosure in any judicial or administrative proceeding involving any of the parties to any mediation to which such materials apply.

(c) Privilege Applicable to Parties' Communications. Any communication made in the course of and relating to the subject matter of any mediation and which is made in the presence of such mediator by any participant, mediator, or other person shall be a confidential communication and not subject to disclosure in any judicial or administrative proceeding.

(d) Privilege Applicable in Labor Disputes. Any person acting as a mediator in a labor dispute who receives information as a mediator relating to the labor dispute shall not be required to reveal

such information received by him or her in the course of mediation in any administrative, civil, or arbitration proceeding. This provision does not apply to criminal proceedings.

NOTE

Subsections (a), (b), and (c). These subsections are derived from G. L. c. 233, § 23C. Although there are no express exceptions to the privilege set forth in Subsections (a), (b), and (c), the Supreme Judicial Court has recognized that the mediation privilege is subject to the doctrine of "at issue" waiver. See Bobick v. United States Fid. & Guar. Co., 439 Mass. 652, 658 n.11 (2003), citing Darius v. City of Boston, 433 Mass. 274, 277–278 (2001), and cases cited. See also Section 523(b)(2), Waiver of Privilege: Conduct Constituting Waiver.

Subsection (d). This subsection is derived from G. L. c. 150, § 10A.

Section 515. Investigatory Privilege

Unless otherwise required by law, information given to governmental authorities in order to secure the enforcement of law is subject to disclosure only within the discretion of the governmental authority.

NOTE

This section is derived from Worthington v. Scribner, 109 Mass. 487, 488–489 (1872), and Attorney Gen. v. Tufts, 239 Mass. 458, 490–491 (1921). See also District Attorney for the Norfolk Dist. v. Flatley, 419 Mass. 507, 510–511 (1995).

Although this privilege is described as "absolute," it is qualified by the duty of the prosecutor to provide discovery to a person charged with a crime. See Mass. R. Crim. P. 14. Moreover, as to certain kinds of information, the privilege is also qualified by the Massachusetts public records law. See G. L. c. 66, § 10. General Laws c. 4, § 7, Twenty-sixth (f), provides that investigatory materials, including information covered by this privilege, are regarded as a public record and thus subject to disclosure even though the material is compiled out of the public view by law enforcement or other investigatory officials, provided that the disclosure of the investigatory materials would not "so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest." Rafuse v. Stryker, 61 Mass. App. Ct. 595, 597 (2004), quoting Bougas v. Chief of Police of Lexington, 371 Mass. 59, 62 (1976). See Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 436 Mass. 378, 383 (2002) (describing the process for determining whether material is exempt from disclosure as a public record).

Cross-Reference: Section 509, Identity of Informer, Surveillance Location, and Protected Witness Privileges.

Section 516. Political Voter Disqualification

A voter who casts a ballot may not be asked and may not disclose his or her vote in any proceeding unless the court finds fraud or intentional wrongdoing.

NOTE

This section is derived from McCavitt v. Registrars of Voters, 385 Mass. 833, 848–849 (1982), in which the court held "that the right to a secret ballot is not an individual right which may be waived by a good faith voter." Id. at 849.

Cross-Reference: Section 511, Privilege Against Self-Incrimination.

Section 517. Trade Secrets

[Privilege not recognized]

NOTE

In Gossman v. Rosenberg, 237 Mass. 122, 124 (1921), the Supreme Judicial Court held that a witness could not claim a privilege as to trade secrets. Cf. Proposed Mass. R. Evid. 507. However, public access to information about trade secrets in a public agency's possession may be limited. See G. L. c. 4, § 7, Twenty-sixth (g) (excluding from the definition of "public records" any "trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality"). The confidentiality of trade secrets also may be maintained by means of a protective order whereby a court may protect from disclosure during discovery "a trade secret or other confidential research, development, or commercial information." Mass. R. Civ. P. 26(c)(7). See also Mass. R. Crim. P. 14(a)(5). The court may issue such a protective order on motion by a party or by the person from whom discovery is sought and if good cause is shown. Mass. R. Civ. P. 26(c)(7).

Section 518. Executive or Governmental Privilege

[Privilege not recognized]

NOTE

Unlike the Federal system, neither the Massachusetts courts nor the Legislature has established a "deliberative process privilege" that prevents a party from obtaining documents from a public officer or agency that record the deliberative process leading up to a decision by the officer or agency. See District Attorney for the Norfolk Dist. v. Flatley, 419 Mass. 507, 509–510 (1995). Likewise, there is no "executive privilege" under the Massachusetts Constitution similar to the privilege which exists under the Federal Constitution. Compare Babets v. Secretary of Human Servs., 403 Mass. 230, 231 (1988) (doctrine of separation of powers does not require recognition of "executive privilege"), with United States v. Nixon, 418 U.S. 683, 711 (1974) (recognizing that separation of powers under Federal Constitution implies a qualified privilege for presidential communications in performance of president's responsibilities).

Access to inter-agency or intra-agency reports, papers, and letters relating to the development of policy is governed by G. L. c. 66, § 10, the public records statute. This law creates a presumption that all records are public, G. L. c. 66, § 10(c), and places on the custodian of the record the burden of establishing that a record is exempt from disclosure because it falls within one of a series of specifically enumerated exemptions set forth in G. L. c. 4, § 7, Twenty-sixth. Id. Under G. L. c. 4, § 7, Twenty-sixth (d), the following material is exempt from public disclosure: "inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based." Id. "The Legislature has . . . chosen to insulate the deliberative process from scrutiny only until it is completed, at

which time the documents thereby generated become publicly available." Babets v. Secretary of Human Servs., 403 Mass. at 237 n.8.

Section 519. State and Federal Tax Returns

(a) State Tax Returns.

(1) Disclosure by Commissioner of Revenue. The disclosure by the commissioner, or by any deputy, assistant, clerk or assessor, or other employee of the Commonwealth or of any city or town therein, to any person but the taxpayer or the taxpayer's representative, of any information contained in or set forth by any return or document filed with the commissioner is prohibited.

(2) Production by Taxpayer. Massachusetts State tax returns are privileged, and a taxpayer cannot be compelled to produce them in discovery.

(3) Exceptions. Subsection (a)(1) does not apply in proceedings to determine or collect the tax, or to certain criminal prosecutions.

(b) Federal Tax Returns.

(1) General Rule. Federal tax returns are subject to a qualified privilege. The taxpayer is entitled to a presumption that the returns are privileged and are not subject to discovery.

(2) Exceptions. A taxpayer who is a party to litigation can be compelled to produce Federal tax returns upon a showing of substantial need by the party seeking to compel production.

NOTE

Subsection (a). This subsection is taken nearly verbatim from G. L. c. 62C, § 21(a). General Laws c. 62C, § 21(b), sets forth twenty-three exceptions, most of which pertain to limited disclosures of tax information to other government agencies or officials.

The commissioner also has authority to disclose tax information to the Secretary of the Treasury of the United States and certain tax officials in other jurisdictions. See G. L. c. 62C, § 22.

A violation of G. L. c. 62C, § 21, may be punishable as a misdemeanor. G. L. c. 62C, § 21(c).

The privilege applicable to State tax returns in the hands of the taxpayer is set forth in Finance Comm'n of Boston v. Commissioner of Revenue, 383 Mass. 63, 67–72 (1981). See also Leave v. Boston Elevated Ry. Co., 306 Mass. 391, 402–403 (1940). Nothing in this subsection prohibits the courts from requiring a party, in appropriate circumstances, to disclose tax documents to another party during the litigation process. See, e.g., Rule 410 of the Supplemental Rules of the Probate and Family Court (requiring certain parties to disclose "federal and state income tax returns and schedules for the past three [3] years and any non-public, limited partnership and privately held corporate returns for any entity in which either party has an interest together with all supporting documentation for tax returns, including but not limited to W-2's, 1099's, 1098's, K-1, Schedule C and Schedule E").

Subsection (b). This subsection is derived from Finance Comm'n of Boston v. McGrath, 343 Mass. 754, 766–768 (1962).

The conditional privilege against disclosure of the contents of Federal tax returns does not forbid disclosure of the defendant's failure to file such a return. A.C. Vaccaro, Inc. v. Vaccaro, 80 Mass. App. Ct. 635, 639–640 (2011).

Section 520. Tax Return Preparer

(a) Definition. For the purposes of this section, a person is engaged in the business of preparing tax returns if the person advertises, or gives publicity to the effect that the person prepares or assists others in the preparation of tax returns, or if he or she prepares or assists others in the preparation of tax returns for compensation.

(b) Privilege. No person engaged in the business of preparing tax returns shall disclose any information obtained in the conduct of such business, unless such disclosure is consented to in writing by the taxpayer in a separate document, or is expressly authorized by State or Federal law, or is necessary to the preparation of the return, or is made pursuant to court order.

NOTE

This section is taken nearly verbatim from G. L. c. 62C, § 74. A violation of this statute may be punishable as a misdemeanor.

Section 521. Sign Language Interpreter–Client Privilege

(a) Definitions. For the purpose of this section, the following words shall have the following meanings:

(1) Client. A "client" is a person rendered interpreting services by a qualified interpreter.

(2) Qualified Interpreter. A "qualified interpreter" is a person skilled in sign language or oral interpretation and transliteration, has the ability to communicate accurately with a deaf or hearing-impaired person, and is able to translate information to and from such hearing-impaired person.

(3) Confidential Communication. A communication is confidential if a client has a reasonable expectation or intent that it not be disclosed to persons other than those to whom such disclosure is made.

(b) Privilege. A client has a privilege to prevent a qualified interpreter from disclosing a confidential communication between one or more persons where the communication was facilitated by the interpreter.

NOTE

Subsection (a). This subsection is derived nearly verbatim from G. L. c. 221, § 92A. The statute's definition of a "qualified interpreter" states that "[a]n interpreter shall be deemed qualified or intermediary as determined by the Office of Deafness, based upon the recommendations of the Massachusetts Registry of the

Deaf, the Massachusetts State Association of the Deaf and other appropriate agencies." G. L. c. 221, § 92A.

Subsection (b). This subsection is derived nearly verbatim from G. L. c. 221, § 92A. The portion of G. L. c. 221, § 92A, that establishes the privilege references "a certified sign language interpreter," but the statute does not specifically define that term. Accordingly, to be consistent with the terms actually defined in G. L. c. 221, § 92A, this subsection uses the term "qualified interpreter." There is no case law in Massachusetts which defines the scope of this privilege.

Appointment of Interpreter. The interpreter must be appointed by the court as part of a court proceeding. See G. L. c. 221, § 92A ("In any proceeding in any court in which a deaf or hearing-impaired person is a party or a witness . . . such court . . . shall appoint a qualified interpreter to interpret the proceedings"). See also Mass. R. Crim. P. 41 ("The judge may appoint an interpreter or expert if justice so requires and may determine the reasonable compensation for such services and direct payment therefor."); Mass. R. Civ. P. 43(f) ("The court may appoint an interpreter of its own selection and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.").

Cross-Reference: Section 604, Interpreters; "Standards and Procedures of the Office of Court Interpreter Services," 1143 Mass. Reg. 15 (Nov. 13, 2009), available at http://perma.cc/RPE2-85CA.

Section 522. Interpreter-Client Privilege

(a) Definitions. For the purpose of this section, the following words shall have the following meanings:

(1) Interpreter. An "interpreter" is a person who is readily able to interpret written and spoken language simultaneously and consecutively from English to the language of the non-English speaker or from said language to English.

(2) Non-English Speaker. A "non-English speaker" is a person who cannot speak or understand, or has difficulty in speaking or understanding, the English language, because he or she uses only or primarily a spoken language other than English.

(b) Privilege. Disclosures made out of court by communications of a non-English speaker through an interpreter to another person shall be a privileged communication, and the interpreter shall not disclose such communication without permission of the non-English speaker.

(c) Scope. The privilege applies when the non-English speaker had a reasonable expectation or intent that the communication would not be disclosed.

NOTE

Subsection (a). This subsection is derived nearly verbatim from G. L. c. 221C, § 1.

Subsection (b). This subsection is derived nearly verbatim from G. L. c. 221C, § 4(c). See Section 4.06 of the "Standards and Procedures of the Office of Court Interpreter Services," 1143 Mass. Reg. 15 (Nov. 13, 2009), which is available at http://perma.cc/RPE2-85CA ("Court interpreters shall protect the confidentiality of all privileged and other confidential information.").

Subsection (c). This subsection is derived nearly verbatim from G. L. c. 221C, § 4(c). There is no case law in Massachusetts that defines the scope of this privilege.

Right to Assistance of an Interpreter. General Laws c. 221C, § 2, states as follows:

> "A non-English speaker, throughout a legal proceeding, shall have a right to the assistance of a qualified interpreter who shall be appointed by the judge, unless the judge finds that no qualified interpreter of the non-English speaker's language is reasonably available, in which event the non-English speaker shall have the right to a certified interpreter, who shall be appointed by the judge."

See Mass. R. Crim. P. 41 ("The judge may appoint an interpreter or expert if justice so requires and may determine the reasonable compensation for such services and direct payment therefor."); Mass. R. Civ. P. 43(f) ("The court may appoint an interpreter of its own selection and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court."). See also G. L. c. 221C, § 3 (waiver of right to interpreter).

Procedural Issues. The statute requires the interpreter to swear or affirm to "make true and impartial interpretation using [the interpreter's] best skill and judgment in accordance with the standards prescribed by law and the ethics of the interpreter profession." G. L. c. 221C, § 4(a). The statute also states that "[i]n any proceeding, the judge may order all of the testimony of a non-English speaker and its interpretation to be electronically recorded for use in audio or visual verification of the official transcript of the proceedings." G. L. c. 221C, § 4(b).

Cross-Reference: Section 604, Interpreters; "Standards and Procedures of the Office of Court Interpreter Services," 1143 Mass. Reg. 15 (Nov. 13, 2009), available at http://perma.cc/RPE2-85CA.

Section 523. Waiver of Privilege

(a) Who Can Waive. A privilege holder or his or her legally appointed guardian, administrator, executor, or heirs can waive the privilege.

(b) Conduct Constituting Waiver. Except as provided in Section 524, Privileged Matter Disclosed Erroneously or Without Opportunity to Claim Privilege, a privilege is waived if the person upon whom this Article confers a privilege against disclosure

(1) voluntarily discloses or consents to disclosure of any significant part of the privileged matter or

(2) introduces privileged communications as an element of a claim or defense.

(c) Conduct Not Constituting Waiver. A person upon whom this Article confers a privilege against disclosure does not waive the privilege if

(1) the person merely testifies as to events which were a topic of a privileged communication, or

(2) there is an unintentional disclosure of a privileged communication and reasonable precautions were taken to prevent the disclosure.

NOTE

Subsection (a). This subsection is derived from Phillips v. Chase, 201 Mass. 444, 449 (1909), and District Attorney for the Norfolk Dist. v. Magraw, 417 Mass. 169, 173–174 (1994). See also G. L. c. 233, § 20B; Adoption of Diane, 400 Mass. 196, 201, 202 n.4 (1987). Waiver by one or more, but not all, jointly represented clients does not waive the attorney-client privilege as to the nonwaiving party, even as to documents or other information already disclosed by a waiving party. ZVI Constr. Co., LLC v. Levy, 90 Mass. App. Ct. 412, 424–425 (2016).

Subsection (b)(1). This subsection is derived from Matter of the Reorganization of Elec. Mut. Liab. Ins. Co. (Bermuda), 425 Mass. 419, 423 n.4 (1997), where the Supreme Judicial Court noted that Proposed Mass. R. Evid. 510 was consistent with the views of the court.

Subsection (b)(2). This subsection is derived from the concept of an "at issue" waiver which the Supreme Judicial Court recognized in Darius v. City of Boston, 433 Mass. 274, 284 (2001). An "at issue" waiver is not a blanket waiver of the privilege, but rather "a limited waiver of the privilege with respect to what has been put 'at issue.'" Id. at 283. See, e.g., Global Investors Agent Corp. v. National Fire Ins. Co. of Hartford, 76 Mass. App. Ct. 812, 818–820 (2010) (determining that a limited at-issue waiver of the plaintiff's attorney-client privilege occurred because its claim for consequential damages was based in part on the advice it received from its attorney in the underlying action). See also Commonwealth v. Brito, 390 Mass. 112, 119 (1983) ("Once such a charge [of ineffectiveness of counsel] is made, the attorney-client privilege may be treated as waived at least in part, but trial counsel's obligation may continue to preserve confidences whose disclosure is not relevant to the defense of the charge of his ineffectiveness as counsel."); Doe v. American Guar. & Liab. Co., 91 Mass. App. Ct. 99, 103 (2017) (privilege waived if client's statement is relevant to action client brought against counsel). In addition, the party seeking to invoke the doctrine of an "at issue" waiver must establish that the privileged information is not available from any other source. Darius v. City of Boston, 433 Mass. at 284.

Subsection (c)(1). This subsection is derived from Commonwealth v. Goldman, 395 Mass. 495, 499–500, cert. denied, 474 U.S. 906 (1985). Though a witness does not waive the privilege merely by testifying as to events which were a topic of a privileged communication, a waiver occurs when the witness testifies as to the specific content of an identified privileged communication. Id. In Commonwealth v. Goldman, the Supreme Judicial Court specifically left open the question whether in a criminal case the rule embodied in this subsection would have to yield to the defendant's constitutional right of confrontation. Id. at 502 n.8. See also Commonwealth v. Neumyer, 432 Mass. 23, 29 (2000) (waiver of sexual assault counselor privilege); Commonwealth v. Clancy, 402 Mass. 664, 668–669 (1988) (waiver of patient-psychotherapist privilege).

Subsection (c)(2). This subsection is derived from Matter of the Reorganization of Elec. Mut. Liab. Ins. Co. (Bermuda), 425 Mass. 419, 422–423 (1997). See also Adoption of Sherry, 435 Mass. 331, 336 (2001).

***Rule 502 of the Federal Rules of Evidence, Waivers in Federal Proceedings*.** On September 19, 2008, Rule 502 of the Federal Rules of Evidence was enacted. See Pub. L. No. 110-322, 110th Cong., 2d Sess. The rule is applicable "in all proceedings commenced after the date of enactment . . . and, insofar as is just and practicable, in all proceedings pending" on that date. The rule was developed in response to concerns about the rising cost of discovery, especially electronic discovery, in Federal proceedings in which among the thousands or hundreds of thousands of documents that are produced by a party in response to a discovery request, the producing party may inadvertently include one or a handful of documents that are covered by the attorney-client privilege or the work-product protection. Prior to the adoption of this rule, there was no uniform national standard governing the determination of when such a mistake would lead to a ruling that the privilege or protection had been waived. As a result, a party was forced to examine each and every document produced in discovery in order to avoid the risk of an inadvertent waiver.

Rule 502 of the Federal Rules of Evidence does not alter the law that governs whether a document is subject to the attorney-client privilege or the work-product protection in the first instance. Under Fed. R. Evid.

501, unless State law, the Federal Constitution, or a Federal statute controls, the existence of a privilege in Federal proceedings "shall be governed by the principles of the common law." However, Fed. R. Evid. 502 does establish a single national standard that protects parties against a determination by a Federal court, a Federal agency, a State court, or a State agency that an inadvertent disclosure of privileged or protected material constitutes a wholesale waiver of the privilege or protection as to other material that has not been disclosed.

Rule 502(a) of the Federal Rules of Evidence addresses when a waiver of either the attorney-client privilege or the work-product protection extends to undisclosed material. It provides that a waiver of the privilege or protection does not extend to undisclosed material unless (1) the waiver is intentional, (2) the disclosed and undisclosed material concern the same subject matter, and (3) both the disclosed and undisclosed material should in fairness be considered together. Rule 502(b) of the Federal Rules of Evidence addresses inadvertent disclosures. It is similar to Section 523(c)(2), Waiver of Privilege: Conduct Not Constituting Waiver, except that the Federal rule requires that to avoid a waiver the holder of the privilege must promptly take reasonable steps to rectify the erroneous disclosure. Fed. R. Evid. 502(b)(3). Rule 502(c) of the Federal Rules of Evidence provides that disclosures made in State court proceedings will not operate as a waiver in Federal proceedings so long as the disclosure is not regarded as a waiver under either Fed. R. Evid. 502(a) or 502(b), or the law of the State where the disclosure occurred. Rule 502(d) of the Federal Rules of Evidence provides that a Federal court order that the privilege or the protection is not waived by a disclosure is binding on both Federal and State courts. Rule 502(e) of the Federal Rules of Evidence provides that an agreement on the effect of the disclosure between the parties in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order. Rule 502(f) of the Federal Rules of Evidence expressly makes the rule applicable to State and Federal proceedings, "even if State law provides the rule of decision." Rule 502(g) of the Federal Rules of Evidence contains definitions of the terms "attorney-client privilege" and "work-product protection."

Section 524. Privileged Matter Disclosed Erroneously or Without Opportunity to Claim Privilege

A claim of privilege is not defeated by a disclosure erroneously made without an opportunity to claim the privilege.

NOTE

This section is derived from Commonwealth v. Neumyer, 432 Mass. 23, 35–36 (2000) (no waiver where record holder unaware of probable cause hearing and victim "was hardly in a position to be aware of her rights"). See also Commonwealth v. Dwyer, 448 Mass. 122, 145–146 (2006).

Section 525. Comment upon or Inference from Claim of Privilege

(a) Civil Case. Comment may be made and an adverse inference may be drawn against a party when that party, or in certain circumstances a witness, invokes a privilege.

(b) Criminal Case.

(1) No comment may be made and no adverse inference may be drawn against a defendant who invokes the privilege against self-incrimination or against a defendant for calling a witness who invokes a privilege that belongs to the witness and not to the defendant.

(2) In a case tried to a jury, the assertion of a privilege should be made outside the presence of the jury whenever reasonably possible.

NOTE

Subsection (a). This subsection is derived from the long-standing rule in Massachusetts that an adverse inference may be drawn against a party who invokes a testimonial privilege in a civil case. Phillips v. Chase, 201 Mass. 444, 450 (1909) (attorney-client privilege). This principle applies equally to cases involving custody or parental access to a child. See Custody of Two Minors, 396 Mass. 610, 616–617 (1986); Care & Protection of Quinn, 54 Mass. App. Ct. 117, 121 (2002); Adoption of Nadia, 42 Mass. App. Ct. 304, 307–308 (1997). Drawing the adverse inference in a civil case does not infringe on the party's privilege against self-incrimination under either Article 12 of the Declaration of Rights of the Massachusetts Constitution or the Fifth Amendment to the Constitution of the United States. Kaye v. Newhall, 356 Mass. 300, 305–306 (1969) (attorney-client privilege). It makes no difference that criminal matters are pending at the time. Frizado v. Frizado, 420 Mass. 592, 596 (1995) (privilege against self-incrimination).

In Labor Relations Comm'n v. Fall River Educators' Ass'n, 382 Mass. 465, 471–472 (1981), the Supreme Judicial Court expanded the rule to allow an adverse inference to be drawn against an organizational party as a result of a claim of the privilege against self-incrimination by its officers who had specific knowledge of actions taken on behalf of the organization in connection with the underlying claim. In Lentz v. Metropolitan Prop. & Cas. Ins. Co., 437 Mass. 23, 26–32 (2002), the Supreme Judicial Court expanded the principle even further to include circumstances in which the court finds, as a preliminary question of fact, that the witness who invokes the privilege against self-incrimination is acting on behalf of or to further the interests of one of the parties. The Supreme Judicial Court also noted that the potential for prejudice can be reduced by limiting the number of questions that may be put to the witness who invokes the privilege, and by a limiting instruction. Id. at 30–31.

Counsel has the right to comment on an opposing party's failure to testify in a civil case. See Kaye v. Newhall, 356 Mass. at 305; Silveira v. Kegerreis, 12 Mass. App. Ct. 906, 906–907 (1981).

When a nonparty witness is closely aligned with a party in a civil case, and the nonparty witness invokes the privilege against self-incrimination, the jury should be instructed that the witness may invoke the privilege for reasons unrelated to the case on trial, and that they are permitted, but not required, to draw an inference adverse to the party from the witness's invocation of the privilege against self-incrimination. The jury is permitted to draw an inference adverse to a party from the witness's invocation of the privilege against self-incrimination. Lentz v. Metropolitan Prop. & Cas. Ins. Co., 437 Mass. at 26–32.

Subsection (b)(1). This subsection is derived from Article 12 of the Declaration of Rights of the Massachusetts Constitution and the Fifth Amendment to the Constitution of the United States, as well as from G. L. c. 233, § 20, Third, and G. L. c. 278, § 23. See Commonwealth v. Goulet, 374 Mass. 404, 412 (1978). See also Commonwealth v. Szerlong, 457 Mass. 858, 869–870 n.13 (2010). In Commonwealth v. Vallejo, 455 Mass. 72, 78–81 (2009), the Supreme Judicial Court adopted the reasoning of Commonwealth v. Russo, 49 Mass. App. Ct. 579 (2000), and held that a defendant's privilege against self-incrimination may be violated by comments made by a codefendant's counsel on the defendant's pretrial silence or the defendant's decision not to testify. For a discussion of the numerous cases dealing with the issue of whether a remark by a judge, a prosecutor, or a co-counsel constitutes improper comment on the defendant's silence, see M.S. Brodin & M. Avery, Massachusetts Evidence § 5.14.8 (2018 ed.). A defendant may have the right to simply exhibit a person before the jury without questioning the person. See Commonwealth v. Rosario, 444 Mass. 550, 557–559 (2005). When there is a timely request made by the defense, the trial judge must instruct the jury that no adverse inference may be drawn from the fact that the defendant did not testify. See Carter v. Kentucky, 450 U.S. 288, 305 (1981); Commonwealth v. Sneed, 376 Mass. 867, 871–872 (1978). See also Commonwealth v. Rivera, 441 Mass. 358, 371 n.9 (2004) ("We remain of the view that judges should not give the instruction when asked not to do so. We are merely saying that it is not per se reversible error to do so.").

Subsection (b)(2). This subsection is derived from Commonwealth v. Martin, 372 Mass. 412, 413, 421 n.17 (1977) (privilege against self-incrimination), and Commonwealth v. Labbe, 6 Mass. App. Ct. 73, 79–80 (1978) (spousal privilege). "Where there is some advance warning that a witness might refuse to testify, the trial judge should conduct a voir dire of the witness, outside the presence of the jury, to ascertain whether the witness will assert some privilege or otherwise refuse to answer questions." Commonwealth v. Fisher, 433 Mass. 340, 350 (2001). If the witness asserts the privilege or refuses to testify before the jury when it was not anticipated, the judge should give a forceful cautionary instruction to the jury. Commonwealth v. Hesketh, 386 Mass. 153, 157–159 (1982).

Section 526. Unemployment Hearing Privilege

(a) Statutory Bar on the Use of Information from Unemployment Hearing. Subject to the exceptions listed in Subsection (b), information secured during an unemployment hearing is absolutely privileged, is not public record, and is not admissible in any action or proceeding.

(b) Exceptions. Such information may be admissible only in the following actions or proceedings:

(1) criminal or civil cases brought pursuant to G. L. c. 151A where the department or Commonwealth is a necessary party,

(2) civil cases relating to the enforcement of child support obligations,

(3) criminal prosecutions for homicide, and

(4) criminal prosecutions for violation of Federal law.

NOTE

This section is derived from G. L. c. 151A, § 46, and Tuper v. North Adams Ambulance Serv., Inc., 428 Mass. 132, 137 (2008) ("Information secured pursuant to [G. L. c. 151A] is confidential, is for the exclusive use and information of the department in the discharge of its duties, is not a public record, and may not be used in any action or proceeding."). A violation of this statute may be punishable as a misdemeanor.

Section 527. Judicial Deliberation Privilege

A judge has an absolute privilege to refuse to disclose the mental impressions and thought processes relied on in reaching a decision, whether harbored internally or memorialized in nonpublic material.

NOTE

This section is derived from Matter of the Enforcement of a Subpoena, 463 Mass. 162 (2012). In that case, the Supreme Judicial Court quashed so much of a subpoena issued by the Commission on Judicial Conduct to a judge as related to the judge's internal thought processes and deliberative communications. Id. at 178. The court recognized an absolute judicial deliberation privilege that protects the judge's "mental impressions and thought processes in reaching a judicial decision, whether harbored internally or memorialized in other nonpublic material." Id. at 174. The court additionally ruled that "the privilege also protects confidential communications among judges and between judges and court staff made in the course of and related to their deliberative processes in particular cases." Id. This absolute but narrowly tailored privilege "does not

cover a judge's memory of nondeliberative events in connection with cases in which the judge participated. Nor does the privilege apply to inquiries into whether a judge was subjected to improper 'extraneous influences' or ex parte communications during the deliberative process." Id. at 174–175. The privilege also does not apply "when a judge is a witness to or was personally involved in a circumstance that later becomes the focus of a legal proceeding." Id. at 175.

Section 528. Union Member–Union Privilege

[Privilege not recognized]

NOTE

In Chadwick v. Duxbury Pub. Sch., 475 Mass. 645 (2016), the Supreme Judicial Court declined to read a privilege for communications between a union member and his or her union into the provisions of G. L. c. 150E. In that case, the plaintiff filed a civil suit against the defendant seeking monetary damages after she was dismissed from her teaching position. The court found that Chapter 150E was designed to "protect the right of public employees to organize and to protect unions and their members from intrusion or control by the employer in the collective bargaining context," and that the Legislature did not intend "to protect the confidentiality of union member–union communications in a private lawsuit brought by the union member against the employer." Chadwick v. Duxbury Pub. Sch., 475 Mass. at 650–651. The court also declined to create the privilege judicially, saying that the Legislature is better equipped to create such a privilege. Id. at 655.

ARTICLE VI. WITNESSES

Section 601. Competency

(a) Generally. Every person is competent to be a witness unless a statute or the Massachusetts common law of evidence provides otherwise.

(b) Rulings. A person is competent to be a witness if he or she has

(1) the general ability or capacity to observe, remember, and give expression to that which he or she has seen, heard, or experienced, and

(2) an understanding sufficient to comprehend the difference between truth and falsehood, the wickedness of the latter, and the obligation and duty to tell the truth, and, in a general way, belief that failure to perform the obligation will result in punishment.

(c) Preliminary Questions. While the competency of a witness is a preliminary question of fact for the judge, questions of witness credibility are to be resolved by the trier of fact.

NOTE

Subsection (a). This subsection is derived from G. L. c. 233, § 20. See Commonwealth v. Monzon, 51 Mass. App. Ct. 245, 248–249 (2001). A person otherwise competent to be a witness may still be disqualified from testifying. See, e.g., G. L. c. 233, § 20 (with certain exceptions, "neither husband nor wife shall testify as to private conversations with the other"; "neither husband nor wife shall be compelled to testify in the trial of an indictment, complaint or other criminal proceeding against the other"; "defendant in the trial of an indictment, complaint or other criminal proceeding shall, at his own request . . . be allowed to testify"; and "an unemancipated, minor child, living with a parent, shall not testify before a grand jury, trial of an indictment, complaint or other criminal proceeding, against said parent"). See also Section 504, Spousal Privilege and Disqualification; Parent-Child Disqualification; Section 511, Privilege Against Self-Incrimination. Cf. Mass. R. Civ. P. 43(a) (witness testimony, and assessment of the competency of a witness, must be done orally in open court); Hayden v. Hayden, 15 Mass. App. Ct. 915, 916 (1983) ("The probate judge acted well within his sound discretion in declining to have a conference in camera with the son of the parties, then twelve years old . . . .").

Subsection (b). This subsection is taken nearly verbatim from Commonwealth v. Allen, 40 Mass. App. Ct. 458, 461 (1996). This test applies to all potential witnesses. Commonwealth v. Brusgulis, 398 Mass. 325, 329 (1986). Neither the inability of a witness to remember specific details of events nor inconsistencies in the testimony render the witness incompetent to testify, so long as the witness demonstrates "the general ability to observe, remember and recount." Commonwealth v. Trowbridge, 419 Mass. 750, 755 (1995); Commonwealth v. Thibeault, 77 Mass. App. Ct. 419, 424–428 (2010) (six year old permitted to testify about incidents that occurred when she was five despite inconsistencies in her ability to observe, remember, and recount facts and her initial difficulty with concept of a promise in connection with duty to tell the truth). See Commonwealth v. Gamache, 35 Mass. App. Ct. 805, 806–809 (1994) (five year old permitted to testify about incidents that allegedly took place when the child was twenty-one and thirty-three months old despite inconsistencies and her inability to recall every detail in her testimony). "The tendency, moreover, except in quite clear cases of incompetency, is to let the witness testify and have the triers make any proper discount

for the quality of her understanding" (quotations omitted). Commonwealth v. Whitehead, 379 Mass. 640, 656 (1980). See, e.g., Commonwealth v. Brusgulis, 398 Mass. at 329 (child); Commonwealth v. Sires, 370 Mass. 541, 546 (1976) (alcoholic); Commonwealth v. Aitahmedlamara, 63 Mass. App. Ct. 76, 78 (2005) (developmentally disabled); Commonwealth v. Hiotes, 58 Mass. App. Ct. 255, 256 (2003) (mental illness).

Subsection (c). The initial segment of this subsection is derived from Demoulas v. Demoulas, 428 Mass. 555, 562–563 (1998); the remainder of the subsection is derived from Commonwealth v. Jackson, 428 Mass. 455, 466 (1998). The question of the competency of a potential witness is within the discretion of the trial judge, who has "wide discretion . . . to tailor the competency inquiry to the particular circumstances and intellect of the witness." Commonwealth v. Brusgulis, 398 Mass. 325, 329–330 (1986). When competency is challenged, a judge usually conducts a voir dire examination of the potential witness, but may require a physician or other expert to examine the potential witness's mental condition where appropriate. Demoulas v. Demoulas, 428 Mass. at 563. See G. L. c. 123, § 19; G. L. c. 233, § 23E. Cf. Mass. R. Civ. P. 43(a) (witness testimony, and assessment of the competency of a witness, must be done orally in open court). "Although competency must of course be determined before a witness testifies, the judge may reconsider his decision, either sua sponte or on motion, if he entertains doubts about the correctness of the earlier ruling." Commonwealth v. Brusgulis, 398 Mass. at 331.

Competency of Criminal Defendant. A defendant in a criminal case is competent so long as the defendant has a "sufficient present ability to consult with his [or her] lawyer with a reasonable degree of rational understanding and . . . a rational as well as factual understanding of the proceedings." Commonwealth v. Hung Tan Vo, 427 Mass. 464, 468–469 (1998), quoting Commonwealth v. Vailes, 360 Mass. 522, 524 (1971), quoting Dusky v. United States, 362 U.S. 402, 402 (1960). The trial judge has a duty to act sua sponte whenever there is "a substantial question of possible doubt" as to the defendant's competency to stand trial. See Commonwealth v. Hill, 375 Mass. 50, 62 (1978).

It is not necessary to suspend all pretrial proceedings because a defendant is not competent. See Abbott A. v. Commonwealth, 458 Mass. 24, 33 (2010) (concluding it is not a per se violation of due process for the Commonwealth to proceed against incompetent person at bail hearing or dangerousness hearing). Contra Commonwealth v. Torres, 441 Mass. 499, 505–507 (2004) (stating due process may be violated if defense counsel is unable to communicate at all with client during bail hearing or hearing on rendition).

Section 602. Need for Personal Knowledge

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This section does not apply to a witness's expert opinion testimony under Section 703.

NOTE

This section is taken from Fed. R. Evid. 602 and Proposed Mass. R. Evid. 602 and is consistent with Massachusetts law. See Commonwealth v. Cintron, 435 Mass. 509, 521 (2001); Malchanoff v. Truehart, 354 Mass. 118, 121–122 (1968); Commonwealth v. Wolcott, 28 Mass. App. Ct. 200, 207 (1990).

The personal-knowledge requirement also applies to hearsay declarants. See, e.g., Commonwealth v. Drapaniotis, 89 Mass. App. Ct. 267, 274–276 (2016) (reversing conviction of firearm offense, based on insufficiency of evidence, where sole evidence on element of gun's operability was gun owner's testimony of hearsay statement by salesman, admitted without objection but not supported by any indication of salesman's personal knowledge).

Cross-Reference: Section 104(b), Preliminary Questions: Relevance That Depends on a Fact; Section 601, Competency; Section 703, Bases of Opinion Testimony by Experts. Cf. Section 402, General

Admissibility of Relevant Evidence; Section 403, Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons; Section 701, Opinion Testimony by Lay Witnesses.

Section 603. Oath or Affirmation to Testify Truthfully

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

NOTE

This section is taken from Fed. R. Evid. 603 and Proposed Mass. R. Evid. 603 and is consistent with Massachusetts law. See G. L. c. 233, §§ 15–19. See also Mass. R. Civ. P. 43(d) ("Whenever under these rules an oath is required to be taken, a solemn affirmation under the penalties of perjury may be accepted in lieu thereof."). "Although taking [the traditional] oath is the customary method for signifying one's recognition that consequences attend purposeful falsehood, it is not the only method for doing so. The law requires some affirmative representation that the witness recognizes his or her obligation to tell the truth. See G. L. c. 233, §§ 17–19." Adoption of Fran, 54 Mass. App. Ct. 455, 467 (2002). A judge is not permitted to waive an oath or affirmation. Commonwealth v. Stewart, 454 Mass. 527, 531 (2009).

"A child witness does not have to understand fully the obligation of an oath, but must show a general awareness of the duty to be truthful and the difference between a lie and the truth." Commonwealth v. Ike I., 53 Mass. App. Ct. 907, 909 (2002). "With children, recognition of that obligation [to tell the truth] sometimes is more effectively obtained through careful questioning of the child than through recitation of what to the child may be a meaningless oath or affirmation." Adoption of Fran, 54 Mass. App. Ct. at 467 n.17. A judge's exchanges with a child and his or her discretionary conclusion that the child understands the difference between the truth and lying and the importance of testifying truthfully "effectively serve[s] the underlying purpose of the oath, and no more [can] be reasonably required of an infant deemed competent to testify, but manifestly lacking in theological understanding." Commonwealth v. McCaffrey, 36 Mass. App. Ct. 583, 590 (1994).

Section 604. Interpreters

An interpreter must be qualified and must give an oath or affirmation to make a true translation.

NOTE

This section is derived from Fed. R. Evid. 604 and Proposed Mass. R. Evid. 604 and is consistent with Massachusetts law. See Commonwealth v. Festa, 369 Mass. 419, 429–430 (1976) (establishing guidelines for when witnesses testify through an interpreter). See G. L. c. 221C, § 2 (a non-English speaker has the right to an interpreter throughout the proceedings, whether criminal or civil); Mass. R. Civ. P. 43(f); Mass. R. Crim. P. 41. The trial judge has discretion to appoint an interpreter. Commonwealth v. Esteves, 46 Mass. App. Ct. 339, 345, reversed and remanded on other grounds, 429 Mass. 636 (1999). "[W]hen a witness testifies in a foreign language, the English translation is the only evidence, not the testimony in the original language." Id. All spoken-language court interpreters and court interpreters who provide services to the Trial Court for deaf and hard-of-hearing persons are governed by the "Standards and Procedures of the Office of Court Interpreter Services," 1143 Mass. Reg. 15 (Nov. 13, 2009), which include a Code of Professional Conduct that includes the subjects of conflict of interest, confidentiality, and interpreting protocols. See http://perma.cc/RPE2-85CA. Where a party seeks to admit a translation of a recorded statement made in a foreign language, the English-language transcript must be provided to opposing counsel sufficiently in

advance to allow the parties to determine whether an agreement can be reached about its accuracy. If the parties are unable to agree on the accuracy of a single translation, each side may offer its own transcript through the testimony of a qualified translator. The foreign-language recording may not be admitted unless accompanied by an English translation. Commonwealth v. Portillo, 462 Mass. 324, 328–329 (2012).

Cross-Reference: Note "Preference for Recording Certain Custodial Interrogations" to Section 511(a)(1), Privilege Against Self-Incrimination: Privilege of Defendant in Criminal Proceeding: Custodial Interrogation; Section 521, Sign Language Interpreter–Client Privilege; Section 522, Interpreter-Client Privilege; "Standards and Procedures of the Office of Court Interpreter Services," 1143 Mass. Reg. 15 (Nov. 13, 2009), available at http://perma.cc/RPE2-85CA.

Section 605. Competency of Judge as Witness

The presiding judge may not testify as a witness at the trial.

NOTE

This section states the first sentence of Fed. R. Evid. 605 and Proposed Mass. R. Evid. 605. While there are no Massachusetts statutes or cases on point, the proposition appears so clear as to be beyond question. See generally S.J.C. Rule 3:09, Canon 3(E) (judicial disqualification); Glenn v. Aiken, 409 Mass. 699, 703 (1991) ("calling a judge as a witness to opine on what ruling he might have made on a particular hypothesis" is disfavored). Cf. Guardianship of Pollard, 54 Mass. App. Ct. 318, 322–323 (2002) (judge who served as guardian ad litem prior to becoming judge not disqualified from testifying in guardianship proceeding before a different judge and from being cross-examined on her guardian ad litem report).

Section 606. Juror's Competency as a Witness

(a) At the Trial. A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.

(b) During an Inquiry into the Validity of a Verdict or Indictment.

(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations, the effect of anything on that juror's or another juror's vote, or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) Exceptions. A juror may testify about whether

(A) extraneous prejudicial information was improperly brought to the jury's attention or

(B) an outside influence was improperly brought to bear on any juror.

NOTE

Subsection (a). This subsection, which is taken verbatim from Fed. R. Evid. 606(a) and is nearly identical to Proposed Mass. R. Evid. 606(a), reflects Massachusetts practice.

Subsection (b). This subsection is taken from Proposed Mass. R. Evid. 606(b) and is derived from Commonwealth v. Tavares, 385 Mass. 140, 153–157, cert. denied, 457 U.S. 1137 (1982), and Commonwealth v. Fidler, 377 Mass. 192, 196–198 (1979). In Commonwealth v. Tavares, 385 Mass. at 155 n.25, the court stated that Proposed Mass. R. Evid. 606(b) "is the federal rule, and is in accord with the current Massachusetts rule admitting evidence of extraneous information and excluding evidence of mental processes" (quotation and citations omitted). See also Commonwealth v. Walker, 379 Mass. 297, 304 (1979); Woodward v. Leavitt, 107 Mass. 453, 466–467 (1871); Commonwealth v. Hanlon, 44 Mass. App. Ct. 810, 816 (1998).

The Doctrine of "Extraneous Matter." In Commonwealth v. Fidler, 377 Mass. at 200, the court held that "if specific facts not mentioned at trial concerning one of the parties or the matter in litigation were brought to the attention of the deliberating jury by a juror . . . such misconduct may be proved by juror testimony." The court cautioned, however, that "evidence concerning the subjective mental processes of jurors" is not admissible to impeach their verdict. Id. at 198. The challenge for courts is to make the distinction between "overt factors and matters resting in a juror's consciousness." Id. See Commonwealth v. Heang, 458 Mass. 827, 858 (2011) (pressure from other jurors during deliberation was not extraneous influence). In Commonwealth v. Guisti, 434 Mass. 245 (2001), the court offered further guidance by defining the concept of an "extraneous matter." "An extraneous matter is one that involves information not part of the evidence at trial and raises a serious question of possible prejudice" (citations and quotation omitted). Id. at 251. Some illustrations of this concept include "(1) unauthorized views of sites by jurors; (2) improper communications to the jurors by third persons; or (3) improper consideration of documents not in evidence" (citations omitted). Commonwealth v. Fidler, 377 Mass. at 197. See Fitzpatrick v. Allen, 410 Mass. 791 (1991) (home medical reference book brought into jury room); Markee v. Biasetti, 410 Mass. 785 (1991) (jurors took unauthorized view and made measurements at accident scene). See also Commonwealth v. Blanchard, 476 Mass. 1026, 1026–1027 (2017) (judge's binder containing information not in evidence at trial, inadvertently brought to jury room during deliberations, constitutes extraneous materials). But see Commonwealth v. Miller, 475 Mass. 212 (2016) (gun magazine not prejudicial).

***Extraneous Matter Prior to Discharge*.** In Commonwealth v. Blanchard, 476 Mass. 1026 (2017), the Supreme Judicial Court ruled that, in a case in which exposure to extraneous matter is revealed before the jury is discharged, as opposed to after a verdict is announced and the jury excused,

> "the judge should ask the juror whether he or she read, saw, heard, or otherwise became aware of the extraneous materials during the jury's deliberations. The judge should then inquire into the effect of the exposure on the particular juror, with the focus of the question or questions being whether the juror can deliberate without being influenced by the materials. In asking about the effect of the extraneous materials on the individual juror, the judge should caution the juror not to speculate about the effect on any other juror or on the jury as a whole.
>
> . . . [A] prefatory instruction by the judge to each juror about the need to avoid telling the judge anything about the substance of the jury's deliberations may be useful."

Id. at 1027–1028.

***Contacting Jurors Post-Discharge*.** A lawyer's ability to contact jurors after the verdict is regulated by Mass. R. Prof. C. 3.5 (2015) and Commonwealth v. Moore, 474 Mass. 541 (2016). In Moore, the Supreme Judicial Court modified the prohibition against attorney-originated communications established by Commonwealth v. Fidler. Id. at 548. The court discussed the revisions to Mass. R. Prof. C. 3.5, effective July 1, 2015, noting that the prohibition against inquiring into the substance of jury deliberations remained intact. Attorneys may initiate contact with jurors, but only after giving opposing counsel five business days' notice. The notice must include "a description of the proposed manner of contact and the substance of any proposed inquiry to the jurors, and, where applicable, a copy of any letter or other form of written communication the attorney intends to send." Commonwealth v. Moore, 474 Mass. at 551–552. If a communication with a juror leads the lawyer to suspect that there was an extraneous influence on the jury, the lawyer may obtain an affidavit from the juror without prior court approval, but the affidavit "must focus on extraneous influences,

and not the substance of the jury's deliberations or the individual or collective thought processes of the juror or the jury as a whole." Id.

Procedure for Determining Whether Jury Was Influenced by an "Extraneous Matter." A party alleging that a jury was exposed to a significant extraneous influence "bears the burden of demonstrating that the jury were in fact exposed to the extraneous matter. To meet this burden he may rely on juror testimony." Commonwealth v. Fidler, 377 Mass. 192, 201 (1979).

Further inquiry by the court is not required where "there has been no showing that specific facts not mentioned at trial concerning one of the parties or the matter in litigation were brought to the attention of the deliberating jury" (emphasis and quotations omitted). Commonwealth v. Drumgold, 423 Mass. 230, 261 (1996). See Commonwealth v. McQuade, 46 Mass. App. Ct. 827, 833 (1999). "The question whether the party seeking an inquiry has made such a showing is properly addressed to the discretion of the trial judge." Commonwealth v. Dixon, 395 Mass. 149, 152 (1985). There is always a danger that when questioned about the existence of an extraneous matter a juror will respond

> "with an answer that inappropriately reveals aspects of the deliberations. Giving cautionary instructions to each juror at the outset of the inquiry and, if necessary, again during the inquiry will reduce the likelihood of answers that stray into revelation of the jury's thought process. The jurors can be instructed to respond about any information that was not mentioned during the trial (appropriate), but not to describe how the jurors used that information or the effect of that information on the thinking of any one or more jurors (inappropriate). Once any juror has established that extraneous information was mentioned, by whom, and whether anyone said anything else about the extraneous information (not what they thought about it or did with it), the inquiry of that juror is complete. As soon as the judge determines that the defendant has satisfied his burden of establishing the existence of an extraneous influence, the questioning of all jurors should cease."

Commonwealth v. Kincaid, 444 Mass. 381, 391–392 (2005).

A defendant seeking a new trial bears the burden of showing that the jury was exposed to extraneous material, at which point the burden shifts to the Commonwealth to prove beyond a reasonable doubt that the defendant was not prejudiced by the exposure. Commonwealth v. Fidler, 377 Mass. at 201. See Commonwealth v. Miller, 475 Mass. 212, 221–222 (2016) (Where the extraneous matter was "not attached to any crucial issue" in the case, and there was substantial evidence of the defendant's guilt, the trial judge properly refused to grant a new trial even though a juror had brought a gun magazine to the jury room.). The same burden-shifting approach applies in a civil case, except that the party opposing the new trial need only show that there is "no reasonable likelihood of prejudice" from the extraneous material. Fitzpatrick v. Allen, 410 Mass. 791, 796 (1991); Markee v. Biasetti, 410 Mass. 785, 788–789 (1991).

***Ethnic or Racial Bias*.** When the defendant files an affidavit from one or more jurors stating that another juror made a statement "that reasonably demonstrates racial or ethnic bias" and the jury's credibility is at issue, the judge must first determine whether the defendant has proved by a preponderance of the evidence that the juror made the biased statement. Commonwealth v. McCowen, 458 Mass. 461, 494 (2010). Second, if the answer to the first question is "yes," the judge must determine whether the defendant has proved by a preponderance of the evidence

> "that the juror who made the statements was actually biased because of the race or ethnicity of a defendant, victim, defense attorney, or witness. A juror is actually biased where her racial or ethnic prejudice, had it been revealed or detected at voir dire, would have required as a matter of law that the juror be excused from the panel for cause." (Citations omitted.)

Id. at 495.

> "In some instances, the statement made by the juror may establish so strong an inference of a juror's actual bias that proof of the statement alone may suffice. Generally, though, the judge must determine the precise content and context of the statement to determine

> whether it reflects the juror's actual racial or ethnic bias, or whether it was said in jest or otherwise bore a meaning that would fail to establish racial bias. Because actual juror bias affects the essential fairness of the trial, a defendant who has established a juror's actual bias is entitled to a new trial without needing to show that the juror's bias affected the jury's verdict." (Citations omitted.)

Id. at 496. Third, even if the defendant fails to prove that the juror was actually biased, if the answer to the first question is "yes," the judge must determine "whether the statements so infected the deliberative process with racially or ethnically charged language or stereotypes that it prejudiced the defendant's right to have his guilt decided by an impartial jury on the evidence admitted at trial" (citations omitted). Id. at 496–497. Even though racial or ethnic bias is not an extraneous matter, see Commonwealth v. Laguer, 410 Mass. 89, 97 (1991), this third question is subject to the same analysis used to evaluate extraneous influences on the jury. If the defendant meets his or her burden of establishing that the statement was made, "the burden then shifts to the Commonwealth to show beyond a reasonable doubt that the defendant was not prejudiced by the jury's exposure to these statements." Commonwealth v. McCowen, 458 Mass. at 497. In making this determination, the judge must not receive any evidence concerning the effect of the statement on the thought processes of the jurors, but instead must focus on its "probable effect" on a "hypothetical average jury." Id.

***Discharge of a Juror During Empanelment*.** Even prior to trial, a potential juror who may not be impartial due to the effect of an extraneous matter such as bias or prejudice may be excused by the court. See G. L. c. 234, § 28; G. L. c. 234A, § 39; Mass. R. Crim. P. 20(b)(2). If the jury has not been sworn, the judge has discretion to excuse a juror without a hearing or a showing of extreme hardship based on information that the juror may not be indifferent. See Commonwealth v. Gambora, 457 Mass. 715, 731–732 (2010) (juror dismissed based on report by court officer that she was observed in the hallway during a break speaking to persons who then joined a group which included members of the defendant's family); Commonwealth v. Duddie Ford Inc., 409 Mass. 387, 392 (1991). "It is generally within the judge's discretion . . . to determine when there exists a substantial risk that extraneous issues would influence the jury such that an individual voir dire of potential jurors is warranted." Commonwealth v. Holloway, 44 Mass. App. Ct. 469, 472 (1998).

***Discharge of a Juror During Trial*.** In Commonwealth v. Jackson, 376 Mass. 790 (1978), the Supreme Judicial Court addressed the procedure for evaluating the effect of possibly prejudicial material on members of the jury and the proper judicial response:

> "When material disseminated during trial is reliably brought to the judge's attention, he should determine whether the material goes beyond the record and raises a serious question of possible prejudice. A number of factors may be involved in making that determination, including the likelihood that the material reached one or more jurors. If the judge finds that the material raises a serious question of possible prejudice, a voir dire examination of the jurors should be conducted. The initial questioning concerning whether any juror saw or heard the potentially prejudicial material may be carried on collectively, but if any juror indicates that he or she has seen or heard the material, there must be individual questioning of that juror, outside of the presence of any other juror, to determine the extent of the juror's exposure to the material and its effects on the juror's ability to render an impartial verdict."

Id. at 800–801. The trial judge must determine the nature of the extraneous matter before exercising discretion as to whether to discharge a juror. See id. (individualized questioning of juror appropriate given concerns of exposure to prejudicial media publicity during trial). See, e.g., Commonwealth v. Alicea, 464 Mass. 837, 848–849 (2013) (judge has "considerable discretion" to ensure that jurors remain impartial and indifferent; when jurors reported to court officer that one juror had made up his mind, judge was warranted in giving jury forceful instruction and appointing foreperson early to ensure compliance with instructions, rather than conducting voir dire); Commonwealth v. Stewart, 450 Mass. 25, 39 (2007) (trial judge acted properly in asking jury collectively whether anyone had seen anything while coming into or exiting courtroom based on court officer's report that door to lockup had been left open while defendant was inside cell);

Commonwealth v. John, 442 Mass. 329, 339–340 (2004) (no error in declining to discharge juror who expressed personal fear due to nature of case); Commonwealth v. Maldonado, 429 Mass. 502, 506–507 (1999) (judge did not abuse her discretion in removing one juror who expressed fear for her personal safety as a result of evidence of defendant's association with a gang). See also Commonwealth v. Francis, 432 Mass. 353, 369–370 (2000). Cf. Commonwealth v. Fredette, 56 Mass. App. Ct. 253, 259 (2002) (judge erred in accepting a juror's note about a matter of extraneous influence without making inquiry of the juror).

***Sleeping Jurors*.** A judge must intervene promptly whenever he or she observes or receives a reliable report that a juror is asleep. Commonwealth v. Villalobos, 478 Mass. 1007, 1008 (2017). By contrast, "[w]here a judge has only tentative information that a juror may be sleeping, it is sufficient to note the report and monitor the situation." Commonwealth v. Alleyne, 474 Mass. 771, 778 (2016). See Commonwealth v. Vaughn, 471 Mass. 398, 413 (2015) ("report of a sleeping juror was not sufficiently reliable to warrant further action"). If a judge makes a "preliminary conclusion that information about a juror's inattention is reliable, the judge must take further steps to determine the appropriate intervention." Commonwealth v. McGhee, 470 Mass. 638, 644 (2015). Although a judge has "substantial discretion in this area," "[t]ypically, the next step is to conduct a voir dire of the potentially inattentive juror, in an attempt to investigate whether that juror 'remains capable of fulfilling his or her obligation to render a verdict based on all of the evidence.'" Id., quoting Commonwealth v. Dancy, 75 Mass. App. Ct. 175, 181 (2009). The judge has discretion as to the nature of the intervention and is not required to conduct a voir dire in every complaint regarding jury attentiveness. Commonwealth v. Beneche, 458 Mass. 61, 78 (2010). Compare Commonwealth v. Ray, 467 Mass. 115, 134 (2014) (no error in declining to discharge juror observed sleeping at various points in the trial after judge conducted voir dire of juror and satisfied herself that juror could fairly participate in deliberations), with Commonwealth v. McGhee, 470 Mass. at 642–646 (failure of trial judge to conduct further inquiry concerning report of sleeping juror necessitated new trial).

***Discharge of a Deliberating Juror*.** The problems associated with the effect of an extraneous matter on the jury also may arise before the jury returns a verdict. General Laws c. 234, § 26B, provides that if, at any time after a case has been submitted to the jury and before the jury have agreed on a verdict, a juror "dies, or becomes ill, or is unable to perform his duty for any other good cause shown to the court," the judge may discharge the juror, substitute an alternate selected by lot, and permit the jury to renew their deliberations. See Mass. R. Crim. P. 20(d)(3). "[G]ood cause includes only reasons personal to a juror, that is, reasons unrelated to the issues of the case, the juror's views on the case, or his relationship with his fellow jurors" (quotations omitted). Commonwealth v. Francis, 432 Mass. 353, 368 (2000). The judge must conduct a hearing before a juror is discharged. See Commonwealth v. Holley, 478 Mass. 508, 529–531 (2017) (judge did not err in dismissing juror who became ill during deliberations where "the judge telephoned the juror in the presence of counsel, questioned her, invited counsel to suggest further questions, and made specific findings of good cause"; no error in judge rejecting "defense counsel's request that he ask the juror about her ability to deliberate, as that question came close to touching upon the content of the deliberations"); Commonwealth v. McCowen, 458 Mass. 461, 488–489 (2010) (after jury reported it was deadlocked, judge was warranted in removing deliberating juror based on a finding that a "palpable conflict" existed due to the arrest of the father of the juror's son, who was being prosecuted by the same district attorney's office that was prosecuting the case on trial). Great care must be taken in such cases that a dissenting juror is not allowed to avoid the responsibility of jury service. See, e.g., Commonwealth v. Garcia, 84 Mass. App. Ct. 760, 770 (2014) (judge improperly dismissed deliberating juror without first determining a valid reason, personal to the juror and unrelated to juror's views about the case or relations with other jurors); Commonwealth v. Rodriguez, 63 Mass. App. Ct. 660, 675–676 (2005) (holding that discharge of deliberating juror was error).

***Required Instruction After Discharge of Deliberating Juror*.** After dismissing a deliberating juror, the judge "must instruct the jury to disregard all prior deliberations and begin its deliberations again" (quotation omitted). Commonwealth v. Connor, 392 Mass. 838, 844 n.2 (1984). See Commonwealth v. Holley, 478 Mass. 508, 530–531 (2017) (holding it was sufficient to instruct jury to begin their deliberations "anew with a new jury of twelve people" and "not to simply pick up where [they] left off" where juror's illness was "clearly a personal problem"); Commonwealth v. Zimmerman, 441 Mass. 146, 151 (2004) ("A judge is not required in every case to adhere to the precise language we used in [Connor].").

Section 607. Who May Impeach a Witness

Any party, including the party that called the witness, may attack the witness's credibility. However, the party who calls a witness may not impeach that witness by evidence of bad character, including reputation for untruthfulness or prior convictions.

NOTE

This section is derived from G. L. c. 233, § 23, and Walter v. Bonito, 367 Mass. 117, 121–123 (1975). In Walter, the Supreme Judicial Court recognized that Labrie v. Midwood, 273 Mass. 578, 581–582 (1931), held that G. L. c. 233, § 22 (party's right to call and cross-examine adverse witness) does not override G. L. c. 233, § 23. See also Mass. R. Civ. P. 43(b). It is not a violation of this principle to permit a witness to testify about a prior criminal conviction in direct examination. Commonwealth v. Daley, 439 Mass. 558, 563 (2003). The reason for permitting a party to bring out the criminal record of his or her own witness is not impeachment, but rather "to avoid having the jury draw the inference that the party calling the witness had misled or deceived the jury as to the background of the witness." Commonwealth v. Blodgett, 377 Mass. 494, 502 (1979). See Commonwealth v. DePina, 476 Mass. 614, 631 (2017) (eliciting testimony on direct examination that witness was not honest with police due to fear of cooperating was not vouching, but was proper in anticipation of impeachment on cross-examination).

"[A] party cannot rely on this statutory right [G. L. c. 233, § 23] to call a witness whom he knows beforehand will offer no testimony relevant to an issue at trial solely for the purpose of impeaching that witness with prior inconsistent statements that would otherwise be inadmissible." Commonwealth v. McAfee, 430 Mass. 483, 489–490 (1999).

When impeaching one's own witness through a prior inconsistent statement, the proponent must bring the statement to the attention of the witness with sufficient circumstances to alert the witness to the particular occasion the prior statement was made and allow the witness an opportunity to explain the statement. See Section 613, Prior Statements of Witnesses, Limited Admissibility.

Subsequent to impeachment, questions concerning a witness's fear in testifying are not per se improper on redirect examination. Commonwealth v. Mitchell, 89 Mass. App. Ct. 13, 27–28 (2016), citing Commonwealth v. Auguste, 418 Mass. 643, 647 (1994).

This Guide includes specific sections dealing with impeachment by evidence of character (Sections 608 and 609), impeachment by prior inconsistent statements (Section 613), impeachment by reference to bias or prejudice (Section 611[b]), and evidence of religious beliefs (Section 610). Other methods of impeachment—e.g., improper motive, impairment of testimonial faculties, and contradiction—remain available and fall within the scope of Sections 102, Purpose and Construction; 410, Pleas, Offers of Pleas, and Related Statements; 403, Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons; and 611, Mode and Order of Examining Witnesses and Presenting Evidence.

Section 608. A Witness's Character for Truthfulness or Untruthfulness

(a) Reputation Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Specific Instances of Conduct. In general, specific instances of misconduct showing the witness to be untruthful are not admissible for the purpose of attacking or supporting the witness's credibility.

NOTE

Subsection (a). This subsection is derived from Commonwealth v. Dockham, 405 Mass. 618, 631 (1989), and Commonwealth v. Daley, 439 Mass. 558, 563 (2003). Cf. Commonwealth v. Daley, 439 Mass. at 562–563 (evidence of person's bad character generally inadmissible to prove action in conformity therewith); Section 404, Character Evidence; Crimes or Other Acts.

Unlike under Federal law, character for truthfulness cannot be proven by evidence of personal opinions or isolated acts. See Commonwealth v. Walker, 442 Mass. 185, 197–198 (2004) (declining to adopt original Proposed Mass. R. Evid. 405[a]); Commonwealth v. Benjamin, 430 Mass. 673, 678 n.6 (2000). Reputation evidence must be based on one's reputation in the community or at the person's place of work or business. Commonwealth v. Walker, 442 Mass. at 198. See G. L. c. 233, § 21A (work or business); Commonwealth v. Dockham, 405 Mass. at 631 (community). A witness's testimony must be based on the witness's knowledge of the person's reputation in the community, not of the opinions of a limited number of people. Commonwealth v. LaPierre, 10 Mass. App. Ct. 871, 871 (1980). See Commonwealth v. Phachansiri, 38 Mass. App. Ct. 100, 109 (1995); Commonwealth v. Gomes, 11 Mass. App. Ct. 933, 933–934 (1981).

The provision regarding testimony of the witness's reputation for having a character for truthfulness or untruthfulness is derived from Commonwealth v. Favorito, 9 Mass. App. Ct. 138, 140 (1980). "Evidence irrelevant to the issue at trial or to the witness's reputation for truth and veracity is inadmissible to impeach a witness." Commonwealth v. Cancel, 394 Mass. 567, 572 (1985).

The provision limiting the admissibility of evidence of truthful character to after the witness's character for truthfulness has been attacked is derived from Commonwealth v. Sheline, 391 Mass. 279, 288 (1984), and Commonwealth v. Grammo, 8 Mass. App. Ct. 447, 455 (1979). This limitation does not restrict the right of a defendant in a criminal case to offer evidence of his or her reputation for a character trait that would suggest he or she is not the type of person who would commit the crime charged. See Section 404(a)(2)(A), Character Evidence; Crimes or Other Acts: Character Evidence: Exceptions for a Defendant or Victim in a Criminal Case. Neither "the offering of testimony that contradicts the testimony of a witness" nor "the introduction of prior out-of-court statements of a witness constitute[s] an attack on the witness's character for truthfulness," because "[t]he purpose and only direct effect of the evidence are to show that the witness is not to be believed in [that] instance." Commonwealth v. Sheline, 391 Mass. at 288–289.

Subsection (b). This subsection is derived from Commonwealth v. LaVelle, 414 Mass. 146, 151 (1993), and Commonwealth v. Bregoli, 431 Mass. 265, 275 (2000). This applies whether or not the witness is a party, Commonwealth v. Binkiewicz, 342 Mass. 740, 755 (1961), and whether the witness is impeached by cross-examination, Commonwealth v. Turner, 371 Mass. 803, 810 (1977), or by the introduction of extrinsic evidence, Commonwealth v. LaVelle, 414 Mass. at 151. On several occasions, the Supreme Judicial Court has declined to adopt Fed. R. Evid. 608(a) and Proposed Mass. R. Evid. 608(b), which permit inquiry into the details of prior instances of misconduct if probative of the witness's character for veracity. See Commonwealth v. Almonte, 465 Mass. 224, 241 (2013).

The Supreme Judicial Court has "chiseled" a narrow exception to the rule that the testimony of a witness may not be impeached with specific acts of prior misconduct, recognizing that in special circumstances (to date, only rape and sexual assault cases) the interest of justice would forbid its strict application. Commonwealth v. LaVelle, 414 Mass. at 151–152. In Commonwealth v. Bohannon, 376 Mass. 90, 94–96 (1978), the special circumstances warranting evidence of the prior accusations were that (1) the witness was the victim in the case on trial; (2) the victim/witness's consent was the central issue at trial; (3) the victim/witness was the only Commonwealth witness on the issue of consent; (4) the victim/witness's testimony was inconsistent and confused; and (5) there was a basis in independent third-party records for concluding that the

victim/witness's prior accusation of the same type of crime had been made and was false. Not all of the Bohannon circumstances must be present for the exception to apply. Commonwealth v. Nichols, 37 Mass. App. Ct. 332, 337 (1994).

Section 609. Impeachment by Evidence of Conviction of Crime

(a) Generally. A party may seek to impeach the credibility of a witness by means of the court record of the witness's conviction or a certified copy, but may not make reference to the sentence that was imposed, subject to Section 403 and the following requirements:

(1) Misdemeanor. A misdemeanor conviction cannot be used after five years from the date on which sentence was imposed, unless the witness has subsequently been convicted of a crime within five years of the time he or she testifies.

(2) Felony Conviction Not Resulting in Committed State Prison Sentence. A felony conviction where no sentence was imposed, a sentence was imposed and suspended, a fine was imposed, or a sentence to a jail or house of correction was imposed cannot be used after ten years from the date of conviction (where no sentence was imposed) or from the date of sentencing, unless the witness has subsequently been convicted of a crime within ten years of the time he or she testifies. For the purpose of this paragraph, a plea of guilty or a finding or verdict of guilty shall constitute a conviction within the meaning of this section.

(3) Felony with State Prison Sentence Imposed. A felony conviction where a sentence to a State prison was imposed cannot be used after ten years from the date of expiration of the minimum term of imprisonment, unless the witness has subsequently been convicted of a crime within ten years of the time he or she testifies.

(4) Traffic Violation. A traffic violation conviction where only a fine was imposed cannot be used unless the witness has been convicted of another crime or crimes within five years of the time he or she testifies.

(5) Juvenile Adjudications of Delinquency or Youthful Offender. Adjudications of delinquency or youthful offender may be used in subsequent delinquency or criminal proceedings in the same manner and to the same extent as prior criminal convictions.

(b) Effect of Being a Fugitive. For the purpose of this section, any period during which the defendant was a fugitive from justice shall be excluded in determining time limitations under the provisions of this section.

NOTE

This section is derived from G. L. c. 233, § 21, except for Subsection (a)(5), which is derived from G. L. c. 119, § 60.

Definition of Conviction. For the purpose of impeachment, a conviction "means a judgment that conclusively establishes guilt after a finding, verdict, or plea of guilty." Forcier v. Hopkins, 329 Mass. 668, 670 (1953), and cases cited. Thus, a case that is continued without a finding, with or without an admission, is not a conviction and may not be used for impeachment under this section. See Wilson v. Honeywell, Inc., 409

Mass. 803, 808–809 (1991). See also Commonwealth v. Pon, 469 Mass. 296, 298 (2014); Commonwealth v. Norwell, 423 Mass. 725, 726 (1996); Commonwealth v. Jackson, 45 Mass. App. Ct. 666, 670 (1998).

Misdemeanors/Probation. A misdemeanor conviction for which a defendant was placed on probation cannot be used for impeachment, because straight probation does not constitute a "sentence" for purposes of the statute. Commonwealth v. Stewart, 422 Mass. 385, 387 (1996).

Probation Violation. The proper use of probation violations is as follows:

> "Although convictions within the time frames established by G. L. c. 233, § 21 . . . , may be used to impeach a witness's character for truthfulness, probation violations may not be so used. Nevertheless, probation violations may be used 'to show bias on the part of the witness who might want to give false testimony to curry favor with the prosecution with respect to his case.' Commonwealth v. DiMuro, 28 Mass. App. Ct. 223, 228 (1990)." (Citation omitted.)

Commonwealth v. Roberts, 423 Mass. 17, 20–21 (1996).

Suspended Sentence. A suspended sentence constitutes a sentence. Forcier v. Hopkins, 329 Mass. 668, 670–671 (1953).

Fine. A fine constitutes a sentence. Commonwealth v. Ortiz, 47 Mass. App. Ct. 777, 781 (1999).

Scope. "[C]onvictions relevant to credibility are not limited to crimes involving dishonesty or false statements." Commonwealth v. Smith, 450 Mass. 395, 407 (2008).

Discretion. The judge must exercise discretion before deciding whether to admit prior convictions for impeachment. Commonwealth v. Ruiz, 400 Mass. 214, 215 (1987). The factors that are relevant to the exercise of discretion include "whether the prior conviction is substantially similar to the crime charged, whether the prior conviction involves a crime implicating truthfulness, whether there were other prior convictions that the Commonwealth could have used to impeach the defendant, and whether the judge conducted the required balancing test." Commonwealth v. Little, 453 Mass. 766, 773 (2009). The balancing test is the one set forth in Section 403, Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reason. See, e.g., Commonwealth v. Roucoulet, 22 Mass. App. Ct. 603, 608 (1986) (reversing conviction in drug case based on improper admission of prior criminal convictions for drug offenses). A judge is not required to exercise discretion in the absence of an objection or motion in limine. Commonwealth v. Bly, 444 Mass. 640, 653 (2005). The discretion to exclude prior convictions applies equally to the testimony of parties and other witnesses. Commonwealth v. Manning, 47 Mass. App. Ct. 923, 923 (1999). "The defendant may challenge the judge's ruling even if he never testifies." Commonwealth v. Little, 453 Mass. at 773. But see Section 103(b), Rulings on Evidence, Objections, and Offers of Proof: Preliminary Evidentiary Motions: Effect on Appellate Rights. "Generally, in order for the prejudicial effect to outweigh the probative value of prior conviction evidence, the 'prior conviction must be substantially similar to the charged offense'" (emphasis omitted). Commonwealth v. Leftwich, 430 Mass. 865, 869 (2000), quoting Commonwealth v. Drumgold, 423 Mass. 230, 250 (1996). However, "[a]lthough similarity of an offense weighs in favor of exclusion, there is no per se rule of exclusion of prior conviction of a similar crime for which the defendant is on trial." Commonwealth v. Bly, 444 Mass. at 654. A trial judge has discretion to permit impeachment of a sexual assault complaining witness by prior convictions of sexual offenses (which would otherwise be inadmissible under the rape-shield statute, G. L. c. 233, § 21B), but in exercising that discretion, the judge must consider the purposes of the rape-shield statute. Commonwealth v. Harris, 443 Mass. 714, 726–728 (2005). See Section 412, Sexual Behavior or Sexual Reputation (Rape-Shield Law).

Proof of Conviction. The conviction must be proven by production of a court record or a certified copy. Commonwealth v. Puleio, 394 Mass. 101, 104 (1985). But see Commonwealth v. Hamilton, 459 Mass. 422, 439 (2011) (proof of prior conviction for purpose other than to impeach truthfulness of witness does not require court record or certified copy). An attorney must have a reasonable evidentiary basis for any

question concerning a prior criminal conviction. See Commonwealth v. Johnson, 441 Mass. 1, 5 n.4 (2004). It is presumed that the defendant was represented by counsel in the underlying conviction, and the Commonwealth does not have to prove representation unless the defendant makes a showing that the conviction was obtained without counsel or a waiver of counsel. Commonwealth v. Saunders, 435 Mass. 691, 695–696 (2002).

Evidence of Conviction. When a record of a witness's criminal conviction is introduced for impeachment purposes, the conviction must be left unexplained; but when "cross-examination goes beyond simply establishing that the witness is the person named in the record of conviction, the proponent of the witness may, in the judge's discretion, properly inquire on redirect examination about those collateral matters raised during the cross-examination." Commonwealth v. McGeoghean, 412 Mass. 839, 843 (1992). See Commonwealth v. Kalhauser, 52 Mass. App. Ct. 339, 343–345 (2001). Any reference to the length of the sentenced imposed should be excluded. Commonwealth v. Eugene, 438 Mass. 343, 352–353 (2003).

A witness may testify about his or her prior convictions for criminal conduct on direct examination in order to blunt the anticipated use of such evidence on cross-examination. Commonwealth v. Daley, 439 Mass. 558, 563 (2003). See Commonwealth v. Blodgett, 377 Mass. 494, 502 (1979). Despite an earlier in limine order excluding evidence of a prior conviction, a witness who testifies untruthfully opens the door to admission of previously excluded evidence to rebut the false testimony. Commonwealth v. Roderick, 429 Mass. 271, 273–275 (1999). Evidence of a stale prior conviction, although inadmissible under G. L. c. 233, § 21, may still be admissible for probative nonimpeachment purposes. Commonwealth v. Jacobs, 6 Mass. App. Ct. 867, 868 (1978). See Commonwealth v. Lavoie, 47 Mass. App. Ct. 1, 4 n.7 (1999).

Redaction. A prior conviction should either be introduced with a description of its nature or excluded entirely, as "[m]asking the nature of the prior offense . . . is more likely to affect the defendant unfairly than receipt in evidence of the unvarnished conviction." Commonwealth v. Ioannides, 41 Mass. App. Ct. 904, 905–906 (1996). However, the judge has discretion to redact the nature of the prior offense and restrict impeachment to the fact of a conviction of "a felony" if redaction is requested by the defendant. Commonwealth v. Kalhauser, 52 Mass. App. Ct. 339, 342 (2001). Any extraneous entries included in the record of criminal conviction should not be shown to the jury, and if, in the judge's opinion, masking the extraneous material risks inducing the jury to speculate about the missing portions of the record, the judge should refuse to mark the records as exhibits. Commonwealth v. Ford, 397 Mass. 298, 300 (1986).

Pardons, Sealing of Record, Expungement, Commutation of Sentence, Appeal Pending. A criminal record that has been sealed is not subject to mandatory discovery and is not available for impeachment. Wing v. Commissioner of Probation, 473 Mass. 368, 370–371 (2015). It appears that pardons and expunged records are likewise unavailable. See Commonwealth v. Childs, 23 Mass. App. Ct. 33, 35 (1986), aff'd, 400 Mass. 1006 (1987). Conversely, it appears that the commutation of a sentence may be used. Rittenberg v. Smith, 214 Mass. 343, 347 (1913) ("The commutation of the sentence did not do away with the conviction. Only a full pardon could do that."). It also appears that the pendency of an appeal does not prevent the use of a conviction for impeachment purposes. The fact that a defendant's prior conviction was vacated after the trial in which it was used to impeach him did not affect its status as a "final judgment" for purposes of G. L. c. 233, § 21. Commonwealth v. DiGiambattista, 59 Mass. App. Ct. 190, 199 (2003), judgment rev'd on other grounds, 442 Mass. 423 (2004). See Fed. R. Evid. 609(e); Proposed Mass. R. Evid. 609(f). The term conviction means "a judgment that conclusively establishes guilt after a finding, verdict, or plea of guilty. . . . In a criminal case the sentence is the judgment." Forcier v. Hopkins, 329 Mass. 668, 670–671 (1953). "The sentence[,] until reversed in some way provided by the law, stands as the final judgment binding upon everybody." Commonwealth v. Dascalakis, 246 Mass. 12, 20 (1923).

Section 610. Religious Beliefs or Opinions

Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

NOTE

This section is derived from Commonwealth v. Dahl, 430 Mass. 813, 822–823 (2000) (citing with approval Proposed Mass. R. Evid. 610), and G. L. c. 233, § 19 ("evidence of [a person's] disbelief in the existence of God may not be received to affect his credibility as a witness"). Though not admissible as to credibility, evidence that relates to a person's religious beliefs is not per se inadmissible. See Commonwealth v. Kartell, 58 Mass. App. Ct. 428, 436–437 (2003) (evidence of defendant's religious beliefs admissible for relevant purpose of showing defendant was jealous of victim); Commonwealth v. Murphy, 48 Mass. App. Ct. 143, 145 (1999) (to establish that a child witness is competent to testify, "a question whether the child believes in God and a question whether the child recognizes the witness's oath as a promise to God are within tolerable limits to test whether the witness's oath meant anything to the child witness").

Section 611. Mode and Order of Examining Witnesses and Presenting Evidence

(a) Control by the Court. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to

(1) make those procedures effective for determining the truth,

(2) avoid wasting time, and

(3) protect witnesses from harassment or undue embarrassment.

The court has discretion to admit evidence conditionally upon the representation that its relevancy will be established by evidence offered subsequently.

(b) Scope of Cross-Examination.

(1) In General. A witness is subject to reasonable cross-examination on any matter relevant to any issue in the case, including credibility and matters not elicited during direct examination. The trial judge may restrict the scope of cross-examination in the exercise of judicial discretion.

(2) Bias and Prejudice. Reasonable cross-examination to show bias and prejudice is a matter of right which cannot be unreasonably restricted.

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions

(1) on cross-examination and

(2) when a party calls a hostile witness, an adverse party, or an officer or agent of an adverse corporate party, or an investigator appointed under G. L. c. 119, § 21A.

(d) Rebuttal Evidence. The trial judge generally has discretion to permit the introduction of rebuttal evidence in civil and criminal cases. In certain limited circumstances, a party may introduce rebuttal evidence as a matter of right. There is no right to present rebuttal evidence that only supports a party's affirmative case.

(e) Scope of Subsequent Examination. The scope of redirect and recross-examination is within the discretion of the trial judge.

(f) Reopening. The court has discretion to allow a party to reopen its case.

(g) Stipulations.

(1) Form and Effect. A stipulation is a voluntary agreement between opposing parties concerning some relevant fact, claim, or defense and may include agreements in both civil and criminal cases to simplify the issues for trial. A stipulation as to a matter of law is not binding on the court. A judge may require a stipulation be reduced to writing. A party is bound by its stipulation in the absence of consideration unless relief is granted by the court. In order to avoid a failure of justice, a court may at any time relieve a party from its stipulation.

(2) Essential Element. A stipulation as to a fact constituting an essential element of a crime or a fact material to the proof of the crime must be presented in some manner to the jury as part of the evidence of the case.

NOTE

Subsection (a). This subsection is derived from Commonwealth v. Rooney, 365 Mass. 484, 496 (1974); Goldman v. Ashkins, 266 Mass. 374, 380 (1929); Chandler v. FMC Corp., 35 Mass. App. Ct. 332, 338 (1993); and Albano v. Jordan Marsh Co., 2 Mass. App. Ct. 304, 311 (1974). See Commonwealth v. Edward, 75 Mass. App. Ct. 162, 171 n.12 (2009) (closing courtroom to the public during any portion of a trial implicates defendant's constitutional rights and must be preceded by a hearing and adequate findings of fact). The judge's discretion to impose reasonable limits on the length of the direct and cross-examination of witnesses does not permit the judge to impose arbitrary time limits that prevent a party from presenting its case. Chandler v. FMC Corp., 35 Mass. App. Ct. at 338. See also Commonwealth v. Conley, 34 Mass. App. Ct. 50, 59–60 & n.4 (1993) (improper for court to systematically screen a party's direct evidence at sidebar before witnesses are permitted to be called).

Evidence may be conditionally admitted (admitted de bene) upon the representation of counsel that additional evidence will be produced providing the foundation for the evidence offered. Harris-Lewis v. Mudge, 60 Mass. App. Ct. 480, 485 n.4 (2004). See Commonwealth v. Perry, 432 Mass. 214, 234–235 (2000). In the event that the foundation evidence is not subsequently produced, the court has no duty to strike the evidence admitted de bene on its own motion. Commonwealth v. Sheppard, 313 Mass. 590, 595–596 (1943). If the objecting party fails to move to strike the evidence, the court's failure to strike it is not error. Muldoon v. West End Chevrolet, Inc., 338 Mass. 91, 98 (1958). See Commonwealth v. Navarro, 39 Mass. App. Ct. 161, 166 (1995). See Section 104(b), Preliminary Questions: Relevance That Depends on a Fact.

A self-represented litigant is bound by the same rules as those that guide attorneys. International Fid. Ins. Co. v. Wilson, 387 Mass. 841, 847 (1983). However, "[w]hether a party is represented by counsel at a trial or represents himself, the judge's role remains the same. The judge's function at any trial is to be 'the directing and controlling mind at the trial, and not a mere functionary to preserve order and lend ceremonial dignity to the proceedings'" (citations omitted). Commonwealth v. Sapoznik, 28 Mass. App. Ct. 236, 241–242 n.4 (1990), quoting Commonwealth v. Wilson, 381 Mass. 90, 118 (1980). See also Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants, The Commonwealth of Massachusetts Administrative Office of the Trial Court (2006).

Subsection (b)(1).

Reasonable Basis for Cross-Examination. Cross-examination must have a reasonable and good-faith basis. See Commonwealth v. Johnson, 441 Mass. 1, 5 n.4 (2004). See also Commonwealth v. Cadet, 473 Mass. 173, 186 (2015) (in cross-examination of defendant, prosecutor's description of victim "gurgling" blood improper without supporting evidence). Attorneys are not permitted to ask questions in bad

faith or without any foundation. See Commonwealth v. Jenkins, 458 Mass. 791, 795 (2011) (attorney had good-faith basis for questions, even where source was not called to testify). The Supreme Judicial Court has applied the limitation set forth in Section 1113(b)(3)(C) (inappropriate to make arguments based on "racial, ethnic, or gender stereotypes") to the form of questions put to witnesses at trial. Commonwealth v. Cadet, 473 Mass. at 186.

Cross-Reference: Section 405(a), Methods of Proving Character: By Reputation.

***Civil Cases*.** This subsection as it applies to civil cases is derived from Beal v. Nichols, 68 Mass. 262, 264 (1854), and Davis v. Hotels Statler Co., 327 Mass. 28, 29–30 (1951). This subsection reflects the Massachusetts practice of permitting cross-examination on matters beyond the subject matter of the direct examination. See Nuger v. Robinson, 32 Mass. App. Ct. 959, 959–960 (1992). Thus, a party can put its own case before the jury by the cross-examination of witnesses called by the opposing party. See Moody v. Rowell, 34 Mass. 490, 499 (1835).

***Criminal Cases*.** "There are few subjects, perhaps, upon which [the Supreme] Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal" (citation omitted). Commonwealth v. Tanso, 411 Mass. 640, 650 (1992). See also Commonwealth v. Farley, 443 Mass. 740, 748 (2005); Commonwealth v. Vardinski, 438 Mass. 444, 449–451 (2003). In determining what is reasonable, the trial judge has discretion. "[T]he scope of cross-examination, including to what extent the accuracy, veracity, and credibility of a witness may be tested, rests largely in the sound discretion of the judge, not subject to revision unless prejudice is shown to a party by reason of too narrow restriction or too great breadth of inquiry" (citations and quotations omitted). Commonwealth v. Gagnon, 408 Mass. 185, 192 (1990). Unreasonable restrictions on the defendant's right to cross-examination in a criminal case require a new trial unless the error is shown to be harmless beyond a reasonable doubt. See Commonwealth v. Miles, 420 Mass. 67, 71–73 (1995). See also Commonwealth v. Reynolds, 429 Mass. 388, 391–392 (1999) (conviction reversed because scope of cross-examination of police officers too limited; "[i]t is well settled that a defendant has a right to expose inadequacies of police investigation"), and cases cited. The trial judge also has the right to limit cross-examination when necessary to protect the safety of the witness. See Commonwealth v. Francis, 432 Mass. 353, 357–358 (2000). See also Note "Address of Witness" to Section 501, Privileges Recognized Only as Provided. The Appeals Court has observed as follows:

> "Where there is no opportunity to cross-examine a witness, because, for example, he is uncooperative, fails to appear, or invokes his privilege against self-incrimination, the striking of any direct testimony by that witness may be constitutionally required. Generally, a witness's inability to answer questions on cross-examination due to lapse of memory, however, does not require striking his direct testimony." (Citations omitted.)

Commonwealth v. Santiago, 30 Mass. App. Ct. 207, 221 (1991). The defendant's right to confrontation is not denied when, on cross-examination, a witness refuses to answer questions relating exclusively to collateral matters. See Commonwealth v. Dwyer, 10 Mass. App. Ct. 707, 713 (1980). Compare Commonwealth v. Almeida, 452 Mass. 601, 607 (2008) (defendant was not denied his right to confront a key identification witness who was unable to recall numerous details; "[i]t was entirely reasonable for the witness to have no memory of some of the information sought by many of the questions"), and Commonwealth v. Amirault, 404 Mass. 221, 234–235 (1989) (lapse of memory by witness on cross-examination did not deny defendant right to confrontation), with Commonwealth v. Funches, 379 Mass. 283, 292 (1979) (trial judge was required to strike witness's direct testimony when witness asserted privilege against self-incrimination during cross-examination), and Commonwealth v. Johnson, 365 Mass. 534, 543–544 (1974) (defendant denied right to confrontation when judge, concerned for safety of witness, ordered witness to not answer questions on cross-examination).

***Fairness to the Commonwealth*.** The Commonwealth has a common-law right to reasonable cross-examination of witnesses called by the defendant. See Commonwealth v. Gagnon, 408 Mass. 185, 192 (1990). See also Commonwealth v. Lawton, 82 Mass. App. Ct. 528, 537–538 (2012).

Subsection (b)(2). This subsection is derived from Commonwealth v. Martinez, 384 Mass. 377, 380–381 (1981); Commonwealth v. Michel, 367 Mass. 454, 459 (1975); and Commonwealth v. Russ, 232 Mass. 58, 79 (1919).

"[W]here . . . facts are relevant to a showing of bias or motive to lie, any general evidentiary rule of exclusion must give way to the constitutionally based right of effective cross-examination." Commonwealth v. Joyce, 382 Mass. 222, 231 (1981), citing Davis v. Alaska, 415 U.S. 308, 316–318 (1974), and Chambers v. Mississippi, 410 U.S. 284 (1973). "A judge may not restrict cross-examination of a material witness by foreclosing inquiry into a subject that could show bias or prejudice on the part of the witness." Commonwealth v. Aguiar, 400 Mass. 508, 513 (1987). See Commonwealth v. Kindell, 84 Mass. App. Ct. 183, 186–189 (2013). This right applies with special force whenever there is evidence that the testimony of a witness is given in exchange for some anticipated consideration or reward by the government, see Commonwealth v. Barnes, 399 Mass. 385, 392 (1987); Commonwealth v. O'Neil, 51 Mass. App. Ct. 170, 178–181 (2001), or when it concerns the subject of identification. See Commonwealth v. Vardinski, 438 Mass. 444, 450 (2003).

However, the trial judge has considerable discretion to limit such cross-examination when it becomes redundant or touches on matters of tangential materiality. See Commonwealth v. Parent, 465 Mass. 395, 405–406 (2013); Commonwealth v. Jordan, 439 Mass. 47, 55 (2003); Commonwealth v. Noj, 76 Mass. App. Ct. 194, 198–199 (2010). See also Commonwealth v. Durand, 475 Mass. 657, 662–663 (2016) (court found that judge's ruling prohibiting defendant's cross-examination of expert concerning e-mail message was not abuse of discretion where defendant argued e-mail message was basis of expert's termination from his position with chief medical examiner's office).

Subsection (c). This subsection is derived from G. L. c. 233, § 22; Carney v. Bereault, 348 Mass. 502, 510 (1965); and Mass. R. Civ. P. 43(b). "[T]he decision whether to allow leading questions should be left for the most part to the wisdom and discretion of the trial judge instead of being restricted by the mechanical operation of inflexible rules" (citations and quotation omitted). Commonwealth v. Flynn, 362 Mass. 455, 467 (1972). See Commonwealth v. Monahan, 349 Mass. 139, 162–163 (1965) (rulings on whether witness is hostile and whether cross-examination of the witness by his or her proponent are permitted are within discretion of trial judge). Some judges in Massachusetts require that when the subject of the cross-examination enters material not covered on direct, the attorney should no longer use leading questions.

Although as a general rule leading questions should not be used on direct examination, there are many instances where they are permitted in the discretion of the judge. See, e.g., DiMarzo v. S. & P. Realty Corp., 364 Mass. 510, 512 (1974) (refresh memory); Commonwealth v. Aronson, 330 Mass. 453, 460 (1953) (witness under stress); Gray v. Kelley, 190 Mass. 184, 187 (1906) (elderly witness); Commonwealth v. Lamontagne, 42 Mass. App. Ct. 213, 217–218 (1997) (child witness).

The use of leading questions on direct examination of an adverse party is authorized by statute. G. L. c. 233, § 22 ("A party who calls the adverse party as a witness shall be allowed to cross-examine him. In case the adverse party is a corporation, an officer or agent thereof, so called as a witness, shall be deemed such an adverse party for the purposes of this section."); Mass. R. Civ. P. 43(b) ("A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party."). When a party calls an adverse witness, that party may inquire by means of leading questions. See Mass. R. Civ. P. 43(b). Cf. G. L. c. 233, § 22. However, such examination is limited by G. L. c. 233, § 23, concerning impeachment of one's own witness. See Walter v. Bonito, 367 Mass. 117, 122 (1975). If a party is called as an adverse witness by opposing counsel, the trial judge may, in his or her discretion, permit leading questions on cross-examination. See Westland Hous. Corp. v. Scott, 312 Mass. 375, 383–384 (1942). See also G. L. c. 119, § 21A (the examination of an investigator "shall be conducted as though it were on cross-examination").

Subsection (d). This subsection is derived from Commonwealth v. Roberts, 433 Mass. 45, 51 (2000), and Commonwealth v. Guidry, 22 Mass. App. Ct. 907, 909 (1986). A party may not present rebuttal evidence

that only "supports a party's affirmative case." Drake v. Goodman, 386 Mass. 88, 92 (1982). In other words, a party may not "present one theory of causation in his case-in-chief and, as a matter of right, present a different theory of causation in rebuttal." Id. at 93. This is especially true when a party is aware of the evidence prior to trial and could have presented it as part of the case-in-chief. Id.

Subsection (e). This subsection is derived from Commonwealth v. Maltais, 387 Mass. 79, 92 (1982) (redirect examination), and Commonwealth v. O'Brien, 419 Mass. 470, 476 (1995) (recross-examination). See Commonwealth v. Andrade, 468 Mass. 543, 549–550 (2014) (holding that on redirect examination of an immunized witness who had been impeached on cross-examination about lying to the police and to the grand jury, it was appropriate over objection to permit the prosecutor to ask the witness whether he "told the truth to the jury today about what [the defendant] told [him] about the murder of [the victim]" and explaining that, viewed in context, the prosecutor was not asking the witness to comment on his own credibility, but instead to rebut the implication of the cross-examination that the witness's testimony was false). Cf. Mass. R. Dom. Rel. P. 43(b).

Subsection (f). This subsection is derived from Kerr v. Palmieri, 325 Mass. 554, 557 (1950) ("As a general proposition, the granting of a motion to permit additional evidence to be introduced after the trial has been closed rests in the discretion of the trial judge."). See also Commonwealth v. Moore, 52 Mass. App. Ct. 120, 126–127 (2001) ("We also add that the decision whether to reopen a case is one that cannot be made in an arbitrary or capricious manner. It would be a wise practice in the future for trial judges to place on the record their reasons for exercising their discretion either for or against reopening the case.").

***Criminal Cases*.** The constitutional rights of the defendant in a criminal case limit the discretion of the court to allow the Commonwealth to reopen. It is only within the court's discretion

> "to permit reopening when mere inadvertence or some other compelling circumstance . . . justifies a reopening and no substantial prejudice will occur. If the court in the exercise of cautious discretion allows the prosecution to reopen its case before the defendant begins its defense, that reopening does not violate either the rules of criminal procedure or the defendant's right not to be put twice in jeopardy."

Commonwealth v. Cote, 15 Mass. App. Ct. 229, 241 (1983), quoting United States v. Hinderman, 625 F.2d 994, 996 (10th Cir. 1980). See Commonwealth v. Costa, 88 Mass. App. Ct. 750, 753–755 (2015) (trial judge properly permitted Commonwealth to reopen its case and present additional evidence regarding breathalyzer accuracy where defendant had deliberately concealed basis for his objection to results, thus depriving prosecution of opportunity to address factual basis for challenge in first instance). Compare Commonwealth v. Hurley, 455 Mass. 53, 68 (2009) (where police officer had gestured at and nodded to the defendant during his testimony, but had not formally identified the defendant on the record, trial judge did not err in permitting the Commonwealth to reopen its case to offer this minimal identification evidence), with Commonwealth v. Zavala, 52 Mass. App. Ct. 770, 779 (2001) (trial judge committed prejudicial error in allowing the Commonwealth to reopen its case to prove an essential element of the offense, previously neglected, where the burden of proving that element was clearly the Commonwealth's and the omission was identified by the defendant's motion). See also Commonwealth v. Hurley, 455 Mass. at 68, for a survey of cases.

Subsection (g)(1). This subsection is derived from Fanciullo v. B.G. & S. Theatre Corp., 297 Mass. 44, 51 (1937); Gurman v. Stowe-Woodward, 302 Mass. 442, 448 (1939); and Goddard v. Goucher, 89 Mass. App. Ct. 41, 45 (2016). See Mass. R. Civ. P. 36(b) (effect of admissions). See also Commonwealth v. Buswell, 468 Mass. 92, 104–105 (2014) (where rationale for stipulation changes, court has discretion to relieve a party of the stipulation); Loring v. Mercier, 318 Mass. 599, 601 (1945) (court "may vacate a stipulation made by the parties if it is deemed improvident or not conducive to justice").

In Mitchell v. Walton Lunch Co., 305 Mass. 76, 80 (1939), the court observed that "[n]othing is more common in practice or more useful in dispatching the business of the courts than for counsel to admit undisputed facts." Brocklesby v. City of Newton, 294 Mass. 41, 43 (1936).

A stipulation may affect the standard of review on appeal. See Commonwealth v. Phoenix, 409 Mass. 408, 420 (1991) (stipulation as to the admissibility of scientific evidence). A stipulation may bind a party in subsequent trials. Household Fuel Corp. v. Hamacher, 331 Mass. 653, 656–657 (1954).

***Binding Admissions*.** A binding admission, sometimes referred to as a judicial admission, "is a proposition of fact in the form of acts or declarations during the course of judicial proceedings which conclusively determine an issue." Wood v. Roy Lapidus, Inc., 10 Mass. App. Ct. 761, 765 (1980). It is binding on the party making it. Quinn v. Mar-Lees Seafood, LLC, 69 Mass. App. Ct. 688, 697 (2007). A judicial admission "relieve[s] the other party of the necessity of presenting evidence on that issue" (quotation omitted). General Elec. Co. v. Board of Assessors of Lynn, 393 Mass. 591, 603 n.8 (1984). A judicial admission does not require an agreement between the parties, but may arise whenever "a party causes the judge to understand that certain facts are admitted or that certain issues are waived or abandoned." Dalton v. Post Publ. Co., 328 Mass. 595, 599 (1952). In a civil case, a party or a party's authorized agent, such as a party's lawyer, is authorized to make statements of fact that may be deemed judicial admissions. Turners Falls Ltd. Partnership v. Board of Assessors of Montague, 54 Mass. App. Ct. 732, 737 (2002). A judicial admission may take the form of statements of fact made in pleadings, G. L. c. 231, § 87; a statement made in an opening, see Beaumont v. Segal, 362 Mass. 30, 32 (1972); or a response to a request for admissions under Mass. R. Civ. P. 36(b). See also Quinn v. Mar-Lees Seafood, LLC, 69 Mass. App. Ct. at 697 (party's testimony as to facts peculiarly within his knowledge is binding). However, the testimony of a party's expert witness is not a judicial admission. Turners Falls Ltd. Partnership v. Board of Assessors of Montague, 54 Mass. App. Ct. at 738.

A judge has discretion to relieve a party from the binding effect of a judicial admission that was the consequence of inadvertence and may permit a party to introduce corrective evidence. Id. at 737. See also Mass. R. Civ. P. 36. When a party delays seeking relief until trial has commenced, Rule 36(b) impliedly adopts a stricter standard of preventing "manifest injustice." Reynolds Aluminum Bldg. Prods. Co. v. Leonard, 395 Mass. 255, 260 n.9 (1985). An admission that is not amended or withdrawn cannot be "ignored by the court even if the party against whom it is directed offers more credible evidence" (citations omitted). Houston v. Houston, 64 Mass. App. Ct. 529, 533 (2005).

***Nonbinding Admissions*.** A nonbinding admission, sometimes referred to as an evidentiary admission, is the "conduct of a party while not on the stand used as evidence against him at trial. The conduct may be in the form of an act, a statement, or a failure to act or make a statement." General Elec. Co. v. Board of Assessors of Lynn, 393 Mass. 591, 603 (1984). Evidentiary admissions, unlike judicial admissions, are not binding on a party, and a party may offer evidence that is inconsistent with an evidentiary admission. Id. "Unlike most prior inconsistent statements, an evidentiary admission is admissible for substantive purposes, not merely on the narrow issue of credibility." Id. Thus, the jury or fact finder can find that a fact is true on the basis on an evidentiary admission. Evidentiary admissions include answers to deposition questions, see Mass. R. Civ. P. 32(a)(2), and answers to interrogatories, see G. L. c. 231, § 89.

Cross-Reference: Section 801(d)(2)(C)–(D), Definitions: Statements That Are Not Hearsay: An Opposing Party's Statement.

Subsection (g)(2). This subsection is derived from Commonwealth v. Ortiz, 466 Mass. 475, 481–487 (2013).

Section 612. Writing or Object Used to Refresh Memory

(a) While Testifying.

(1) General Rule. When a testifying witness's memory is exhausted as to a matter about which he or she once had knowledge, the witness's memory may be refreshed, in the presence of the jury, with any writing or other object that permits the witness to further testify from his or her own memory. The writing or object should not be read from or shown to the jury.

(2) Production and Use.

(A) When a testifying witness uses a writing or object to refresh his or her memory, an adverse party is entitled to the production of the writing or object after it is shown to the witness and before cross-examination, even if it contains information subject to work-product protection.

(B) A party entitled to the production of a writing or object under this section is entitled to examine the writing or so much of it as relates to the case on trial, may cross-examine about it, and may introduce it in evidence to show that it could not or did not aid the witness in any legitimate way.

(b) Before Testifying.

(1) Production. If, before testifying, a witness uses a writing or object to refresh his or her memory for the purpose of testifying, an adverse party has no absolute right to the production and inspection of the writing or object. The trial judge, however, in his or her discretion, may, at the request of the adverse party, order production of the writing or object at the trial, hearing, or deposition in which the witness is testifying if it is practicable and the interests of justice so require.

(2) Admissibility. Where the adverse party at trial calls for a writing or other object from his or her opponent that was used to refresh the witness's memory prior to trial, does so in front of the jury, and receives and examines it, the writing or other object may be offered in evidence by the producing party when necessary to prevent the impression of evasion or concealment, even though it would have been incompetent if it had not been called for and examined.

(3) Suppressed Statement. If, before testifying in a criminal case, a witness uses a suppressed statement to refresh his or her memory for the purpose of testifying, the judge must conduct a voir dire to establish that the witness has a present recollection of the event to which he or she is testifying.

NOTE

Subsection (a)(1). This subsection is derived from Commonwealth v. O'Brien, 419 Mass. 470, 478–479 (1995) (citing with approval Proposed Mass. R. Evid. 612), and Bendett v. Bendett, 315 Mass. 59, 63 (1943). A witness may use a writing or other object to refresh a failing memory. Commonwealth v. O'Brien, 419 Mass. at 478. The witness's testimony, however, must be the product of present recollection. See Commonwealth v. Hoffer, 375 Mass. 369, 376 (1978). This subsection should not be confused with the doctrine of past recollection recorded.

Cross-Reference: Section 803(5), Hearsay Exceptions; Availability of Declarant Immaterial: Past Recollection Recorded.

Subsection (a)(2)(A). This subsection is derived from Commonwealth v. O'Brien, 419 Mass. 470, 478–480 (1995). "[W]hen materials protected by the work product doctrine are used by the examiner to refresh a witness's recollection on the stand, the protection afforded by the work product doctrine is waived and the

opponent's attorney is entitled to inspect the writing." Id. at 478. The Supreme Judicial Court observed in dicta that

> "[t]he few State courts that have addressed the issue of the conflict between the rule and protected documents used while the witness is on the stand have reached conclusions similar to the Federal courts, i.e., that use of protected material to refresh a witness's recollection on the stand constitutes waiver of that protection."

Id. at 479.

Subsection (a)(2)(B). This subsection is taken nearly verbatim from Bendett v. Bendett, 315 Mass. 59, 62–63 (1943) (allowing adverse party to show that writing or object did not or could not have refreshed the memory of the witness).

Subsection (b)(1). This subsection is derived from Leonard v. Taylor, 315 Mass. 580, 583–584 (1944), citing Goldman v. United States, 316 U.S. 129, 132 (1942). This rule has been the subject of considerable criticism. See Commonwealth v. O'Brien, 419 Mass. 470, 479 n.5 (1995) ("Presently, the more controversial issue, and the one on which courts are still somewhat unclear, is whether an adverse party has a right under [Fed. R. Evid.] 612 to inspect protected and privileged documents used by the witness to refresh her recollection *prior* to testifying."); Commonwealth v. Marsh, 354 Mass. 713, 721–722 (1968) ("It is an artificial distinction to allow inspection of notes used on the stand to refresh recollection and to decline it where the witness inspects his notes just before being called to the stand.").

Subsection (b)(2). This subsection is derived from Leonard v. Taylor, 315 Mass. 580, 581–584 (1944). The purpose of this rule is to protect the opposing party from the impression of evasion and concealment from a "bold and dramatic demand" by the adverse party—not to make otherwise inadmissible evidence admissible—and should therefore be used sparingly. See id. at 582–583.

Cross-Reference: Section 106(b), Doctrine of Completeness: Curative Admissibility.

Subsection (b)(3). This subsection is derived from Commonwealth v. Woodbine, 461 Mass. 720, 731 (2012), where the court stated as follows:

> "We do not decide today that it is impermissible for a witness to testify concerning an event after his memory has been refreshed by his review, before taking the stand, of material that is suppressed due to violations of a defendant's rights under the Fifth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights. However, before such a witness is permitted to testify, the judge must ensure that the Commonwealth has met its burden of establishing that the witness will testify not from a memory of the suppressed statement, which by definition is not to be placed in evidence, but from an independent memory of the separate event. This requires that the judge conduct a voir dire through which the basis for the witness's assertion that he or she has a present recollection of the separate event may be thoroughly examined."

Section 613. Prior Statements of Witnesses, Limited Admissibility

(a) Prior Inconsistent Statements.

(1) Examining Own Witness. A party who produces a witness may prove that the witness made prior statements inconsistent with his or her present testimony; but before proof of such inconsistent statements is given, the party must lay a foundation by asking the witness if the prior statements were in fact made and by giving the witness an opportunity to explain.

(2) Examining Other Witness. Extrinsic evidence of a prior inconsistent statement by a witness, other than a witness covered under Subsection (a)(1), is admissible whether or not the witness was afforded an opportunity to explain or deny the inconsistency.

(3) Disclosure of Extrinsic Evidence. In examining a witness, other than a witness covered under Subsection (a)(1), concerning a prior statement made by such witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(4) Collateral Matter. Extrinsic evidence to impeach a witness on a collateral matter is not admissible as of right, but only in the exercise of sound discretion by the trial judge.

(b) Prior Consistent Statements.

(1) Generally Inadmissible. A prior consistent statement by a witness is generally inadmissible.

(2) Exception. If the court makes a preliminary finding that there is a claim that the witness's in-court testimony is the result of recent contrivance or a bias, and the prior consistent statement was made before the witness had a motive to fabricate or the occurrence of the event indicating a bias, the evidence may be admitted for the limited purpose of rebutting the claim of recent contrivance or bias.

NOTE

Subsection (a)(1). This subsection is derived from G. L. c. 233, § 23, and Commonwealth v. Scott, 408 Mass. 811, 824 n.14 (1990). See Sherman v. Metropolitan Transit Auth., 345 Mass. 777, 778 (1963); Commonwealth v. Anselmo, 33 Mass. App. Ct. 602, 609 (1992). If the witness denies making the prior statement, he or she need not be given the opportunity to explain it. Commonwealth v. Scott, 408 Mass. at 824 n.14. See Commonwealth v. Festa, 369 Mass. 419, 425–426 (1976).

Cross-Reference: Section 607, Who May Impeach a Witness.

Subsections (a)(2) and (3). These subsections are derived from Hubley v. Lilley, 28 Mass. App. Ct. 468, 472, 473 n.7 (1990). See also Commonwealth v. Parent, 465 Mass. 395, 398–402 (2013). Opposing counsel has a right to examine the statement before conducting any further inquiry of the witness to prevent selective quotation of the prior statement by the questioner and to insure that the witness has an opportunity to explain or elaborate on the alleged inconsistencies. Hubley v. Lilley, 28 Mass. App. Ct. at 472, 473 n.7. This right arises after the examination of the witness under Subsection (a)(1) or (a)(2) and does not permit counsel to make a demand for a document before the jury during opposing counsel's cross-examination. See Section 103(d), Rulings on Evidence, Objections, and Offers of Proof: Preventing the Jury or Witnesses from Hearing Inadmissible Evidence. Such conduct may warrant the court admitting extrinsic evidence of the prior inconsistent statement. See Section 612(b)(2), Writing or Object Used to Refresh Memory: Before Testifying: Admissibility.

A prior inconsistent statement offered to impeach one's own witness, Subsection (a)(1), or an opposing party's witness, Subsection (a)(2), is not admissible for its truth unless (1) there is no objection or (2) it falls within the exception set forth in Section 801(d)(1)(A), Definitions: Statements That Are Not Hearsay: A Declarant-Witness's Prior Statement, or another hearsay exception. See Commonwealth v. Jones, 439 Mass. 249, 261–262 (2003); Commonwealth v. Keevan, 400 Mass. 557, 562 (1987); Commonwealth v. Balukonis, 357 Mass. 721, 726 n.6 (1970).

Use of Certain Prior Inconsistent Statements of Defendant in Criminal Case. Trial judges must proceed with caution when the Commonwealth seeks to impeach the defendant with his or her pretrial silence. See Doyle v. Ohio, 426 U.S. 610, 611, 617, 618 (1976) (use of defendant's postarrest silence violates Federal due process); Commonwealth v. Connolly, 454 Mass. 808, 828 (2009) (same). In Massachusetts, even use of the defendant's prearrest silence may violate Article 12 of the Declaration of Rights. See Harris v. New York, 401 U.S. 222, 226 (1971); Commonwealth v. Ly, 454 Mass. 223, 228 (2009); Commonwealth v. Harris, 364 Mass. 236, 240–241 (1973); Commonwealth v. Sazama, 339 Mass. 154, 157–158 (1959). See also Section 511(a)(2), Privilege Against Self-Incrimination: Privilege of Defendant in Criminal Proceeding: Refusal Evidence. Although a statement obtained in violation of a person's rights under the Fourth and Fourteenth Amendments to the Constitution of the United States may be used for impeachment purposes, see United States v. Havens, 446 U.S. 620, 627–628 (1980), Article 14 of the Declaration of Rights forbids the use of evidence in the case of electronic eavesdropping in or about a private home. Compare Commonwealth v. Fini, 403 Mass. 567, 573–574 (1988) (excluding statements), with Commonwealth v. Eason, 427 Mass. 595, 600–601 (1998) (admitting statements).

Cross-Reference: Section 525(b), Comment upon or Inference from Claim of Privilege: Criminal Case; Section 104(d), Preliminary Questions: Cross-Examining a Defendant in a Criminal Case.

Prior Statements That Qualify as Inconsistent. "It is not necessary that the prior statement contradict in plain terms the testimony of the witness." Commonwealth v. Simmonds, 386 Mass. 234, 242 (1982). "It is enough if the proffered testimony, taken as a whole, either by what it says or by what it omits to say, affords some indication that the fact was different from the testimony of the witness whom it is sought to contradict." Commonwealth v. Hesketh, 386 Mass. 153, 161 (1982). An omission in a prior statement may render that statement inconsistent "when it would have been natural to include the fact in the initial statement." Commonwealth v. Ortiz, 39 Mass. App. Ct. 70, 72 (1995). See also Langan v. Pignowski, 307 Mass. 149 (1940). It follows that a witness who denies making an earlier statement may be impeached with it, while a witness who is unable to remember the earlier statement, but does not deny making it, may have his or her recollection refreshed. See Section 612(a)(1), Writing or Object Used to Refresh Memory: While Testifying: General Rule. However, "a witness who has actually made a statement contradictory to trial testimony cannot escape impeachment simply by saying she does not remember making the statement." Commonwealth v. Parent, 465 Mass. 395, 401 (2013). Ordinarily, "[t]here is no inconsistency between a present failure of memory on the witness stand and a past existence of memory" (citation and quotation omitted). Commonwealth v. Martin, 417 Mass. 187, 197 (1994). However, if the trial judge makes a preliminary determination (see Section 104[a], Preliminary Questions: In General) that the witness's present failure of memory is fabricated, the witness's prior detailed statement is admissible for impeachment purposes. See Commonwealth v. Sineiro, 432 Mass. 735, 742–743 & n.7 (2000). Cf. Note "Feigning Lack of Memory" to Section 801(d)(1)(A), Definitions: Statements That Are Not Hearsay: A Declarant-Witness's Prior Statement (feigning lack of memory may result in the admission of a prior statement, not simply for impeachment purposes, but also for its truth). A witness who gives a detailed account of an incident at trial but who indicated at some earlier point in time only limited or no memory of the details of the incident may be impeached with that earlier failure of memory. Commonwealth v. Granito, 326 Mass. 494, 500 (1950).

If a witness previously remained "silent in circumstances in which he naturally would have been expected to deny some asserted fact . . . the jury may consider the failure to respond in assessing the veracity of the witness in testifying contrary to the fact that was adoptively admitted by his silence." Commonwealth v. Nickerson, 386 Mass. 54, 57 (1982). In circumstances where it "would not be natural for a witness to provide the police before trial with exculpatory information," this omission is admissible to impeach the witness at trial only after first establishing "[1] that the witness knew of the pending charges in sufficient detail to realize that he possessed exculpatory information, [2] that the witness had reason to make the information available, [and] [3] that he was familiar with the means of reporting it to the proper authorities . . . ." Commonwealth v. Hart, 455 Mass. 230, 238–239 (2009). See id. at 239–240 (abolishing requirement that prosecutor needs to "elicit from the witness that she was not asked by the defendant or the defense attorney to refrain from disclosing her exculpatory information to law enforcement authorities"). The Supreme Judicial Court has observed that

> "[t]here are some circumstances, though, in which it would not be natural for a witness to provide the police before trial with exculpatory information, such as when the witness does not realize she possesses exculpatory information, when she thinks that her information will not affect the decision to prosecute, or when she does not know how to furnish such information to law enforcement."

Id. at 238. The principles applicable to impeachment of a witness by failure to provide exculpatory information apply to tangible evidence as well as oral testimony. Commonwealth v. Issa, 466 Mass. 1, 15–16 (2013).

An omission from an earlier statement may qualify as a prior inconsistent statement. Commonwealth v. Perez, 460 Mass. 683, 699 (2011) (absence of journal entry regarding visit from defendant on night of murder qualified as prior inconsistent statement to trial testimony that defendant visited witness in person on night of murder), and cases cited.

Although there is discretion involved in determining whether to admit or exclude evidence offered for impeachment, when the impeaching evidence is directly related to testimony on a central issue in the case, there is no discretion to exclude it. See Commonwealth v. McGowan, 400 Mass. 385, 390–391 (1987). See also Section 611(d), Mode and Order of Examining Witnesses and Presenting Evidence: Rebuttal Evidence.

Subsection (a)(4). This subsection is derived from Commonwealth v. Farley, 443 Mass. 740, 751 (2005), quoting Commonwealth v. Chase, 372 Mass. 736, 747 (1977), citing Commonwealth v. Doherty, 353 Mass. 197, 213–214 (1967), cert. denied, 390 U.S. 982 (1968). See also Commonwealth v. Zezima, 365 Mass. 238, 242 n.5 (1974), rev'd on other grounds, 387 Mass. 748 (1982); Leone v. Doran, 363 Mass. 1, 15–16 (1973), modified on other grounds, 363 Mass. 886 (1973); Commonwealth v. Connolly, 308 Mass. 481, 495 (1941). This principle is based on the practical need to keep a case from getting out of control. See Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 120 (2000). The better practice is to exclude such evidence in a criminal case when it bears on a defendant's character. Commonwealth v. Ferguson, 425 Mass. 349, 355–356 n.6 (1997).

When the extrinsic evidence relates exclusively to a collateral matter, the discretion of the trial judge has been described as "nearly unreversible." Commonwealth v. Roberts, 433 Mass. 45, 51 (2000), quoting Commonwealth v. Johnson, 41 Mass. App. Ct. 81, 89 (1996).

"Because bias, prejudice, and motive to lie are not considered collateral matters, they may be demonstrated by extrinsic proof as well as on cross-examination. There is no requirement that the opponent cross-examine on the matter as a foundation prior to offering extrinsic evidence." (Citations omitted.) Commonwealth v. Hall, 50 Mass. App. Ct. 208, 213 n.7 (2000), quoting P.J. Liacos, Massachusetts Evidence § 6.9, at 299–300 (7th ed. 1999).

Subsection (b). This subsection is derived from Commonwealth v. Novo, 449 Mass. 84, 93 (2007), and Commonwealth v. Kindell, 44 Mass. App. Ct. 200, 202 (1998). "The reason for the rule is that the testimony of a witness in court should not need—and ought not—to be 'pumped up' by evidence that the witness said the same thing on some prior occasion." Commonwealth v. Kindell, 44 Mass. App. Ct. at 202–203. "The trial judge has a range of discretion in determining whether a suggestion of recent contrivance exists in the circumstances." Commonwealth v. Zukoski, 370 Mass. 23, 27 (1976). The judge should make preliminary findings on the record that a party has claimed that a witness's in-court testimony is the result of recent contrivance or bias, and that the prior consistent statement was made before the witness had a motive to fabricate or before the occurrence of an event indicating bias. See Commonwealth v. Caruso, 476 Mass. 275, 284 & n.5 (2017). However, "the impeachment of a witness by prior inconsistent statements or omissions does not, standing alone, entitle the adverse party to introduce other prior statements made by the witness that are consistent with his trial testimony." Commonwealth v. Bruce, 61 Mass. App. Ct. 474, 482 (2004), citing Commonwealth v. Retkovitz, 222 Mass. 245, 249–250 (1915). See also Commonwealth v. Hatzigiannis, 88 Mass. App. Ct. 395, 399–400 (2015) (rehabilitation by prior consistent statement improper where theory of impeachment was mistaken perception or there was no suggestion of recent fabrication).

Such statements "should be allowed only with caution, and where the probative value for the proper purpose is clear." Commonwealth v. Lareau, 37 Mass. App. Ct. 679, 683 (1994), quoting Commonwealth v. Darden, 5 Mass. App. Ct. 522, 528 (1977).

Although the admission of cumulative accounts of prior consistent statements may create a danger of improper bolstering, multiple prior consistent statements are admissible if each statement is relevant to rebut various claims of recent contrivance. Commonwealth v. Lessieur, 472 Mass. 317, 325–326 (2015). The judge may admit a prior consistent statement on direct examination, prior to any impeachment, if it is obvious that a claim of recent contrivance will be made (e.g., when a party makes a statement in his or her opening statement that he or she will attack the credibility of the witness on cross-examination on the basis of recent contrivance). See Commonwealth v. Barbosa, 457 Mass. 773, 797–798 (2010) (opponent's opening statement suggested recent contrivance).

A prior consistent statement that does not meet the requirements of this subsection nonetheless may be admissible on other grounds. See Commonwealth v. Tennison, 440 Mass. 553, 562–564 (2003) (verbal completeness). The prior consistent statement may be admissible not only if made before the motive to fabricate arose, but also if made at a time when the motive to fabricate no longer exists. Commonwealth v. Aviles, 461 Mass. 60, 69–70 (2011) (prior consistent statement made after victim moved back to grandmother's house admissible to rebut inference that victim had fabricated accusation of abuse to provide basis for moving out of defendant's home and back to grandmother's).

Cross-Reference: Section 413, First Complaint of Sexual Assault; Section 611(a), Mode and Order of Examining Witnesses and Presenting Evidence: Control by the Court; Note to Section 801(d)(1)(B), Definitions: Statements That Are Not Hearsay: A Declarant-Witness's Prior Statement; Section 801(d)(1)(C), Definitions: Statements That Are Not Hearsay: A Declarant-Witness's Prior Statement; Section 1104, Witness Cooperation Agreements.

Section 614. Calling and Examination of Witnesses by Court or Jurors

(a) Calling. When necessary in the interest of justice, the court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.

(b) Examining by Court. The court may examine a witness to clarify an issue, to prevent perjury, or to develop trustworthy testimony, provided that the judge remains impartial.

(c) Objections. A party may object to the court's calling or examining a witness, but the objection should be made outside the presence of the jury.

(d) Examining by Jurors. The court, in its discretion, may allow questions posed by the jury, subject to the following procedures:

(1) The judge should instruct the jury that they will be given the opportunity to pose questions to witnesses.

(2) Jurors' questions need not be limited to important matters, but may also seek clarification of a witness's testimony.

(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 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) The judge should tell the jurors that they should not give the answers to their own questions or questions by other jurors a disproportionate weight.

(6) These instructions should be given before the testimony begins and repeated during the final charge to the jury before they begin deliberations.

(7) All questions should be submitted in writing to the judge, with the juror's identification number included on each question.

(8) 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.

(9) Counsel should be given an opportunity to reexamine a witness after juror interrogation with respect to the subject matter of the juror questions.

NOTE

Subsection (a). This subsection is derived from Quincy Trust Co. v. Taylor, 317 Mass. 195, 198 (1944). See also Henry T. Lummus, The Trial Judge 19–21 (Chicago, The Foundation Press 1937).

Subsection (b). This subsection is derived from Commonwealth v. Lucien, 440 Mass. 658, 664 (2004), and Commonwealth v. Fitzgerald, 380 Mass. 840, 846–847 (1980). See Commonwealth v. Festa, 369 Mass. 419, 422 (1976) ("There is no doubt that a judge can properly question a witness, albeit some of the answers may tend to reinforce the Commonwealth's case, so long as the examination is not partisan in nature, biased, or a display of belief in the defendant's guilt."); Commonwealth v. Fiore, 364 Mass. 819, 826–827 (1974) ("The judge has a right, and it is perhaps sometimes a duty, to intervene on occasion in the examination of a witness. . . . Here a discrepancy appeared between the proffered testimony and earlier testimony of the same witnesses. A likely possibility existed that each witness would perjure himself or admit to perjury in his prior statement. As this became evident to the judge, he indulged in no transgression when for the benefit of the witness and to aid in developing the most trustworthy evidence he took a hand in indicating to the witness the extent of the inconsistencies. In this case the questioning by the judge was not clearly biased or coercive." [Citations omitted.]). Accord Adoption of Seth, 29 Mass. App. Ct. 343, 351 (1990). See also Commonwealth v. Hanscomb, 367 Mass. 726, 732 (1975) (Hennessey, J., concurring) ("The judge need not be mute; he is more than a referee. Justice may require that he ask questions at times. However, the primary principle in jury trials is that he must use this power with restraint."). Compare Commonwealth v. Watkins, 63 Mass. App. Ct. 69, 74 (2005) (trial judge's questions were appropriate because they helped to clarify the testimony), with Commonwealth v. Hassey, 40 Mass. App. Ct. 806, 810–811 (1996) (judge's cross-examination of defense witnesses "too partisan" and lacked appropriate foundation).

Subsection (c). This subsection is derived from Commonwealth v. Fitzgerald, 380 Mass. 840, 846 (1980). Despite "the natural reluctance of trial counsel to object to questions or comments coming from a judge, sometimes trial counsel's duty to protect his client's rights requires him to object, preferably at the bench out of the jury's hearing." Id. Where a party fails to object at trial to questions by the judge, any error by the trial judge is reviewed for a substantial risk of a miscarriage of justice. Commonwealth v. Gomes, 54 Mass. App. Ct. 1, 5 (2002).

Subsection (d). This subsection is taken nearly verbatim from Commonwealth v. Britto, 433 Mass. 596, 613–614 (2001). See also Commonwealth v. Urena, 417 Mass. 692, 701–703 (1994). In addition to the procedures outlined in Subsection (d), the judge should instruct the jury "not to let themselves become aligned with any party, and that their questions should not be directed at helping or responding to any party"; the judge should also instruct the 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." Commonwealth v. Britto, 433 Mass. at 613–614. Upon counsels' review of the submitted questions, "[t]he judge should rule on any objections at [that] 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." Id. at 614. Finally, the scope of the reexamination of the witness after juror interrogation "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." (Citation omitted.) Id. at 614.

Section 615. Sequestration of Witnesses

At a party's request, the court may order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But the court may not exclude any parties in a civil proceeding, nor the defendant in a criminal proceeding.

NOTE

This section is derived from Zambarano v. Massachusetts Turnpike Auth., 350 Mass. 485, 487 (1966), and Mass. R. Crim. P. 21 ("Upon his own motion or the motion of either party, the judge may, prior to or during the examination of a witness, order any witness or witnesses other than the defendant to be excluded from the courtroom."). See Commonwealth v. Therrien, 359 Mass. 500, 508 (1971) (court may except from general sequestration order a witness deemed "essential to the management of the case").

"Sequestration of witnesses lies in the discretion of the trial judge." Zambarano v. Massachusetts Turnpike Auth., 350 Mass. at 487. See Commonwealth v. Herndon, 475 Mass. 324, 336 (2016) (trial judge properly found that defendant's sister's Facebook posts were sufficiently relevant to justify naming her as potential witness subject to sequestration order, and that adding her to witness list was not pretext to exclude her from courtroom); Commonwealth v. Perez, 405 Mass. 339, 343 (1989) (court has discretion to exempt police officer in charge of investigation from sequestration order). Upon a violation of a sequestration order, a trial judge has discretion in taking remedial action. See, e.g., Commonwealth v. Neves, 474 Mass. 355, 367–368 (2016) (no abuse of discretion in denying motion to strike testimony of witness who had violated sequestration order where defense counsel stated he was "satisfied" with judge's "instructional remedy" to jury); Custody of a Minor (No. 2), 392 Mass. 719, 726 (1984) (trial judge may exclude testimony of person who violates sequestration order); Commonwealth v. Navarro, 2 Mass. App. Ct. 214, 223 (1974) ("but even in a case where a violation of sequestration order is wilful a trial judge might for good reason prefer to invoke contempt proceedings rather than declare a mistrial").

The second sentence of this section is derived from the Sixth and Fourteenth Amendments to the United States Constitution, and Article 12 of the Declaration of Rights of the Massachusetts Constitution. See also Commonwealth v. Nwachukwu, 65 Mass. App. Ct. 112, 117–120 (2005). Civil litigants also have a right to be present during the trial. See White v. White, 40 Mass. App. Ct. 132, 141–142 (1996).

ARTICLE VII. OPINION AND EXPERT EVIDENCE

Section 701. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is

(a) rationally based on the witness's perception;

(b) helpful to a clear understanding of the witness's testimony or in determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Section 702.

NOTE

This section, which is taken nearly verbatim from Fed. R. Evid. 701, reflects Massachusetts practice. See Noyes v. Noyes, 224 Mass. 125, 129 (1916); Commonwealth v. Sturtivant, 117 Mass. 122, 133, 137 (1875); Commonwealth v. Brusgulis, 41 Mass. App. Ct. 386, 390–391 (1996). "While an expert opinion is admissible only where it will help jurors interpret evidence that lies outside of common experience, a lay opinion is admissible only where it lies within the realm of common experience" (quotation omitted). Commonwealth v. Canty, 466 Mass. 535, 541–542 (2013). "The rule that witnesses in describing conduct should tell what they saw and heard does not foreclose the use of words of summary description." Kane v. Fields Corner Grille, Inc., 341 Mass. 640, 647 (1961) (judge had the discretion to permit witnesses to use the words "boisterous" and "in an arrogant manner" in describing the actions of a person they observed). Accord Commonwealth v. Bonomi, 335 Mass. 327, 339 (1957) (condition of nervousness or happiness); Commonwealth v. Fuller, 66 Mass. App. Ct. 84, 91 (2006). See also Commonwealth v. Bonds, 445 Mass. 821, 830 (2006); McGrath v. Fash, 244 Mass. 327, 329 (1923) (witness permitted to testify that "all of a sudden this truck came around the corner on two wheels, and zigzagging across the street and appeared to be out of the control of the driver"); Commonwealth v. Rodziewicz, 213 Mass. 68, 69 (1912) (it was error to permit a police investigator to identify points of origin of a fire based simply on observations about condition of the burned structure).

Ultimately, the admission of summary descriptions of observed facts is left to the discretion of the trial judge. Kane v. Fields Corner Grille, Inc., 341 Mass. at 647 ("Trials are not to be delayed and witnesses made inarticulate by too nice objections or rulings as to the use of such descriptive words."). See Commonwealth v. Barbosa, 477 Mass. 658, 673–674 (2017) (witness may testify about time discrepancy between video surveillance footage and GPS data to explain "investigative significance" of evidence). A witness may not express an opinion about the credibility of another witness. See Commonwealth v. Triplett, 398 Mass. 561, 567 (1986).

Illustrations. When, due to the complexity of expressing the observation, such evidence might otherwise not be available, witnesses are permitted, out of necessity, to use "shorthand expressions" to describe observed facts such as the identity, size, distance, and speed of objects; the length of the passage of time; and the age, identity, and conduct of persons. See Commonwealth v. Tracy, 349 Mass. 87, 95–96 (1965); Noyes v. Noyes, 224 Mass. 125, 129–130 (1916); Ross v. John Hancock Mut. Life Ins. Co., 222 Mass. 560, 562 (1916).

***Cellular Phone Positioning*.** A lay witness is not permitted to testify to the intra-cell site position of a phone user because the testimony requires specialized knowledge that relates to the scientific and technological features of cell sites. Commonwealth v. Gonzalez, 475 Mass. 396, 412 n.37 (2016).

***Identity*.** In some circumstances, lay witnesses are permitted to identify a person in a photograph or on videotape. Compare Commonwealth v. Vitello, 376 Mass. 426, 459–460 & n.29 (1978) (allowing police officer to testify that a photograph selected by a witness depicted the defendant because his appearance had changed since the date of the offense), and Commonwealth v. Pleas, 49 Mass. App. Ct. 321, 323–329 (2000) (allowing police officer to testify that man depicted in a surveillance videotape who was holding the victim was the defendant "because [1] the image in the videotape and the prints made from it were of poor quality . . . ; [2] [the officer] had long familiarity with the defendant that enabled him to identify an indistinct picture of the defendant; [3] there was some change in the appearance of the defendant at trial and as he generally presented in everyday life outdoors; and [4] the acquaintanceship of [the officer] with the de-

fendant, as it was presented to the jury, was social rather than tied to [the officer's] duties as a police officer"), with Commonwealth v. Austin, 421 Mass. 357, 365–366 (1995) (excluding testimony of police officer identifying person in a surveillance videotape as the defendant because the jury was equally capable of making the determination), and Commonwealth v. Nassar, 351 Mass. 37, 41–42 (1966) (because a sketch and a photograph of the defendant were in evidence, the jury did not require any assistance from a witness who was asked whether they were a likeness of the defendant). See also Commonwealth v. Connolly, 91 Mass. App. Ct. 580, 591–593 (2017) (police officer's testimony that person in surveillance video that was inadvertently erased was the defendant was not helpful to jury without foundation providing "enough information to allow the jury to conduct an independent assessment of the accuracy and reliability of his identifications"; rejecting categorical approach to exclusion of such evidence).

***Intent*.** This section does not permit a witness to express an opinion about what someone was intending or planning to do based on an observation of the person. See Commonwealth v. Jones, 319 Mass. 228, 230 (1946).

***Mental Capacity*.** A lay opinion as to sanity or mental capacity is permitted only by an attesting witness to a will and only as to the testator's mental condition at the time of its execution. See Holbrook v. Seagrave, 228 Mass. 26, 29 (1917); Commonwealth v. Spencer, 212 Mass. 438, 447 (1912). "Although a lay witness may not testify about whether another person suffered from mental illness, such a witness is permitted to 'testify to facts observed.'" Commonwealth v. Sliech-Brodeur, 457 Mass. 300, 330 n.43 (2010), quoting Commonwealth v. Monico, 396 Mass. 793, 803 (1986).

***Sobriety*.**

- ***Alcohol*.** A police officer or lay witness may provide an opinion, in summary form, about another person's sobriety, provided there exists a basis for that opinion. Commonwealth v. Orben, 53 Mass. App. Ct. 700, 704 (2002). Where a defendant is charged with operating a vehicle while under the influence of alcohol, a police officer who observed the defendant may offer an opinion as to the defendant's level of intoxication but may not offer an opinion as to whether the defendant's intoxication impaired his ability to operate a motor vehicle, because the latter comes too close to an opinion on the defendant's guilt. Commonwealth v. Canty, 466 Mass. 535, 545 (2013). As a lay witness, a police officer may testify to the administration and results of field sobriety tests that measure a person's balance, coordination, and acuity of mind in understanding and performing simple instructions, as a juror understands from common experience and knowledge that "intoxication leads to diminished balance, coordination, and mental acuity." Commonwealth v. Sands, 424 Mass. 184, 187 (1997) (contrasting the Horizontal Gaze Nystagmus Test, which requires expert testimony, from "ordinary" field sobriety tests such as a nine-step walk and turn and recitation of the alphabet); Id. at 186 ("Expert testimony on the scientific theory is needed if the subject of expert testimony is beyond the common knowledge or understanding of the lay juror.").
- ***Marijuana*.** Where a defendant is charged with operating a motor vehicle under the influence of marijuana, a police officer may testify as a lay witness as to his or her observations of the defendant's performance of the one-leg stand test and the nine-step walk-and-turn test. Commonwealth v. Gerhardt, 477 Mass. 775, 783 (2017). These observations are admissible to the extent that they are probative of "a defendant's balance, coordination, ability to retain and follow directions, and ability to perform tasks requiring divided attention," as well as "the presence or absence of other skills necessary for the safe operation of a motor vehicle." Id. However, a police officer may not testify that a defendant charged with operating under the influence of marijuana "passed" or "failed" a field sobriety test. Id. at 784. Lay witnesses and police officers also may not present testimony indicating that, in their opinion, a defendant was under the influence of marijuana. Id. A testifying witness "should" refer to field sobriety tests as "roadside assessments." Id. at 785.

***Sounds*.** In Commonwealth v. Sturtivant, 117 Mass. 122, 133 (1875), the Supreme Judicial Court stated that a witness "may state his opinion in regard to sounds, their character, from what they proceed, and the direction from which they seem to come."

Struggle. An experienced police officer, or possibly even a lay witness, could opine on whether a scene was suggestive of a struggle. Commonwealth v. Burgess, 450 Mass. 422, 436 n.8 (2008).

Value. Depending on the circumstances, opinion testimony about the value of real or personal property may be given by lay witnesses or expert witnesses. With regard to lay witnesses,

> "[t]he rule which permits the owner of real or personal property to testify as to its value does not rest upon the fact that he holds the legal title. The mere holding of the title to property by one who knows nothing about it and perhaps has never even seen it does not rationally and logically give him any qualification to express an opinion as to its value. Ordinarily an owner of property is actually familiar with its characteristics, has some acquaintance with its uses actual and potential and has had experience in dealing with it. It is this familiarity, knowledge and experience, not the holding of the title, which qualify him to testify as to its value."

Menici v. Orton Crane & Shovel Co., 285 Mass. 499, 503 (1934). Accord von Henneberg v. Generazio, 403 Mass. 519, 524 (1988) (same rule applied to landowner's opinion as to damages to his property caused by filling of drainage ditch by abutter); Turner v. Leonard, Inc., 17 Mass. App. Ct. 909, 910–911 (1983) (owner was not so familiar with his automobile to permit him to offer an opinion as to its value). A lay witness also may testify to the value of his or her own services. Berish v. Bornstein, 437 Mass. 252, 273 (2002).

Section 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

NOTE

Introduction. This section, which is based upon Fed. R. Evid. 702 and Proposed Mass. R. Evid. 702, reflects Massachusetts law. There are two methods by which the judge may satisfy his or her duty as the gatekeeper to ensure that expert witness testimony is reliable: (1) the "Frye" test, i.e., general acceptance in the relevant scientific community, or (2) a Daubert-Lanigan analysis. Commonwealth v. Powell, 450 Mass. 229, 238 (2007). See Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 585–595 (1993), and Commonwealth v. Lanigan, 419 Mass. 15, 24–26 (1994).

It is important to distinguish between the words used to express the principle of Massachusetts law set forth in this section and the application of the principle in specific cases. As the following notes indicate, the framework used under the Federal rules and in Massachusetts is the same, and each approach is specifically described as flexible. The principal difference is that in Massachusetts, the trial judge satisfies his or her gatekeeper responsibilities under Subsections (b) and (c) once the proponent of the evidence establishes that it is generally accepted by the relevant scientific community. See Commonwealth v. Patterson, 445 Mass. 626, 640–641 (2005); Commonwealth v. Sands, 424 Mass. 184, 185–186 (1997). Compare Commonwealth v. Lanigan, 419 Mass. at 26 ("We accept the basic reasoning of the Daubert opinion because it is consistent with our test of demonstrated reliability. We suspect that general acceptance in the

relevant scientific community will continue to be the significant, and often the only, issue."), and Canavan's Case, 432 Mass. 304, 314 n.5 (2000) ("Application of the Lanigan test requires flexibility. Differing types of methodology may require judges to apply differing evaluative criteria to determine whether scientific methodology is reliable. In the Lanigan case, we established various guideposts for determining admissibility including general acceptance, peer review, and testing."), with Daubert v. Merrell Dow Pharms., Inc., 509 U.S. at 594–595 ("The inquiry envisioned by [Fed. R. Evid.] 702 is, we emphasize, a flexible one. Its overarching subject is the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission."), and Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999) ("[T]he test of reliability is 'flexible,' and Daubert's list of specific factors neither necessarily nor exclusively applies to all experts or in every case."). See also Kumho Tire Co. v. Carmichael, 526 U.S. at 150 ("Daubert makes clear that the factors it mentions do *not* constitute a 'definitive checklist or test.' [Daubert v. Merrell Dow Pharms., Inc., 509 U.S.] at 593. And Daubert adds that the gatekeeping inquiry must be 'tied to the facts' of a particular 'case.' Id. at 591." [Quotation and citation omitted.]); Daubert v. Merrell Dow Pharms., Inc., 509 U.S. at 594 ("Widespread acceptance can be an important factor in ruling particular evidence admissible, and a known technique which has been able to attract only minimal support within the community[] may properly be viewed with skepticism" [quotation and citation omitted].).

Hearing. An evidentiary hearing is not always necessary to comply with Commonwealth v. Lanigan, 419 Mass. 15 (1994). See Palandjian v. Foster, 446 Mass. 100, 111 (2006); Vassallo v. Baxter Healthcare Corp., 428 Mass. 1, 1–13 (1998) (trial judge properly relied on affidavits and transcripts of testimony from other cases). However, as the Supreme Judicial Court noted, "we have not 'grandfathered' any particular theories or methods for all time, especially in areas where knowledge is evolving and new understandings may be expected as more studies and tests are conducted." Commonwealth v. Shanley, 455 Mass. 752, 763 n.15 (2010) (court acknowledged it was prudent for trial judge to conduct an evidentiary hearing in connection with expert testimony about dissociative amnesia because of "the evolving nature of scientific and clinical studies of the brain and memory"); Commonwealth v. Camblin, 471 Mass. 639, 648 (2015) (fact that the Legislature may prescribe rules of evidence and methods of proof employed in trials "does not mean that the reliability of every type of evidence the Legislature may deem admissible, particularly in a criminal case, is automatically insulated from challenge and review on reliability grounds"). To preserve an objection to expert testimony on grounds it is not reliable, a defendant must file a pretrial motion and request a hearing on the subject. See Commonwealth v. Sparks, 433 Mass. 654, 659 (2001). See also Commonwealth v. Cole, 473 Mass. 317, 328 (2015) (defendant who wished to challenge the scientific reliability of program used to calculate probability of DNA match should have filed a pretrial motion stating grounds and requesting Daubert-Lanigan hearing). A trial judge's decision on whether expert witness evidence meets the Lanigan standard of reliability is reviewed on appeal under an abuse of discretion standard. See General Elec. Co. v. Joiner, 522 U.S. 136, 141–143 (1997); Canavan's Case, 432 Mass. 304, 311–312 (2000).

Five Foundation Requirements. The proponent of expert witness testimony has the burden of establishing the five foundation requirements for the admission of such testimony under this section. See Commonwealth v. Barbosa, 457 Mass. 773, 783 (2010) (explaining the five foundation requirements). First, the proponent must establish that the expert witness testimony will assist the trier of fact. See Commonwealth v. Francis, 390 Mass. 89, 98 (1983); Commonwealth v. Rodziewicz, 213 Mass. 68, 69–70 (1912). Second, the proponent must demonstrate that the witness is qualified as an expert in the relevant area of inquiry. See Commonwealth v. Frangipane, 433 Mass. 527, 535–536 (2001); Commonwealth v. Boyd, 367 Mass. 169, 182 (1975). Third, the proponent must demonstrate that the facts or data in the record are sufficient to enable the witness to give an opinion that is not merely speculation. See Lightlab Imaging, Inc. v. Axsun Techs., Inc., 469 Mass. 181, 191 (2014). Fourth, the expert opinion must be based on a body of knowledge, a principle, or a method that is reliable. Commonwealth v. Lanigan, 419 Mass. 15, 26 (1994). Fifth, the proponent must demonstrate that the expert has applied the body of knowledge, the principle, or the method in a reliable manner to the particular facts of the case. See Commonwealth v. Patterson, 445 Mass. 626, 645–648 (2005); Commonwealth v. McNickles, 434 Mass. 839, 850 (2001).

Each of these five foundation requirements is a preliminary question of fact for the trial judge to determine under Section 104(a), Preliminary Questions: In General. The trial judge has "broad discretion" in

making these determinations. Commonwealth v. Robinson, 449 Mass. 1, 5 (2007). In making these preliminary determinations, the trial judge may be required to resolve disputes as to the credibility of witnesses. Commonwealth v. Patterson, 445 Mass. at 647–648. Expert witness testimony should not be deemed unreliable simply because there is a disagreement of opinion or in terms of the level of confidence among the experts. See Commonwealth v. Torres, 442 Mass. 554, 581 (2004).

The judge has no authority to exclude the evidence because he or she disagrees with the expert's opinion or finds the testimony unpersuasive. See Commonwealth v. Roberio, 428 Mass. 278, 281 (1998) ("Once the expert's qualifications were established and assuming the expert's testimony met the standard of Commonwealth v. Lanigan, 419 Mass. 15 [1994], the issue of credibility was for a jury, not the judge."). When an expert's opinion is based on the analysis of complex facts, the failure of the expert to account for all the variables goes to its weight and not its admissibility. Salvas v. Wal-Mart Stores, Inc., 452 Mass. 337, 359–360 (2008). See id. at 351–360 (expert witness with doctorate in psychology and mathematics used statistical methods to evaluate large body of employee records to account for missing records and to opine that employer had wrongfully deprived employees of compensation).

First Foundation Requirement: Assistance to the Trier of Fact. "The role of an expert witness is to help jurors interpret evidence that lies outside of common experience." Commonwealth v. Tanner, 45 Mass. App. Ct. 576, 581 (1998). Thus, expert testimony may be excluded when it will not assist the jury. See Commonwealth v. Tolan, 453 Mass. 634, 648 (2009) (trial judge has discretion "to preclude expert testimony on commonly understood interrogation methods"); Commonwealth v. Bly, 448 Mass. 473, 496 (2007) (trial judge did not abuse his discretion in excluding expert witness testimony on the subject of cross-racial identification). Expert witness testimony also may be excluded because it is cumulative. See Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451, 482 (1991). Expert witness testimony may be excluded because it does not fit the facts of the case. See Ready, petitioner, 63 Mass. App. Ct. 171, 179 (2005) (concluding that a diagnostic test known as the Abel Assessment of Sexual Interest [AASI] was of no value to the fact issues facing the jury). See generally Section 403, Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reason. Finally, expert witness testimony may be excluded as not probative of a material fact in dispute and thus of no assistance to the jury when it amounts to a mere guess or conjecture. See Kennedy v. U-Haul Co., 360 Mass. 71, 73–74 (1971). See also Section 402, General Admissibility of Relevant Evidence. There are circumstances, however, in which an expert witness's opinion as to a possibility will have probative value. See Commonwealth v. Federico, 425 Mass. 844, 852 (1997). The trial judge has discretion to determine whether expert witness testimony will assist the trier of fact. See, e.g., Commonwealth v. Francis, 390 Mass. 89, 95–102 (1983) (expert witness testimony on the reliability of eyewitness identification evidence); Commonwealth v. Trainor, 374 Mass. 796, 801 (1978) ("A properly conducted public opinion survey, offered through an expert in conducting such surveys, is admissible in an obscenity case if it tends to show relevant standards in the Commonwealth.").

Second Foundation Requirement: Qualifications of the Expert. "The crucial issue in determining whether a witness is qualified to give an expert opinion is whether the witness has sufficient education, training, experience and familiarity with the subject matter of the testimony" (quotations and citation omitted). Commonwealth v. Richardson, 423 Mass. 180, 183 (1996). See Adoption of Hugo, 428 Mass. 219, 232–234 (1998) (license clinical social worker); Custody of Michel, 28 Mass. App. Ct. 260, 266 (1990) (investigator appointed under G. L. c. 119, § 24). Qualification of a witness as an expert in accordance with Section 104(a), Preliminary Questions: In General, does not always require an explicit ruling on the record by the judge. However, if a formal ruling is made, it should be made outside the hearing of the jury. Id. at 184.

> "Whether an expert determined to be qualified in one subject is also qualified to testify in another, related subject will depend on the circumstances of each case, and, where an expert has been determined to be qualified, questions or criticisms as to whether the basis of the expert's opinion is reliable go to the weight, and not the admissibility, of the testimony."

Commonwealth v. Crouse, 447 Mass. 558, 569 (2006) (noting that there must always be a first time for every expert witness). However, the trial judge, acting as the gatekeeper, must enforce boundaries between areas

of expertise within which the expert is qualified and areas that require different training, education, and experience and within which the expert is not qualified. See Commonwealth v. Frangipane, 433 Mass. 527, 535 (2001) (social worker qualified to testify as an expert witness that abused children may experience dissociative memory loss and recovered memory, but was not qualified to testify about how trauma victims store and retrieve or dissociate memories).

Third Foundation Requirement: Knowledge of Sufficient Facts or Data in the Record. The basis of expert opinion may include the factors set forth in Section 703, namely: (a) facts observed by the witness or otherwise in the witness's direct personal knowledge; (b) evidence already in the record or which the parties represent will be presented during the course of the proceedings, which facts may be assumed to be true in questions put to the witness; and (c) facts or data not in evidence if the facts or data are independently admissible in evidence and are a permissible basis for an expert to consider in formulating an opinion. See Section 703, Bases of Opinion Testimony by Experts; LaClair v. Silberline Mfg. Co., 379 Mass. 21, 32 (1979). See also Department of Youth Servs. v. A Juvenile, 398 Mass. 516, 531 (1986). This requirement means the expert witness

> "must have sufficient familiarity with the particular facts to reach a meaningful expert opinion. The relevant distinction is between an opinion based upon speculation and one adequately grounded in facts. Although a trial judge has some discretion in making that distinction, it may be an abuse of discretion to disallow expert testimony which is based upon reasonably adequate familiarity with the facts." (Citations omitted.)

Fourth St. Pub, Inc. v. National Union Fire Ins. Co., 28 Mass. App. Ct. 157, 161 (1989). Contrast Commonwealth v. Talbot, 444 Mass. 586, 589 (2005) (no error in excluding defense expert who was proffered to testify about the effects of hypoglycemic shock in view of the absence of any evidence that the defendant experienced such a condition at the time of the offense); Commonwealth v. Laliberty, 373 Mass. 238, 241 (1977) (opinion concerning defense of lack of criminal responsibility not admissible absent evidence that defendant suffered from mental disease or defect at time of crime).

Fourth Foundation Requirement: Reliability of Principle or Method Used by the Expert. Both the United States Supreme Court, applying Fed. R. Evid. 702 in Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993), and the Supreme Judicial Court applying the common law in Commonwealth v. Lanigan, 419 Mass. 15 (1994), agree on the fundamental requirement that "[i]f the process or theory underlying [an] . . . expert's opinion lacks reliability, that opinion should not reach the trier of fact." Commonwealth v. Lanigan, 419 Mass. at 26. Both the Supreme Court and the Supreme Judicial Court require the trial judge to act as a gatekeeper to ensure that the expert witness testimony that is considered by the jury meets minimum standards of reliability. The variation between the two approaches is that Massachusetts law makes general acceptance the default position and a Daubert analysis an alternative method of establishing reliability. Under Fed. R. Evid. 702, Federal courts must consider five nonexclusive factors in assessing reliability, one of which is the traditional test that looked at whether the principle or method was generally accepted in the relevant scientific community. See Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). "[G]eneral acceptance in the relevant community of the theory and process on which an expert's testimony is based, on its own, continues to be sufficient to establish the requisite reliability for admission in Massachusetts courts regardless of other Daubert factors." Commonwealth v. Patterson, 445 Mass. 626, 640 (2005) (latent fingerprint identification theory). See Commonwealth v. Frangipane, 433 Mass. 527, 538 (2001) (Lanigan hearing not necessary where qualified expert testimony has been accepted as reliable in the past in Massachusetts appellate cases). "Where general acceptance is not established by the party offering the expert testimony, a full Daubert analysis provides an alternate method of establishing reliability." Commonwealth v. Patterson, 445 Mass. at 641. These alternative, Daubert considerations include the ability to test the theory, existence of peer-reviewed publications supporting it, existence of standards for controlling or maintaining it, and known or potential error rates. See Daubert v. Merrell Dow Pharms., Inc., 509 U.S. at 593–594. "A Daubert-Lanigan inquiry does not end once it is determined that an expert's methodology is generally accepted. In Lightlab Imaging, Inc. v. Axsun Techs., Inc., 469 Mass. 181, 189–191 (2014), the plaintiff claimed the judge erred in excluding expert witness testimony about lost profits because the witness used the discounted cash flow (DCF) method that is generally regarded as a reliable meth-

odology. However, the judge found a specific aspect of the expert witness's methodology to be speculative. In particular, the witness relied on a theory known as "first mover advantage," which posits that "firms that innovate often capture long-term benefits from doing so, thanks to various first mover advantages." It was within the judge's discretion to conclude that the use of "first mover advantage" in the witness's methodology rendered that methodology incapable of being validated and tested.

In determining reliability, "[a] judge may also look to his own common sense, as well as the depth and quality of the proffered expert's education, training, experience, and appearance in other courts to determine reliability" (quotation and citation omitted). Commonwealth v. Pasteur, 66 Mass. App. Ct. 812, 826 (2006). See also Commonwealth v. Powell, 450 Mass. 229, 239 (2007) (holding a court may consider an appellate decision from a different jurisdiction).

In making the reliability determination it is also important that

> "[a] relevant scientific community must be defined broadly enough to include a sufficiently broad sample of scientists so that the possibility of disagreement exists, . . . and . . . trial judges [must] not . . . define the relevant scientific community so narrowly that the expert's opinion will inevitably be considered generally accepted. In the context of technical forensic evidence, the community must be sufficiently broad to permit the potential for dissent."

Commonwealth v. Patterson, 445 Mass. at 643, quoting Canavan's Case, 432 Mass. 304, 314 n.6 (2000). See Canavan's Case, 432 Mass. at 313–316 (holding that the requirement of reliability under Lanigan extends to expert opinions based on personal observations and clinical experience, including medical expert testimony concerning diagnosis and causation). The testimony of a substitute medical examiner who did not perform or witness the autopsy is not, for that reason, unreliable. Commonwealth v. Williams, 475 Mass. 705, 720 (2016).

The requirements of Lanigan, as amplified in Canavan's Case, do not apply fully as to the standard of care in a medical negligence case. Palandjian v. Foster, 446 Mass. 100, 108–109 (2006) ("How physicians practice medicine is a fact, not an opinion derived from data or other scientific inquiry by employing a recognized methodology. However, when the proponent of expert testimony incorporates scientific fact into a statement concerning the standard of care, that science may be the subject of a Daubert-Lanigan inquiry." [Quotation and citation omitted.]).

The application of the Daubert-Lanigan factors in cases involving the "hard" sciences may not apply in the same way in cases involving the "soft" sciences. See Daubert v. Merrell Dow Pharms., Inc., 509 U.S. at 593–594; Commonwealth v. Lanigan, 419 Mass. at 25–26. See also Mark S. Brodin, Behavioral Science Evidence in the Age of Daubert: Reflections of a Skeptic, 73 U. Cin. L. Rev. 867 (2005). The Supreme Judicial Court has stated as follows:

> "Observation informed by experience is but one scientific technique that is no less susceptible to Lanigan analysis than other types of scientific methodology. The gatekeeping function pursuant to Lanigan is the same regardless of the nature of the methodology used: to determine whether 'the process or theory underlying a scientific expert's opinion lacks reliability [such] that [the] opinion should not reach the trier of fact.' Commonwealth v. Lanigan, 419 Mass. 15, 26 (1994). Of course, even though personal observations are not excepted from Lanigan analysis, in many cases personal observation will be a reliable methodology to justify an expert's conclusion. If the proponent can show that the method of personal observation is either generally accepted by the relevant scientific community or otherwise reliable to support a scientific conclusion relevant to the case, such expert testimony is admissible."

Canavan's Case, 432 Mass. at 313–314. See, e.g., Commonwealth v. Shanley, 455 Mass. 752, 766 (2010) ("[T]he judge's finding that the lack of scientific testing did not make unreliable the theory that an individual may experience dissociative amnesia was supported in the record, not only by expert testimony but by a wide collection of clinical observations and a survey of academic literature.").

In several cases, the Supreme Judicial Court has relied on the discussion of forensic methods contained in a 2009 report by the National Research Council entitled Strengthening Forensic Science in the United States: A Path Forward 134–135 (2009) (NAS Report). See, e.g., Commonwealth v. Fernandez, 458 Mass. 137, 149 n.17 (2010) (citing NAS Report that the "near universal" laboratory test for drug identity is the "gas chromatography-mass spectrometry" test); Commonwealth v. Barbosa, 457 Mass. 773, 788 n.13 (2010) (citing NAS Report for proposition that nuclear DNA analysis is the standard against which many other forensic individualization techniques are judged). In Commonwealth v. Gambora, 457 Mass. 715, 724–727 (2010), the defendant challenged the scientific basis of the latent fingerprint identification methodology known as ACE-V, which was criticized in the NAS Report. The Supreme Judicial Court observed that "[t]he NAS Report does not conclude that fingerprint evidence is so unreliable that courts should no longer admit it. The Report does, however, stress the subjective nature of the judgments that must be made by the fingerprint examiner at every step of the ACE-V process . . . ."

The Supreme Judicial Court has not addressed the standard to apply to evidence that meets the general acceptance test but is opposed on grounds that it is nonetheless unreliable. "Given that knowledge is constantly expanding, and that scientific principles are frequently modified in light of new discoveries or theories, it is inconsistent with the reliability requirement to permit any theories or methods to be 'grandfathered' as admissible evidence." M.S. Brodin & M. Avery, Massachusetts Evidence § 7.5.1, at 419 (8th ed. 2007). See Commonwealth v. Camblin, 471 Mass. 639, 650 (2015) (despite statutory authorization, where evidence offered from breathalyzer machine utilizing new methodology not previously shown to be reliable, Lanigan hearing was required).

Fifth Foundation Requirement: Reliability of the Application of the Principle or Method to the Specific Facts of the Case. See Commonwealth v. Colturi, 448 Mass. 809, 815–817 (2007) (results of otherwise valid breathalyzer test is admissible to establish blood alcohol level at the time of the offense without expert witness testimony on the theory of retrograde extrapolation so long as the test was administered within three hours of the offense); Commonwealth v. McNickles, 434 Mass. 839, 847–850 (2001) (disagreement among experts regarding the reliability of the application of a statistical method known as "likelihood ratios" to mixed samples of DNA evidence went to the weight, but not the admissibility, of the expert witness evidence). But see Lightlab Imaging, Inc. v. Axsun Techs., Inc., 469 Mass. 181, 192–194 (2014) (the judge did not abuse her discretion in excluding the expert witness's opinion because the expert's estimate of lost profits was based on speculation about the availability of future funding for the business); Smith v. Bell Atlantic, 63 Mass. App. Ct. 702, 718–719 (2005) (even though expert witness was qualified and employed a reliable diagnostic method, her lack of knowledge of the details of the patient's life called into question the reliability of her opinion and justified its exclusion in judge's discretion).

Duty to Consult with Expert. In cases where scientific evidence is central to the defense, counsel may have a duty to consult with an appropriate expert. See Commonwealth v. Field, 477 Mass. 553, 556–558 (2017) (error for counsel not to consult with mental health expert regarding defense of mental impairment, but error not likely to have affected verdict). Where science critical to a defense is evolving with new research findings, it may be manifestly unreasonable and present a substantial risk of a miscarriage of justice for counsel to fail to consult or present an expert who could offer evidence in support of the defense. See Commonwealth v. Epps, 474 Mass. 743 (2016) (ineffective assistance of counsel requiring new trial where counsel failed to consult or present expert on possibility of accidental fall as substantial defense in prosecution based upon shaken baby syndrome); Commonwealth v. Millien, 474 Mass. 417 (2016) (failure to consult or call expert on science of shaken baby syndrome).

Profile Evidence. Using a criminal profile to suggest that a defendant committed an act by comparing him or her to stereotypes is inadmissible as not relevant and inherently prejudicial. Commonwealth v. Day, 409 Mass. 719, 723 (1991) (testimony that defendant fit "child battering" profile inadmissible). Similarly, it is inadmissible for an expert to provide so-called negative profile evidence by testifying that the defendant does not match a particular profile. Commonwealth v. Horne, 476 Mass. 222, 227–228 (2017) (testimony that defendant did not fit description of drug addict and so possessed drugs for purposes of distribution is inadmissible). See also Commonwealth v. Coates, 89 Mass. App. Ct. 728, 735 (2016).

Cross-Reference: Section 404(a), Character Evidence; Crimes or Other Acts: Character Evidence.

Certitude of Expert Witness Opinion. In Commonwealth v. Heang, 458 Mass. 827 (2011), the Supreme Judicial Court explained that when an expert witness offers an opinion that is empirically based but subjective in nature, such as whether a cartridge or casing was fired from a particular firearm, it is not permissible for the witness to imply that the opinion has a statistical or mathematical basis. "Phrases that could give the jury an impression of greater certainty, such as 'practical impossibility' and 'absolute certainty' should be avoided. The phrase 'reasonable degree of scientific certainty' should also be avoided because it suggests that forensic ballistics is a science, where it is clearly as much an art as a science." (Citation and footnote omitted.) Id. at 849. In Heang, the Supreme Judicial Court provided the following examples of the degree of certitude that an expert witness may express when the opinion is empirically based but subjective in nature: for firearm or ballistics identification, a "reasonable degree of ballistics certainty," Id. at 848–849; for medical examiner and pathologist opinions, a "reasonable degree of medical certainty," id. at 849, citing Commonwealth v. Nardi, 452 Mass. 379, 383 (2008); Commonwealth v. DelValle, 443 Mass. 782, 788 (2005); for clinical diagnoses, a "reasonable degree of scientific certainty," Commonwealth v. Roberio, 428 Mass. 278, 280 (1998); and for psychological opinions, a "reasonable degree of psychological certainty," Commonwealth v. Wentworth, 53 Mass. App. Ct. 82, 86 (2001). It may also be error for a fingerprint expert to state with absolute certainty that a particular latent print matches a known fingerprint. Commonwealth v. Gambora, 457 Mass. 715, 727–728 (2010). In Heang, the court also noted that there are forensic disciplines that permit expert witness opinion to be expressed to a mathematical or statistical certainty. Commonwealth v. Heang, 458 Mass. at 849, citing Commonwealth v. Mattei, 455 Mass. 840, 850–853 (2010) (because it is possible to say to mathematical degrees of statistical certainty that one DNA profile matches another, test results and opinions regarding DNA profile must be accompanied by testimony explaining likelihood of that match occurring in general population).

Illustrations.

***Abused Children*.** See Commonwealth v. Federico, 425 Mass. 844, 847–848 (1997).

***Battered Woman Syndrome*.** The defendant has a statutory right under G. L. c. 233, § 23F, to present such evidence "where certain specified defenses are asserted." Commonwealth v. Asenjo, 477 Mass. 599, 607–609 (2017) ("Section 23F is more permissive than the common law bases for expert opinions outlined in Mass. G. Evid. § 703.").

***Bloodstain Analysis*.** See Commonwealth v. Vasquez, 462 Mass. 827, 844–846 (2012); Commonwealth v. Powell, 450 Mass. 229, 237–241 (2007).

***Breath Test Analysis*.** See Commonwealth v. Camblin, 478 Mass. 469, 480 (2017).

***Capacity to Contract*.** See Sparrow v. Demonico, 461 Mass. 322, 327–330 (2012).

***Cause and Origin of Fire*.** See Commonwealth v. Rosario, 477 Mass. 69, 80–81 (2017); Commonwealth v. Goodman, 54 Mass. App. Ct. 385, 389–393 (2002).

***Computer Simulations*.** Evidence consisting of computer-generated models or simulations is treated like other scientific tests; admissibility is conditioned "on a sufficient showing that: (1) the computer is functioning properly; (2) the input and underlying equations are sufficiently complete and accurate (and disclosed to the opposing party, so that they may challenge them); and (3) the program is generally accepted by the appropriate community of scientists." Commercial Union Ins. Co. v. Boston Edison Co., 412 Mass. 545, 549–550 (1992).

***Contribution of Alcohol to Personal Injury*.** See Baudanza v. Comcast of Mass. I, Inc., 454 Mass. 622, 631–633 (2009).

***Coprophilia (Sexual Fetish)*.** See Commonwealth v. Lawton, 82 Mass. App. Ct. 528, 538–539 (2012).

***Development of Adolescent Brain*.** See Commonwealth v. Okoro, 471 Mass. 51, 66–67 (2015) (expert properly permitted to testify regarding development of adolescent brain and how it might affect a

particular juvenile's capacity for impulse control and reasoned decision-making at time in question as it relates to juvenile's ability to form specific intent for murder but may not opine that no juvenile of that age could form specific intent).

***Dissociative Memory Loss*.** See Commonwealth v. Polk, 462 Mass. 23, 32–36 (2012).

***Dissociative Trance Disorder*.** See Commonwealth v. Montanez, 55 Mass. App. Ct. 132, 144–146 (2002).

***Distributing Heroin*.** See Commonwealth v. Miranda, 441 Mass. 783, 792–795 (2004).

***DNA*.** See Commonwealth v. Dixon, 458 Mass. 446, 453 (2010) ("[a] properly generated DNA profile is a string of code that exclusively identifies a person's hereditary composition with near infallibility"); Commonwealth v. Mattei, 455 Mass. 840, 847–852 (2010) (evidence that DNA test failed to exclude defendant "without accompanying evidence that properly interprets that result creates a greater risk of misleading the jury and unfairly prejudicing the defendant than admission of a 'match' without accompanying statistics"). There is a distinction between nonexclusion (the defendant is not excluded as a contributor of the sample) and inconclusive (insufficient sample material, contamination, or some other problem) DNA results. "Evidence that a defendant is not excluded could suggest to the jury that a link would be more firmly established if only more [sample] were available for testing. Such evidence should not [be] admitted without accompanying statistical explanation of the meaning of nonexclusion." Commonwealth v. Cameron, 473 Mass. 100, 106 (2015); Commonwealth v. Lally, 473 Mass. 693, 702–704 (2016). Inconclusive DNA results are not relevant absent a Bowden defense. Commonwealth v. Cameron, 473 Mass. at 107 n.8. See Section 1107, Inadequate Police Investigation Evidence.

***Extrapolation*.** Extrapolation evidence to determine the weight of drugs is permissible, and any objections to its admissibility should be raised by way of pretrial motion. Commonwealth v. Crapps, 84 Mass. App. Ct. 442, 445–449 (2013).

***False Confessions*.** See Commonwealth v. Hoose, 467 Mass. 395, 413–420 (2014).

***Fingerprints*.** See Commonwealth v. Patterson, 445 Mass. 626, 641–655 (2005). See also Commonwealth v. Joyner, 467 Mass. 176, 177 (2014) (testimony of fingerprint expert did not violate prohibition against expressing an opinion to a scientific certainty that there was a match). Where a fingerprint is the only identification evidence, the Commonwealth must prove beyond a reasonable doubt that the fingerprint was placed during the commission of the charged crime. Commonwealth v. French, 476 Mass. 1023, 1024–1025 (2017). Unlike DNA evidence, the statistical significance of an opinion about a match is not a foundational requirement, but may affect the weight of the evidence. Commonwealth v. Wadlington, 467 Mass. 192 (2014). Cf. Commonwealth v. Gambora, 457 Mass. 715, 724–725 (2010) (considering report by National Research Council, Strengthening Forensic Science in the United States: A Path Forward 102–104, 136–145 [2009]).

***Firearm Identification (Forensic Ballistics)*.** See Commonwealth v. Heang, 458 Mass. 827, 847–848 (2011) (adopting "guidelines" for the admissibility of expert firearm identification testimony that [1] require documentation of the basis of the expert's opinion before trial, which the Commonwealth must disclose to the defense in discovery; [2] require an explanation by the expert to the jury of the theories and methodologies underlying the field of forensic ballistics before offering any opinions; and [3] limit the degree of certitude that the qualified expert may express about whether a particular firearm fired a specific projectile or cartridge to a "reasonable degree of ballistic certainty").

***Gang Membership*.** See Commonwealth v. Barbosa, 477 Mass. 658, 667–669 (2017).

***Gunshot Residue*.** See Commonwealth v. Johnson, 463 Mass. 95, 107–108 (2012); Commonwealth v. Heang, 458 Mass. 827, 851 (2011).

***Personality Testing*.** See Ready, petitioner, 63 Mass. App. Ct. 171, 172–179 (2005).

***Posttraumatic Stress Disorder*.** See Commonwealth v. Anestal, 463 Mass. 655, 658 n.5 (2012); Commonwealth v. Crawford, 429 Mass. 60, 67 (1999).

***Retrograde Extrapolation*.** See Commonwealth v. Senior, 433 Mass. 453, 458–462 (2001). But see Commonwealth v. Dacosta, 85 Mass. App. Ct. 386, 386–388 (2014) (breath test within fifty minutes of arrest permits inference of blood alcohol content above 0.08 percent without need for expert witness testimony).

***Sexual Assault Evidence*.** See Commonwealth v. Scesny, 472 Mass. 185, 194–196 (2015) (testimony regarding what evidence criminologist would expect to have found if victim pulled up her underwear and pants following intercourse).

***Sexually Dangerous Persons*.** See Commonwealth v. George, 477 Mass. 331, 341–342 (2017) (Static-99R risk assessment tool's raw score and risk percentage are admissible; Static-99R risk category labels are inadmissible, as they do not provide sincere, numeric estimates of recidivism risk).

***Shaken Baby Syndrome*.** See Commonwealth v. Epps, 474 Mass. 743 (2016); Commonwealth v. Millien, 474 Mass. 417 (2016).

***Susceptibility to Suggestiveness*.** See Commonwealth v. Soares, 51 Mass. App. Ct. 273, 280–282 (2001).

***Valuation of Business Interest*.** In divorce cases, the judge may accept one expert valuation over another or reject expert opinion altogether and arrive at a valuation on other evidence, but he or she may not reach a valuation that varies from the requirements of the equitable distribution statute. G. L. c. 208, § 34. See Adams v. Adams, 459 Mass. 361, 380–381 (2011); Bernier v. Bernier, 449 Mass. 774 (2007).

***Valuation of Real Estate*.** There is no requirement that the person testifying as an expert have sales or practical experience in the locality about which they are testifying. See McLaughlin v. Board of Selectman of Amherst, 422 Mass. 359, 362–363 (1996). A real estate broker or appraiser with "sufficient experience and knowledge of values of other similar real estate in the particular locality" may testify. Lee Lime Corp. v. Massachusetts Turnpike Auth., 337 Mass. 433, 436 (1958). A witness who had "worked as an appraiser" and "was in the process of earning professional designations in the appraisal field" may testify as an expert in real estate. See Lavin v. Lavin, 24 Mass. App. Ct. 929, 931 (1987). An expert witness may use the depreciated reproduction cost method to form an opinion as to the value of real estate when the judge finds that there is a justification for the use of this disfavored approach. Correia v. New Bedford Redev. Auth., 375 Mass. 360, 362–367 (1978).

For examples of cases applying this section, see M.S. Brodin & M. Avery, Massachusetts Evidence §§ 7.4–7.6 (2018 ed.); 2 M.G. Perlin & D. Cooper, Proof of Cases in Massachusetts §§ 71:1–71:23 (2017–2018 ed.); and W.G. Young, J.R. Pollets, & C. Poreda, Annotated Guide to Massachusetts Evidence § 702 (2017–2018 ed.).

Jury Instructions. See Commonwealth v. Hinds, 450 Mass. 1, 12 n.7 (2007).

Cross-Reference: Section 703, Bases of Opinion Testimony by Experts.

Section 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert witness bases an opinion or inference may be those perceived by or made known to the witness at or before the hearing. These include (a) facts observed by the witness or otherwise in the witness's direct personal knowledge; (b) evidence already in the record or that will be presented during the course of the proceedings, which facts may be assumed to be true in questions put to the witness; and (c) facts or data not in evidence if the facts or data are independently admissible in evidence and are a permissible basis for an expert to consider in formulating an opinion.

NOTE

This section is derived from Department of Youth Servs. v. A Juvenile, 398 Mass. 516, 531 (1986); LaClair v. Silberline Mfg. Co., 379 Mass. 21, 32 (1979); and Commonwealth v. Russ, 232 Mass. 58, 73 (1919). See Commonwealth v. Piantedosi, 478 Mass. 536, 541–546 (2017). Massachusetts has not fully adopted Fed. R. Evid. 703, or Proposed Mass. R. Evid. 703, which would permit opinions based on inadmissible evidence if it is of a type reasonably relied upon by experts in the relevant field.

> "When an expert provides the jury with an opinion regarding the facts of the case, that opinion must rest on a proper basis, else inadmissible evidence might enter in the guise of expert opinion. The expert must have knowledge of the particular facts from firsthand observation, or from a proper hypothetical question posed by counsel, or from unadmitted evidence that would nevertheless be admissible."

Commonwealth v. Waite, 422 Mass. 792, 803 (1996). See id. at 803–804 (psychologist called by the defense in a murder trial could opine on the defendant's mental impairment at the time of the offense based on the witness's interview with the defendant five weeks after the killings, and the contents of police and medical records, but not on the basis of a psychiatrist's earlier "preliminary diagnosis" that was not shown to be reliable and independently admissible). Accord Vassallo v. Baxter Healthcare Corp., 428 Mass. 1, 15–16 (1998) ("The judge properly prevented the defendants' experts [as well as the plaintiffs' experts] from testifying on direct examination to the out-of-court opinions of other scientists in the absence of some specific exception to the hearsay rule [none was shown]."). But see Commonwealth v. Asenjo, 477 Mass. 599, 607–609 (2017) (error to exclude expert testimony regarding battered woman syndrome where G. L. c. 233, § 23F, provides independent statutory basis for admission of evidence, as statute is more permissive than common law embodied in Section 703 and permits expert testimony based solely on defendant's assertion of certain specified defenses).

Regarding Section 703(b), unless the evidence is capable of only one interpretation, the question to the expert witness must refer to specific portions of the record. See Connor v. O'Donnell, 230 Mass. 39, 42 (1918).

Regarding Section 703(c), in determining whether facts or data are independently admissible, it is not whether the forms in which such facts or data exist satisfy evidentiary requirements. Rather, the court will determine whether the underlying facts or data would potentially be admissible through appropriate witnesses. Such witnesses need not be immediately available in court to testify. See Commonwealth v. Markvart, 437 Mass. 331, 337–338 (2002), citing Department of Youth Servs. v. A Juvenile, 398 Mass. at 531. But see Custody of Michel, 28 Mass. App. Ct. 260, 267 (1990) (applying G. L. c. 119, § 24).

On direct examination, the expert witness may testify to the basis of his or her opinion regarding (1) facts within the witness's personal knowledge; (2) facts in evidence; or (3) with approval of the court, facts that a party will put in evidence. However, "it is settled that an expert witness may not, under the guise of stating the reasons for his opinion, testify to matters of hearsay in the course of his direct examination unless such matters are admissible under some statutory or other recognized exception to the hearsay rule." Commonwealth v. Nardi, 452 Mass. 379, 392 (2008), quoting Grant v. Lewis/Boyle, Inc., 408 Mass. 269, 273 (1990), quoting Kelly Realty Co. v. Commonwealth, 3 Mass. App. Ct. 54, 55–56 (1975). The limitation on the direct-examination testimony of expert witnesses operates in both civil and criminal cases and applies to both sides. Commonwealth v. Chappell, 473 Mass. 191, 204 (2015) (this evidentiary rule does not violate defendant's right to present a full defense). On cross-examination, the defendant may choose to elicit the underlying facts or data, thereby waiving his or her rights under the confrontation clause. Commonwealth v. Barbosa, 457 Mass. 773, 785 (2010).

Cross-Reference: Section 705, Disclosure of Facts or Data Underlying Expert Opinion.

Limitation on Cross-Examination. On cross-examination of an expert, a judge may exclude evidence as unfairly prejudicial, see Section 403, even if the expert is aware of those facts, if the facts were not relied

upon as part of the expert's opinion, do not clarify or discredit the opinion, and serve only to focus the jury on those facts. Commonwealth v. Anestal, 463 Mass. 655, 667–668 (2012) (prior bad acts excluded).

Risk of Inaccurate Forensic Analysis. In Commonwealth v. Barbosa, 457 Mass. 773 (2010), the Supreme Judicial Court addressed the risk of inaccurate forensic analysis as follows:

> "Our common-law rules of evidence protect a defendant in various ways from the risk of inaccurate forensic analysis. Where there is reason to believe that evidence has been mislabeled or mishandled or that data have been fabricated or manipulated, a defendant may challenge the admissibility of an expert opinion relying on such evidence or data in a Daubert-Lanigan hearing, because an opinion must rest on evidence or data that provide 'a permissible basis' for an expert to formulate an opinion. A defendant may also challenge the admissibility of an opinion where an expert relies solely on the conclusions of the testing analyst, without knowledge of the procedures employed by the testing analyst or the underlying data and evidence that are generally contained in worksheets, because a conclusory opinion alone may not be a permissible basis on which an expert may rest an opinion. Where an expert opinion survives a Daubert-Lanigan challenge or where . . . the defendant does not challenge the admissibility of the expert's opinion, the defendant may still . . . cross-examine the testifying expert as to the risk of evidence being mishandled or mislabeled or of data being fabricated or manipulated, and as to whether the expert's opinion is vulnerable to these risks." (Citations omitted.)

Id. at 790–791.

Substituted Experts.

Meaningful Opportunity to Cross-Examine. The Massachusetts common law of evidence is more protective of confrontation rights than the Sixth Amendment to the United States Constitution in that it requires that the defendant have "a meaningful opportunity to cross-examine the expert about her opinion and the reliability of the facts or data that underlie her opinion." Commonwealth v. Tassone, 468 Mass. 391, 399–402 (2014). In Tassone, the Supreme Judicial Court explained that, where an expert opines on the cause of death in a homicide case, "a defendant will generally have a meaningful opportunity to cross-examine the expert witness regarding possible flaws in the opinion based on the underlying autopsy report and notes, and photographs taken during the autopsy," regardless of whether the witness performed the autopsy or is a substituted expert. Id. at 400. However, "where a DNA expert offers an opinion regarding a DNA match, a meaningful opportunity for cross-examination means that a defendant must have the opportunity substantively to explore the 'risk of evidence being mishandled or mislabeled, or of data being fabricated or manipulated, and . . . whether the expert's opinion is vulnerable to these risks.'" Id. at 400, quoting Commonwealth v. Barbosa, 457 Mass. 773, 790 (2010). Thus, in Tassone, the court held that, where the substitute DNA analyst was not affiliated with the laboratory where the DNA testing was conducted and there was no showing that she had any personal knowledge of that lab's evidence-handling protocols, the defendant was denied the opportunity to explore through cross-examination whether the testing was flawed. The court distinguished Commonwealth v. Greineder, 464 Mass. 580 (2013), where the substitute DNA expert was the forensic laboratory director of the facility where the DNA testing was conducted and was personally aware of the DNA testing process employed by the laboratory. Compare Commonwealth v. Sanchez, 476 Mass. 725, 734 (2017) (fire inspector who was present for electrician's inspection of arson site could testify and be meaningfully cross-examined about his own observations), with Commonwealth v. Jones, 472 Mass. 707, 715–716 (2015) (where DNA expert's knowledge of how DNA samples had been collected was derived from form completed by person who had collected the specimens from victim's body, no meaningful opportunity to cross-examine witness).

DNA Analyst. Where the prosecution offers an opinion about a DNA profile match without calling the DNA analyst who conducted the testing of the crime scene DNA, the prosecution must, at a minimum, call an expert affiliated with the laboratory where the testing took place. Commonwealth v. Tassone, 468 Mass. 391, 402 (2014). Where the testifying expert has personal knowledge of the testing laboratory's procedures, the witness may give an opinion about a DNA match, even though the basis is in whole or in part evidence

collected or created by an absent DNA analyst. See Commonwealth v. Greineder, 464 Mass. 580, 583–584 (2013). However, an expert who has no knowledge of how the sample was collected cannot testify to the location from which the sample was collected. Commonwealth v. Jones, 472 Mass. 707, 716–717 n.3 (2015) (no meaningful opportunity to cross-examine testifying DNA expert about how specimen was collected).

Medical Examiner. A substitute medical examiner may not testify to the observations, findings, or opinions made by an absent medical examiner. In accordance with Section 705, a medical examiner may testify to his or her opinion even though the basis is in whole or in part evidence collected or created by the absent medical examiner. Commonwealth v. Leng, 463 Mass. 779, 785 (2012); Commonwealth v. Nardi, 452 Mass. 379, 388 (2008). See Commonwealth v. Tassone, 468 Mass. 391, 402 (2014) (autopsy report, notes, and photographs provide defendant with "meaningful basis" to cross-examine substitute witness about possible flaws in his or her opinion). The Commonwealth is not required to show that the medical examiner who performed an autopsy is unavailable for a substitute medical examiner to testify. Commonwealth v. Reavis, 465 Mass. 875, 881–882 (2013). See also Commonwealth v. Williams, 475 Mass. 705, 719 (2016).

Cross-Reference: Section 702, Testimony by Expert Witnesses; Section 705, Disclosure of Facts or Data Underlying Expert Opinion; Introductory Note to Article VIII, Hearsay.

Section 704. Opinion on Ultimate Issue

An opinion is not objectionable just because it embraces an ultimate issue.

NOTE

This section is derived from Proposed Mass. R. Evid. 704; Commonwealth v. Woods, 419 Mass. 366, 374–375 (1995); and Simon v. Solomon, 385 Mass. 91, 105 (1982). The critical question is not whether the opinion touches on the ultimate issue, but whether it satisfies Sections 403, Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons; 701, Opinion Testimony by Lay Witnesses; 702, Testimony by Expert Witnesses; and any other applicable sections. See Commonwealth v. Goddard, 476 Mass. 443, 446–447 (2017); Commonwealth v. Canty, 466 Mass. 535, 543 (2013); Martel v. Massachusetts Bay Transp. Auth., 403 Mass. 1, 3–4 (1988); Commonwealth v. LaCorte, 373 Mass. 700, 705 (1977); Commonwealth v. Almeida, 34 Mass. App. Ct. 901, 902–903 (1993); Commonwealth v. Lopes, 25 Mass. App. Ct. 988, 990 (1988), citing Commonwealth v. Sendele, 18 Mass. App. Ct. 755, 760 (1984). Accord M.S. Brodin & M. Avery, Massachusetts Evidence § 7.3.2 (2018 ed.).

Improper Vouching. Despite the abolition of the common-law doctrine that prohibited expert opinion testimony on the ultimate issue, the admissibility of such testimony in Massachusetts still depends on whether it explains evidence that is beyond the common understanding of the jury. Commonwealth v. Tanner, 45 Mass. App. Ct. 576, 581 (1998). See Section 702, Testimony by Expert Witnesses. Thus, expert witness testimony which simply amounts to an opinion on the credibility of a witness (improper vouching), on whether the defendant was "negligent," or on the guilt or innocence of the defendant is prohibited. See, e.g., Commonwealth v. Burgess, 450 Mass. 422, 436 (2008) ("the prosecutor [improperly] asked [the Commonwealth's expert] to comment on the credibility of the Commonwealth's theory of the case by asking whether its theory was 'consistent' with [the expert's] observations"); Commonwealth v. Jewett, 442 Mass. 356, 368 (2004) ("in the absence of special circumstances, an expert may not be asked whether a rape or sexual assault has occurred"); Commonwealth v. Richardson, 423 Mass. 180, 185–186 (1996), quoting Commonwealth v. Trowbridge, 419 Mass. 750, 759 (1995) ("[a]lthough expert testimony on the general behavioral characteristics of sexually abused children is permissible, an expert may not refer or compare the child to those general characteristics"); Birch v. Strout, 303 Mass. 28, 32 (1939) (defendant could not be asked to "pass upon the question of his own negligence"); Commonwealth v. Coates, 89 Mass. App. Ct. 728, 733–737 (2016) (trial judge properly excluded criminal-profile testimony that defendant did not fit profile of

pedophile); Commonwealth v. Aspen, 85 Mass. App. Ct. 278, 282–284 (2014), citing Commonwealth v. Federico, 425 Mass. 844, 849 (1997) (conviction reversed where expert gave profile testimony relating to intrafamilial sexual abuse that closely resembled complainant's family makeup and dynamic).

Testimony regarding the behavioral characteristics of sexual abuse victims is improper when it implicitly vouches for the victim's credibility regarding sexual abuse allegations. See Commonwealth v. Quinn, 469 Mass. 641, 646 (2014) (risk of improper vouching was "especially acute" because expert witness had treated victim for months); Commonwealth v. Trowbridge, 419 Mass. 750, 759–760 (1995).

At least four different, but related, reasons are given for the exclusion of such evidence. First, such opinions offer no assistance to the fact finders "because the jury are capable of making that assessment without an expert's aid." Commonwealth v. Colin C., 419 Mass. 54, 60 (1994). See Commonwealth v. Andujar, 57 Mass. App. Ct. 529, 531 (2003). Second, "[o]n such questions, the influence of an expert's opinion may threaten the independence of the jury's decision." Simon v. Solomon, 385 Mass. 91, 105 (1982). Third, such questions call for opinions on matters of law or mixed questions of law and fact, and the jury must be allowed to draw their own conclusions from the evidence. See Commonwealth v. Hesketh, 386 Mass. 153, 161–162 (1982); Birch v. Strout, 303 Mass. at 32. Fourth, expert opinion in the form of conclusions about the credibility of a witness or a party are beyond the scope of the witness's expertise and in the realm of speculation and conjecture. See Commonwealth v. Gardner, 350 Mass. 664, 666 (1966). Cf. Commonwealth v. Colon, 64 Mass. App. Ct. 303, 312 (2005) ("while an expert may not opine as to whether a particular child has been raped or sexually abused, an expert may opine, after a physical examination of the victim, that a child's vaginal injuries are 'consistent with' penetration").

Illustrations. For examples of cases applying this section, see M.S. Brodin & M. Avery, Massachusetts Evidence § 7.3 (2018 ed.), and 2 M.G. Perlin & D. Cooper, Proof of Cases in Massachusetts § 71.4 (2017–2018 ed.).

Operating Under the Influence Cases. In Commonwealth v. Canty, 466 Mass. 535, 541 (2013), the court explained that the limitation on testimony that amounts to an opinion as to guilt or innocence applies to the lay witness as well as to the expert witness. Cross-Reference: Section 701, Opinion Testimony by Lay Witnesses.

Opinions About the Law Versus the Facts. Legal questions, as to which testimony is not permitted, should be distinguished from factual conclusions, as to which testimony is proper. The line between a "conclusion of law" and an "ultimate factual issue" is sometimes blurred. Commonwealth v. Little, 453 Mass. 766, 769 (2009) ("Narcotics investigators may testify as experts to describe how drug transactions occur on the street . . . [such as] testimony on the use of lookouts in drug transactions, and the significance of the purity of seized drugs. We have also repeatedly held that there is no error in allowing a police detective to testify that in his opinion the amount of drugs possessed by the defendant was not consistent with personal use but was consistent with an intent to distribute." [Citations and quotations omitted.]). See Commonwealth v. Roderiques, 78 Mass. App. Ct. 515, 522 (2010) (pediatrician allowed to testify that baby's injuries were not accidental); Puopolo v. Honda Motor Co., 41 Mass. App. Ct. 96, 99 (1996) (expert should have been permitted to testify that vehicle was unreasonably dangerous even though special question given to jury was framed in nearly identical language). Cf. Commonwealth v. Brady, 370 Mass. 630, 635 (1976) (insurance agent may not testify to applicability of insurance coverage); Perry v. Medeiros, 369 Mass. 836, 842 (1976) (building inspector cannot give opinion interpreting building code); Commonwealth v. Coleman, 366 Mass. 705, 711 (1975) (medical examiner not permitted to testify that death was "homicide"); DeCanio v. School Comm. of Boston, 358 Mass. 116, 125–126 (1970) (expert could not testify that "suspension and dismissal of probationary teachers without a hearing 'would have no legitimate educational purpose'"); Commonwealth v. Gardner, 350 Mass. 664, 666–667 (1966) (doctor in rape prosecution cannot testify to "forcible entry"); S.D. Shaw & Sons v. Joseph Rugo, Inc., 343 Mass. 635, 639 (1962) (witness may not give opinion as to whether certain work was included in contract specification); Commonwealth v. Ross, 339 Mass. 428, 435 (1959) (guilt); Foley v. Hotel Touraine Co., 326 Mass. 742, 745 (1951) (treasurer of corporation could not testify on question whether assistant manager had "ostensible authority" on day of accident); Silva v. Norfolk & Dedham Mut. Fire Ins. Co., 91 Mass. App. Ct. 413, 420 (2017) (testimony in action brought under

G. L. c. 176D that insurer's action was "unfair and deceptive" properly excluded). But see Ford v. Boston Hous. Auth., 55 Mass. App. Ct. 623, 626 (2002) (expert testimony explaining requirements of complicated code was not per se inadmissible; judge had discretion to admit expert opinion of building inspector that "if the door was locked at the time of the accident . . . that would have been noncompliance with the State building code").

Section 705. Disclosure of Facts or Data Underlying Expert Opinion

Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

NOTE

This section is taken from Proposed Mass. R. Evid. 705, which the Supreme Judicial Court adopted in Department of Youth Servs. v. A Juvenile, 398 Mass. 516, 532 (1986).

> "The rule is aimed principally at the abuse of the hypothetical question. It does not eliminate the availability of the hypothetical question, but only the requirement of its use. . . . The thrust of the rule is to leave inquiry regarding the basis of expert testimony to cross-examination, which is considered an adequate safeguard."

Id., quoting Advisory Committee's Note on Proposed Mass. R. Evid. 705. Under Massachusetts law, for purposes of direct examination, there is a "distinction between an expert's opinion on the one hand and the hearsay information that formed the basis of the opinion on the other, holding the former admissible and the latter inadmissible." Commonwealth v. Greineder, 464 Mass. 580, 584 (2013). However, on cross-examination, the opposing party may choose to elicit the hearsay basis for an opinion offered on direct examination. See Commonwealth v. Nardi, 452 Mass. 379, 387–395 (2008). In Commonwealth v. Barbosa, 457 Mass. 773, 785–787 (2010), the Supreme Judicial Court stated the direct examination of an expert on facts not in evidence

> "is limited to the expert's opinion and matters of which the expert had personal knowledge, such as her training and experience, and the protocols generally accepted in her field of expertise. Only the defendant can open the door on cross-examination to testimony regarding the basis for the expert's opinion, which may invite the expert witness to testify to facts or data that may be admissible in evidence but have not yet been admitted in evidence."

Accord Commonwealth v. Leng, 463 Mass. 779, 783–785 (2012); Commonwealth v. Nardi, 452 Mass. 379, 387–395 (2008).

Cross-Reference: Introductory Note to Article VIII, Hearsay.

Limitation on Cross-Examination. Under certain circumstances, the requirement that the expert disclose underlying facts or data on cross-examination may be limited by Section 403 considerations. See Commonwealth v. Anestal, 463 Mass. 655, 668–669 (2012). In Anestal, the court held that

> "[o]nce the Commonwealth sought to inquire over objection about this prior bad act evidence, it was incumbent on the judge in the sound exercise of his discretion to ascertain whether the evidence was probative and, if so, whether that probative value was substantially outweighed by the danger of unfair prejudice to the defendant."

Id. at 669. This inquiry should take place at sidebar, or the judge should conduct a voir dire. Id. at 669 n.20.

Section 706. Court-Appointed Experts

(a) Appointment. If legally permissible, the court, on its own or at the request of a party, may appoint an expert. Unless mandated by law to accept the assignment, the expert shall have the right to refuse such appointment. The court, after providing an opportunity to the parties to participate, shall inform the expert of his or her duties. The expert may be required to testify.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation, as set by the court, unless controlled by statute or rule. Except as otherwise provided by law, the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of Appointment. The fact that the court appointed the expert witness shall not be disclosed to the jury.

(d) Parties' Choice of Their Own Experts. This section does not limit a party in calling its own experts.

NOTE

This section is derived from Commonwealth v. O'Brien, 423 Mass. 841, 855 n.24 (1996); Fed. R. Evid. 706; and Proposed Mass. R. Evid. 706, and reflects the Massachusetts practice of making widespread use of court-appointed experts. See, e.g., G. L. c. 119, §§ 21, 24 (court-appointed expert to assist in determination of cases involving children in need of services); G. L. c. 123, § 15(a)–(c) (court-appointed expert to assess criminal defendant's competency to stand trial or criminal responsibility); G. L. c. 123, § 15(e) (court-appointed expert to render opinion to assist court in sentencing defendant); G. L. c. 190B, § 5-303(e) (court-appointed expert to assess mental health of a person who may be in need of guardianship); G. L. c. 215, § 56A (guardian ad litem to investigate facts for the Probate and Family Court relating to care, custody, and maintenance of children); Brodie v. Jordan, 447 Mass. 866, 867 (2006) (expert witness appointed by court to render opinion on the value of corporation's net assets); Commonwealth v. Berry, 420 Mass. 95, 103 (1995) (judge warranted in relying upon opinion of court-appointed expert); Commonwealth v. Aponte, 391 Mass. 494, 497–498 (1984) (court-appointed expert in statistical analysis in social sciences to assist in resolution of challenge to method of grand jury selection in Essex County); Gilmore v. Gilmore, 369 Mass. 598, 604–605 (1976) (use of court-appointed guardian ad litem for investigation in child custody cases); Munshani v. Signal Lake Venture Fund II, LP, 60 Mass. App. Ct. 714, 717 (2004) (court-appointed expert to assess authenticity of an electronic communication).

Failure to seek funds to consult or retain an expert where there is new scientific research and the science is evolving, which could provide a substantial ground of defense, may constitute ineffective assistance of counsel. Commonwealth v. Millien, 474 Mass. 417 (2016) (failure to consult or call expert on shaken baby syndrome).

ARTICLE VIII. HEARSAY

INTRODUCTORY NOTE

(a) Confrontation Clause and Hearsay in Criminal Cases. In considering the following sections, it is necessary to recognize the distinction between hearsay rules and the requirements of the confrontation clause of the Sixth Amendment to the Constitution of the United States and Article 12 of the Declaration of Rights. Even if an out-of-court statement would be admissible for its truth under the hearsay rule, it must still satisfy the requirements of the confrontation clause and Article 12.

In Crawford v. Washington, 541 U.S. 36, 54 (2004), the United States Supreme Court explained that the Sixth Amendment expressed the common-law right of the defendant in a criminal case to confrontation, and that it was subject only to those exceptions that existed at the time of the amendment's framing in 1791. As a result, the Supreme Court held that "testimonial statements" of a witness for the government in a criminal case who is not present at trial and subject to cross-examination are not admissible unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. Id. at 53–54. Accord Commonwealth v. Gonsalves, 445 Mass. 1, 14 (2005), cert. denied, 548 U.S. 926 (2006) ("constitutional provision of the confrontation clause trumps [our own] rules of evidence"). In Commonwealth v. Lao, 450 Mass. 215, 223 (2007), the Supreme Judicial Court held that "the protection provided by art. 12 is co-extensive with the guarantees of the Sixth Amendment to the United States Constitution."

The Supreme Judicial Court has expressed the following analytical approach to determine whether out-of-court statements constitute admissible evidence:

> "When the Commonwealth offers an out-of-court statement in a criminal case, the evidentiary and potential confrontation clause issues can prove challenging. The following conceptual approach may be helpful: First, is the out-of-court statement being offered to establish the truth of the words contained in the statement? In other words, is the out-of-court statement hearsay? If the out-of-court statement is offered for any purpose other than its truth, then it is not hearsay and the confrontation clause is not implicated. Second, if the evidence is hearsay, does the statement fall within an exception to the rule against hearsay? Third, if the hearsay falls within an exception, is the hearsay 'testimonial'? Fourth, if the hearsay is testimonial, has the out-of-court declarant been previously subject to cross-examination *and* is the out-of-court declarant 'unavailable' as a matter of law, such that the testimonial hearsay does not offend the confrontation clause?"

Commonwealth v. Caruso, 476 Mass. 275, 295 n.15 (2017).

(1) Testimonial Versus Nontestimonial; the Primary Purpose Test. The United States Supreme Court and the Supreme Judicial Court use the primary purpose test to determine whether a statement is testimonial or nontestimonial. See Michigan v. Bryant, 562 U.S. 344 (2011); Davis v. Washington, 547 U.S. 813 (2006); Commonwealth v. Celester, 473 Mass. 553, 562–563 (2016); Commonwealth v. Beatrice, 460 Mass. 255 (2011); Commonwealth v. Smith, 460 Mass. 385 (2011); Commonwealth v. Rodriguez, 90 Mass. App. Ct. 315, 321 (2016). The primary purpose test's key analysis is whether the statement is procured with the primary purpose of creating an out-of-court substitute for trial testimony. Commonwealth v. Beatrice, 460 Mass. at 260–262 (holding that statements are testimonial when "the primary purpose . . . is to establish or prove past events potentially relevant to later criminal prosecution"). The primary purpose test is objective, and "the relevant inquiry into the parties' statements and actions is not the subjective or actual purpose

of the particular parties, but the purpose that reasonable participants would have had, as ascertained from the parties' statements and actions and the circumstances in which the encounter occurred." Michigan v. Bryant, 562 U.S. at 360. See Commonwealth v. Cole, 473 Mass. 317, 329–330 (2015) (computer software used to calculate the statistical probability of a DNA match was not testimonial, as program's creator would not anticipate that the probability statistics would be used to prosecute this particular defendant). See also Commonwealth v. Smith, 460 Mass. at 394 ("[T]he 'primary purpose' inquiry [is] objective. The parties' subjective motives or intentions are largely irrelevant."). The United States Supreme Court has noted that under the primary purpose test, "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause." Ohio v. Clark, 135 S. Ct. 2173, 2182 (2015). The following factors are relevant to an analysis under the primary purpose test.

(A) *Whether an Emergency Exists*. In Davis v. Washington, 547 U.S. 813, 822 (2006), the United States Supreme Court held as follows:

> "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

In Michigan v. Bryant, 562 U.S. 344, 363–366 (2011), the Supreme Court held that "whether an emergency exists and is ongoing is a highly context-dependent inquiry" and explained that "'a conversation which begins as an interrogation to determine the need for emergency assistance' can 'evolve into testimonial statements,'" and "[a] conversation that begins with a prosecutorial purpose may nevertheless devolve into nontestimonial statements if an unexpected emergency arises."

In Commonwealth v. Beatrice, 460 Mass. 255, 259–260 (2011), and Commonwealth v. Smith, 460 Mass. 385, 392–393 (2011), both decided after Michigan v. Bryant, the Supreme Judicial Court identified a nonexhaustive list of factors relevant to determining whether an ongoing emergency exists at the time a declarant makes statements to a law enforcement agent:

- whether an armed assailant poses a substantial threat to the public at large, the victim, or the responding officers;
- the type of weapon that has been employed;
- the severity of the victim's injuries;
- the formality of the interrogation;
- the involved parties' statements and actions; and
- whether the victim's safety is at substantial imminent risk.

See Commonwealth v. Beatrice, 460 Mass. at 260–262; Commonwealth v. Smith, 460 Mass. at 393–394. See also Commonwealth v. Middlemiss, 465 Mass. 627, 635–636 (2013) (applying Beatrice factors to statements shooting victim made to 911 operator).

In Michigan v. Bryant, 562 U.S. 344, 366 (2011), the Supreme Court additionally explained that "whether an ongoing emergency exists is simply one factor—[although] an important factor—that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation." "[T]here may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." Id. at 358.

(B) *The Formality of the Statements and the Actions of the Parties Involved*. The formality of an interrogation is an important factor for determining whether a statement was procured with a primary purpose of creating an out-of-court substitute for trial testimony. Michigan v. Bryant, 562 U.S. at 367. In Michigan v. Bryant, 562 U.S. 344 (2011), the United States Supreme Court held that questioning that occurred in an exposed, public area, prior to the arrival of emergency medical services (when the declarant

had been shot in the abdomen and the armed assailant was still at large), and in a disorganized fashion, was informal and "distinguishable from [a] formal station-house interrogation." Id. at 366.

The statements of a declarant and the actions of both the declarant and interrogators also provide objective evidence of the interrogation's primary purpose. Id. at 367. The Supreme Court explained that looking to the content of both the questions and the answers is an important factor in the primary purpose test because both interrogators and declarants may have mixed motives. Id. Police officers' dual responsibilities as both first responders and criminal investigators may lead them to act with different motives simultaneously or in quick succession. Id. Likewise, during an ongoing emergency, victims may make statements they think will help end the threat to their safety but may not envision these statements being used for prosecution. Id. Alternatively, a severely injured victim may lack the ability to have any purpose at all in answering questions. Id. The inquiry is still objective, however, and it focuses on the understanding and purpose of a reasonable victim in the actual victim's circumstances, which prominently include the victim's physical state. Id.

(C) *Whether the Statements Were Made to Non–Law Enforcement Personnel*. In Ohio v. Clark, 135 S. Ct. 2173 (2015), the United States Supreme Court concluded that statements made to non–law enforcement personnel "are much less likely to be testimonial than statements to law enforcement officers." Id. at 2181. The Supreme Judicial Court, by comparison, has stated that although "out-of-court statements made in response to questions from people who are not law enforcement agents" are not "per se testimonial," they are "testimonial in fact" if "a reasonable person in the declarant's position would anticipate the statement's being used against the accused in investigating and prosecuting a crime." Commonwealth v. Gonsalves, 445 Mass. 1, 11–13 (2005), cert. denied, 548 U.S. 926 (2006). See Commonwealth v. Celester, 473 Mass. 553, 563 (2016) (shooting victim's response to bystander's question, "Who shot you?" was not testimonial in fact because of gravity of victim's injuries and immediate threat they posed to him).

"[W]here statements contained in hospital medical records demonstrate, on their face, that they were included for the purpose of medical treatment, that evident purpose renders the statements both nontestimonial as to the author of the record, and as falling within the scope of [G. L. c. 233,] § 79." Commonwealth v. Irene, 462 Mass. 600, 618 (2012).

(2) Records Admitted Without Live Testimony. Many cases since Crawford v. Washington, 541 U.S. 36 (2004), have challenged the admissibility of certificates attested to by nontestifying experts. In Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), the United States Supreme Court held that the reasoning of Crawford applied to certain certificates of analysis that had been frequently introduced in criminal trials to establish that a substance was a "controlled substance" under G. L. c. 94C. The Supreme Court held that a drug certificate in the form of an affidavit by the analyst was a testimonial statement because it was prepared with the knowledge that it would be used at trial, and thus its admission in evidence over the defendant's objection violated the confrontation clause of the Sixth Amendment because the technician or scientist who made the findings set forth in the certificate was not made available for questioning by the defense. As a result, the United States Supreme Court reversed the decision of the Appeals Court in Commonwealth v. Melendez-Diaz, 69 Mass. App. Ct. 1114 (2007) (unpublished), and effectively overruled the decision of the Supreme Judicial Court in Commonwealth v. Verde, 444 Mass. 279, 283–285 (2005). Analytical certificates made under oath by chemists or ballisticians that a substance is a drug, is of a specific weight, or both, or that a thing is a working firearm, "are functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination'" (emphasis deleted). Melendez-Diaz v. Massachusetts, 557 U.S. at 310–311, quoting Davis v. Washington, 547 U.S. 813, 830 (2006). See also Commonwealth v. Brown, 75 Mass. App. Ct. 361, 363 (2009) (applying Melendez-Diaz holding to ballistics certificate).

In Melendez-Diaz v. Massachusetts, 557 U.S. 305, 306–309 (2009), the Supreme Court explicitly rejected the idea that an analyst's testimony was the only way to prove the chemical composition of a substance. In Commonwealth v. MacDonald, 459 Mass. 148 (2011), the Supreme Judicial Court stated as follows:

> "Melendez-Diaz stands for the proposition that if a certificate of drug analysis is used, it must be accompanied by the testimony of an analyst so that the defendant's right to confrontation is preserved. However, nowhere does the decision state that where . . . a prosecutor uses the opinion testimony of an expert to establish the composition of a drug, that testimony requires corroboration. . . . A prosecutor's decision to proceed without a certificate of drug analysis does not violate the holding in Melendez-Diaz."

Id. at 155–156.

In Commonwealth v. Zeininger, 459 Mass. 775 (2011), the Supreme Judicial Court held that statements contained in an annual certification and accompanying diagnostic records, attesting to the proper functioning of a breath-testing machine used to test the defendant's blood alcohol content, were not testimonial, and that the defendant's confrontation rights were not violated by the admission of the certification and records without the live testimony of the technician who had performed the certification test on the machine. Id. at 788–789. The critical distinction that "ma[de] all the difference" was that the certificate of analysis in Melendez-Diaz resembled "the type of 'ex parte in-court testimony or its functional equivalent' at the nucleus of the confrontation clause" because it was particularized and performed in aid of a prosecution seeking to prove the commission of a past act, while the Office of Alcohol Testing certification records were generalized and performed prospectively in primary aid of the administration of a regulatory program. Id., quoting Crawford v. Washington, 541 U.S. 36, 51–52 (2004).

In Bullcoming v. New Mexico, 564 U.S. 647 (2011), the United States Supreme Court decided five to four that a blood alcohol analysis report, which certified that the defendant's blood alcohol concentration was well above the threshold for aggravated driving while intoxicated under New Mexico law, and which was introduced at trial through the testimony of an analyst who had not performed the certification, was testimonial within the meaning of the confrontation clause. The Supreme Court found that the laboratory report in Bullcoming resembled those in Melendez-Diaz "[i]n all material respects." Id. at 664.

In Commonwealth v. Parenteau, 460 Mass. 1 (2011), the Commonwealth introduced in evidence a certificate from the Registry of Motor Vehicles attesting that a notice of license suspension or revocation was mailed to the defendant; the Commonwealth did not present any testimony from a witness on behalf of the registry. The Supreme Judicial Court held that the certificate was testimonial in nature and that its admission without testimony from the preparers violated the confrontation clause. Id. at 8–9. The court explained that one "must examine carefully the purpose for which [a document is] created" when "determining the admissibility of a particular business record." Id. at 10. In Parenteau, the business record was created two months after the criminal complaint was issued and therefore was "plainly" created to establish an element of the statutory offense at trial. Id. at 8. Importantly, the court noted that "[i]f such a record had been created at the time the notice was mailed and preserved by the registry as part of the administration of its regular business affairs, then it would have been admissible at trial." Id. at 10. See also Commonwealth v. Ellis, 79 Mass. App. Ct. 330 (2011).

The admission of a properly completed and returned G. L. c. 209A return of service absent the testimony of the officer who completed it does not violate a defendant's confrontation clause rights. Commonwealth v. Shangkuan, 78 Mass. App. Ct. 827, 833–834, 837 (2011) ("[T]he primary purpose for which the return of service in this case was created is to serve the routine administrative functions of the court system, ensuring that the defendant received the fair notice to which he is statutorily and constitutionally entitled . . . , establishing a time and manner of notice for purposes of determining when the order expires or is subject to renewal, and assuring the plaintiff that the target of the order knows of its existence. The return of service here was not created for the purpose of establishing or proving some fact at a potential future criminal trial."). See also Commonwealth v. Bigley, 85 Mass. App. Ct. 507, 515–516 (2014) (defendant's Registry of Motor Vehicles record may be admitted without testimony as it is an automatically generated list regularly maintained by registry in the administration of its regular business affairs); Commonwealth v. Fox, 81 Mass. App. Ct. 244, 246 (2012) (sexual offender registry records are admissible as business records without violation of confrontation clause because they are not created to prove fact at trial). In Commonwealth v. Carr, 464 Mass. 855, 876 (2013), the Supreme Judicial Court held that a statement by the medical examiner in the death certificate that the victim's death was the result of a

"gunshot wound of the head with fracture of the skull and perforation of the brain" was testimonial based on the obvious purpose for which it will be used in the case of a homicide and the statutory duties of the medical examiner. Id. at 876.

(3) Expert Testimony. In the years since Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), was decided, the United States Supreme Court and the Supreme Judicial Court have considered to what extent that case alters procedures governing the admissibility of expert testimony. That debate is ongoing.

In Commonwealth v. Barbosa, 457 Mass. 773, 785–787 (2010), the Supreme Judicial Court held that Melendez-Diaz does not "purport to alter the rules governing expert testimony" and does not, therefore, forbid one expert from testifying and offering an opinion on the basis of an examination of tests performed and data collected by others, so long as the witness does not testify to the details of the hearsay on direct examination. See also Commonwealth v. Phim, 462 Mass. 470, 479 (2012), and Commonwealth v. Greineder, 458 Mass. 207, 235–239 (2010), vacated and remanded in light of Williams v. Illinois, 567 U.S. 50 (2012).

In Bullcoming v. New Mexico, 564 U.S. 647 (2011), the United States Supreme Court held five to four that admission in evidence of a blood alcohol analysis report, which certified that the defendant's blood alcohol concentration was well above the threshold for aggravated driving while intoxicated under New Mexico law, and which was introduced at trial through the testimony of an analyst who had not performed the certification, violated the confrontation clause. The Supreme Court found that the laboratory report in Bullcoming resembled those in Melendez-Diaz "[i]n all material respects." Id. at 664.

In Commonwealth v. Munoz, 461 Mass. 126, 132 (2011), vacated and remanded in light of Williams v. Illinois, 567 U.S. 50 (2012), the Supreme Judicial Court opined that Bullcoming did not call Barbosa into question. In Munoz, the court affirmed the distinction between a substitute analyst's permissible testimony as to independent opinions based on data generated by a nontestifying analyst and a substitute analyst's impermissible testimony as to the testing analyst's reports and conclusions.

Several days after the decision in Munoz, the United States Supreme Court held five to four that the testimony of a forensic specialist identifying a match between the defendant's blood sample and a DNA sample taken from the victim's vaginal swab was admissible even where the specialist did not work for the outside lab that had produced the DNA sample. Williams v. Illinois, 567 U.S. at 56. Writing for four Justices, Justice Alito found that the specialist's testimony regarding the DNA match was not admitted for its truth, but for the limited purpose of explaining the basis for her own independent expert opinion. Id. at 72. In the opinion of the same four Justices, the underlying DNA report was nontestimonial since it was prepared to catch an unknown rapist who was still at large, not for the primary purpose of accusing a targeted individual. Id. at 84. In a concurrence, Justice Thomas found no confrontation clause violation because the underlying DNA report lacked "the requisite 'formality and solemnity' to be considered 'testimonial' for purposes of the confrontation clause." Id. at 103 (Thomas, J., concurring). In dissent, Justice Kagan, joined by three other Justices, found the DNA report to be precisely the sort of testimonial evidence barred by the decisions in Melendez-Diaz and Bullcoming. Id. at 133–135, 140–141 (Kagan, J., dissenting).

In Commonwealth v. Greineder, 464 Mass. 580, 592–602 (2013), on remand from the United States Supreme Court, the Supreme Judicial Court affirmed its earlier ruling. In that case, the testifying DNA analyst was not the analyst who had performed the tests and written the report on which her opinion testimony was based, although she was the forensic laboratory director of the same company. The court reasoned that Massachusetts evidence law, which permits opinion testimony that is based on data that is hearsay, but prohibits the admission of such a hearsay basis on direct examination of the expert, provides the defendant with more protection than the confrontation clause as interpreted by the United States Supreme Court in Williams v. Illinois, 567 U.S. 50 (2012), especially where, as here, the expert was able to be meaningfully cross-examined on the reliability of the testing procedures that produced the data underlying her opinion.

Two years later, in Commonwealth v. Jones, 472 Mass. 707, 713–715 (2015), the Supreme Judicial Court reversed a conviction based on testimony of a DNA expert as to the location on the victim's body from which the DNA samples had been collected, where the DNA expert's knowledge of how the DNA samples had been gathered was derived from a form completed by the nurse who had collected the specimens from

the victim's body. The court concluded that this violated two principles of Greineder: one, the expert may not testify to hearsay on direct examination, and two, the expert must have the capacity to be meaningfully cross-examined about the reliability of the underlying data.

(b) Confrontation Clause Inapplicable. Under certain conditions, the confrontation clause of the Federal and State Constitutions does not bar the admission of testimonial statements, introduced for purposes other than establishing the truth of the matter asserted, in criminal cases even though the declarant is not available for cross-examination. Commonwealth v. Hurley, 455 Mass. 53, 65 n.12 (2009). See Commonwealth v. Pelletier, 71 Mass. App. Ct. 67, 69–72 (2008) (wife's statement was properly admitted for a limited purpose other than its truth even though she did not testify at the defendant's trial).

(c) Massachusetts Law Versus Federal Law. Based on differences in the language of the Sixth Amendment (defendant's right to be "confronted with the witnesses against him") and Article 12 of the Declaration of Rights (defendant's right to "meet the witnesses against him face to face"), the State Constitution has been interpreted by the Supreme Judicial Court to provide a criminal defendant more protection than the Sixth Amendment in certain respects. Compare Maryland v. Craig, 497 U.S. 836, 844–850 (1990) (confrontation clause does not guarantee criminal defendants an absolute right to a face-to-face meeting with the witnesses against them at trial; upholding constitutionality of a procedure whereby a young child alleged to have been the victim of a sexual assault testified at trial outside the courtroom but was visible to defendant and jury on a monitor), with Commonwealth v. Amirault, 424 Mass. 618, 631–632 (1997) (Article 12 requires that the jury be allowed to assess the encounter between the witness and the defendant with the witness testifying in the face of the defendant; in certain circumstances, however, the encounter between the defendant and the child witness may take place outside the courtroom and be presented at trial by videotape; see G. L. c. 278, § 16D). See also Commonwealth v. Bergstrom, 402 Mass. 534, 541–542 (1988). However, when the question involves the relationship between the hearsay rule and its exceptions, on the one hand, and the right to confrontation, on the other hand, "the protection provided by art. 12 is coextensive with the guarantees of the Sixth Amendment to the United States Constitution." Commonwealth v. DeOliveira, 447 Mass. 56, 57 n.1 (2006), citing Commonwealth v. Whelton, 428 Mass. 24, 28 (1998), and Commonwealth v. Childs, 413 Mass. 252, 260 (1992).

(d) Waiver of Right to Confrontation. The right to confrontation may be waived. See Commonwealth v. Szerlong, 457 Mass. 858, 860–861 (2010) (doctrine of forfeiture by wrongdoing extinguishes right to confrontation); Commonwealth v. Chubbuck, 384 Mass. 746, 751 (1981) (defendant waived right to be present at trial based on persistent disruptive behavior in the courtroom); Commonwealth v. Flemmi, 360 Mass. 693, 694 (1971) (if defendant is voluntarily absent after trial begins, "the court may proceed without the defendant"). See also Mass. R. Crim. P. 18(a)(1) ("If a defendant is present at the beginning of a trial and thereafter absents himself without cause or without leave of court, the trial may proceed to a conclusion in all respects except the imposition of sentence as though the defendant were still present."). A defendant must be competent to plead guilty in order to waive his or her presence at trial. Commonwealth v. L'Abbe, 421 Mass. 262, 268–269 (1995).

Section 801. Definitions

The following definitions apply under this Article:

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that

(1) the declarant does not make while testifying at the current trial or hearing, and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement

(A) (i) is inconsistent with the declarant's testimony; (ii) was made under oath before a grand jury, or at an earlier trial, a probable cause hearing, or a deposition, or in an affidavit made under the penalty of perjury in a G. L. c. 209A proceeding; (iii) was not coerced; and (iv) is more than a mere confirmation or denial of an allegation by the interrogator;

(B) [for a discussion of prior consistent statements, which are not admissible substantively under Massachusetts law, see Section 613(b), Prior Statements of Witnesses, Limited Admissibility: Prior Consistent Statements]; or

(C) identifies a person as someone the declarant perceived earlier.

(2) An Opposing Party's Statement. The statement is offered against an opposing party and

(A) was made by the party;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject, or who was authorized to make true statements on the party's behalf concerning the subject matter;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator or joint venturer during the cooperative effort and in furtherance of its goal, if the existence of the conspiracy or joint venture is shown by evidence independent of the statement.

NOTE

Subsection (a). This subsection is taken from Commonwealth v. Baker, 20 Mass. App. Ct. 926, 928 n.3 (1985), quoting with approval the definition of a "statement" contained in Fed. R. Evid. 801(a) and Proposed Mass. R. Evid. 801(a).

To be hearsay, the statement, whether verbal or nonverbal, must be intended as an assertion. See Bacon v. Charlton, 61 Mass. 581, 586 (1851) (distinguishing between groans and exclamations of pain, which are not hearsay, and anything in the nature of narration or statement). Cf. Commonwealth v. DeJesus, 87 Mass. App. Ct. 198, 201–202 (2015) (checkmarks on photocopies of currency made to indicate a match with bills in defendant's pocket are hearsay when offered to prove the match).

"[C]onduct can serve as a substitute for words, and to the extent it communicates a message, hearsay considerations apply." Commonwealth v. Gonzalez, 443 Mass. 799, 803 (2005). "[O]ut-of-court conduct, which by intent or inference expresses an assertion, has been regarded as a statement and therefore hearsay if offered to prove the truth of the matter asserted. See Bartlett v. Emerson, [73 Mass. 174, 175–176] (1856) (act of pointing out boundary marker inadmissible hearsay)." Opinion of the Justices, 412 Mass. 1201, 1209 (1992) (legislation that would permit the Commonwealth to admit evidence of a person's refusal to take a breathalyzer test violates the privilege against self-incrimination because it reveals the person's thought process and is thus tantamount to an assertion).

***Computer Records*.** For hearsay purposes, whether a computer record contains a statement depends on if the record is "computer-generated," "computer-stored," or a hybrid of both. Commonwealth v. Thissell, 457 Mass. 191, 197 n.13 (2010). Computer-generated records are created solely by the electrical or mechanical operation of a computer. Id. See Commonwealth v. Royal, 89 Mass. App. Ct. 168, 171–172 (2016) (examples include "automated teller machine receipts, log-in records from Internet service providers, and telephone records"). "Because computer-generated records, by definition, do not contain a statement from a person, they do not necessarily implicate hearsay concerns." Commonwealth v. Thissell, 457 Mass. at 197 n.13 (reliability of generative process that created record addressed by rules of authentication). See, e.g., Commonwealth v. Woollam, 478 Mass. 493, 498 (2017) (cellular telephone call logs); Commonwealth v. Perez, 89 Mass. App. Ct. 51, 56 (2016) (automatically generated bank withdrawal records). Conversely, computer-stored records are electronic records generated by humans that are maintained on a computer system. Commonwealth v. Thissell, 457 Mass. at 197 n.13. See Commonwealth v. Royal, 89 Mass. App. Ct. at 171–172 (examples include "electronic mail messages, online posts, and word processing files"). Computer-stored records generally implicate the hearsay rule because these records contain human statements and assertions that have been reduced to electronic form and are merely stored on a computer system. Commonwealth v. Thissell, 457 Mass. at 197 n.13. See, e.g., Commonwealth v. Royal, 89 Mass. App. Ct. at 171–172 (Registry of Motor Vehicle records requiring human action to create and retrieve the records). Hybrid records are comprised of both computer-stored records (containing human statements) and computer-generated data. Commonwealth v. Thissell, 457 Mass. at 197 n.13 (hybrid records may implicate both hearsay and authentication issues).

Subsection (b). This subsection is identical to Fed. R. Evid. 801(b). While no Massachusetts case has defined "declarant," the term has been commonly used in Massachusetts case law to mean a person who makes a statement. See, e.g., Commonwealth v. DeOliveira, 447 Mass. 56, 57–58 (2006); Commonwealth v. Zagranski, 408 Mass. 278, 285 (1990). See also Webster's Third New International Dictionary 586 (2002), which defines "declarant" as a person "who makes a declaration" and "declaration" as "a statement made or testimony given by a witness."

Subsection (c). This subsection is derived from Commonwealth v. Cohen, 412 Mass. 375, 393 (1992), quoting McCormick, Evidence § 246, at 729 (3d ed. 1984), and Fed. R. Evid. 801(c). See Commonwealth v. Cordle, 404 Mass. 733, 743 (1989); Commonwealth v. Randall, 50 Mass. App. Ct. 26, 27 (2000). See also Commonwealth v. Silanskas, 433 Mass. 678, 693 (2001) ("Hearsay is an out-of-court statement offered to prove the truth of the matter asserted."); G.E.B. v. S.R.W., 422 Mass. 158, 168 (1996), quoting Commonwealth v. Keizer, 377 Mass. 264, 269 n.4 (1979) ("Hearsay is an 'extrajudicial statement offered to prove the truth of the matter asserted.'"); Commonwealth v. DelValle, 351 Mass. 489, 491 (1966) ("The broad rule on hearsay evidence interdicts the admission of a statement made out of court which is offered to prove the truth of what it asserted."). If a witness at trial affirms the truth of a statement made out of court, the witness adopts it and it is not hearsay. Commonwealth v. Sanders, 451 Mass. 290, 302 n.8 (2008). Whether the witness has adopted his or her out-of-court statement is a question of fact for the jury and not a preliminary question for the judge. Id. at 302.

"The theory which underlies exclusion is that with the declarant absent the trier of fact is forced to rely upon the declarant's memory, truthfulness, perception, and use of language not subject to cross-examination." Commonwealth v. DelValle, 351 Mass. at 491.

***Evidence Admitted for Nonhearsay Purpose*.** "The hearsay rule forbids only the testimonial use of reported statements." Commonwealth v. Miller, 361 Mass. 644, 659 (1972). Accord Commonwealth v. Fiore, 364 Mass. 819, 824 (1974), quoting Wigmore, Evidence § 1766 (3d ed. 1940) (out-of-court utterances are hearsay only when offered "for a special purpose, namely, as assertions to evidence the truth of the matter asserted"). Thus, when out-of-court statements are offered for a reason other than to prove the truth of the matter asserted or when they have independent legal significance, they are not hearsay. There are many nonhearsay purposes for which out-of-court statements may be offered, such as the following:

- ***Proof of "Verbal Acts" or "Operative" Words*.** See Commonwealth v. McLaughlin, 431 Mass. 241, 246 (2000) ("[e]vidence of the terms of that oral agreement was not offered for the truth of the matters asserted, but as proof of an 'operative' statement, i.e., existence of a conspiracy"); Charette v. Burke, 300 Mass. 278, 280–281 (1938) (father's remark to a child before leaving the child to go into the house ["Wait where you are while I go inside to get you a cookie"] was a "verbal act" and not hearsay); Commonwealth v. Perez, 89 Mass. App. Ct. 51, 55–56 (2016) (withdrawal and deposit slips used by defendant accused of theft from customer bank accounts were legally operative verbal acts and not hearsay); Shimer v. Foley, Hoag & Eliot, LLP, 59 Mass. App. Ct. 302, 310 (2003) (evidence of the terms of a contract used to establish lost profits is not hearsay because it is not an assertion).
- ***To Show Notice or Other Effect on Hearer*.** See Commonwealth v. Santana, 477 Mass. 610, 621–622 (2017) (interrogating police officer's statement that he had information that defendant had been inside apartment where murder was committed admissible to "contextualize" defendant's "arguably exculpatory" statement that he had been just outside apartment, thus avoiding improper suggestion that defendant had gratuitously placed himself at murder scene); Commonwealth v. Spinucci, 472 Mass. 872, 882–883 (2015) (statements made within defendant's earshot, indicating codefendant's possession of a knife, were not hearsay when offered to show defendant's knowledge that codefendant had a knife); Pardo v. General Hosp. Corp., 446 Mass. 1, 18–19 (2006) (memorandum admissible to show notice); A.W. Chesterton Co. v. Massachusetts Insurers Insolvency Fund, 445 Mass. 502, 515–516 (2005) (knowledge of insurance reserves not listed in response to question on insurance application regarding potential losses); Commonwealth v. Bregoli, 431 Mass. 265, 273 (2000) (other declarants' knowledge of facts relating to crime to rebut Commonwealth's claim that only killer would be aware of facts); Vassallo v. Baxter Healthcare Corp., 428 Mass. 1, 17 (1998) (other complaints about product admissible as evidence that manufacturer was on notice of defect); Mailhiot v. Liberty Bank & Trust Co., 24 Mass. App. Ct. 525, 529 n.5 (1987) (instructions given to the plaintiff by bank examiners about how to handle a problem were not assertions and thus not hearsay). Cf. Commonwealth v. Daley, 55 Mass. App. Ct. 88, 94 n.9 (2002) (a passerby's remark ["Hey, are you all right?"], if offered as an assertion that the victim was in distress, would be hearsay, but if offered to explain why the defendant fled, and thus not as an assertion, would not be hearsay), S.C., 439 Mass. 558 (2003).
- ***To Show "the State of Police Knowledge."*** Out-of-court statements to a police investigator may sometimes be admitted for the nonhearsay purpose of showing "the state of police knowledge," because "an arresting or investigating officer should not be put in the false position of seeming just to have happened upon the scene; he should be allowed some explanation of his presence and conduct." Commonwealth v. Cohen, 412 Mass. 375, 393 (1992). See Commonwealth v. Miller, 361 Mass. 644, 659 (1972) (out-of-court statements are admissible when offered to explain why police approached defendant to avoid misimpression that police acted arbitrarily in singling out defendant for investigation). However, "[t]estimony of this kind carries a high probability of misuse, because a witness may relate historical aspects of the case, replete with hearsay statements in the form of complaints and reports[,] even when not necessary to show state of police knowledge" (quotation omitted). Commonwealth v. Rosario, 430 Mass. 505, 510 (1999). Such evidence, therefore, (1) is permitted only through the testimony of a police officer, who must testify only on the basis of his or her own knowledge; (2) is limited to the facts required to establish the officer's state of knowledge; (3) is allowed only when the police action

or state of police knowledge is relevant to an issue in the case. Commonwealth v. Sullivan, 478 Mass. 369, 376 (2017). Cross-Reference: Section 105, Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes.

– ***As Circumstantial Evidence of Declarant's State of Mind.*** Where the declarant asserts his or her own state of mind (usually by words describing the state of mind), the statement is hearsay and is admissible only if it falls within the hearsay exception. See Section 803(3)(B), Hearsay Exceptions; Availability of Declarant Immaterial: Then-Existing Mental, Emotional, or Physical Condition, and the accompanying note. However, when the statement conveys the speaker's state of mind only circumstantially (usually because the words themselves do not describe the state of mind directly), it is not hearsay. See, e.g., Commonwealth v. Romero, 464 Mass. 648, 652 n.5 (2013) (defendant's statement that passenger in his vehicle had shown him a gun was admissible to show defendant's knowledge that gun was in car, as well as being admission of a party-opponent); Commonwealth v. Montanez, 439 Mass. 441, 447–448 (2003) (evidence of victim's statement to her friend was properly admitted to establish victim's state of mind [concern for her family's shame and diminished economic circumstances if abuser were removed from her home], which helped explain her delay in reporting an episode of sexual abuse and thus was not hearsay). Contrast Section 803(3)(B)(ii), Hearsay Exceptions; Availability of Declarant Immaterial: Then-Existing Mental, Emotional, or Physical Condition.

– ***As Circumstantial Evidence of the Nature of a Place or a Thing.*** Sometimes out-of-court statements that do not directly describe the nature or character of a place or an object can nevertheless be probative of that nature or character. In such cases, the statements are treated as nonhearsay. See, e.g., Commonwealth v. Massod, 350 Mass. 745, 748 (1996) (statements over telephone not hearsay when used to show that telephone was apparatus used for registering bets on horse races); Commonwealth v. DePina, 75 Mass. App. Ct. 842, 850 (2009) (conversation of police officer on defendant's cellular telephone was admissible as evidence of nature of the cellular telephone as instrument used in cocaine distribution); Commonwealth v. Washington, 39 Mass. App. Ct. 195, 199–201 (1995) (conversations of police officer with callers to defendant's beeper not hearsay when used to show that beeper was used for drug transactions). See also Commonwealth v. Purdy, 459 Mass. 442, 452 (2011) (words soliciting sexual act have independent legal significance and are not hearsay); Commonwealth v. Mullane, 445 Mass. 702, 711 (2006) (portion of conversation regarding negotiation for "extras" between police detective and "massage therapist" were not hearsay).

Prior Statements Used to Impeach or Rehabilitate. Ordinarily, the out-of-court statements of a testifying witness are hearsay if they are offered to prove the truth of the statement. Prior inconsistent statements are usually admissible only for the limited purpose of impeaching the credibility of the witness. But see Subsection (d)(1)(A) and the accompanying note. A witness's prior consistent statements are not admissible substantively under Massachusetts law, but they may be admissible for certain other purposes. See for example Section 413, First Complaint of Sexual Assault, and Section 613(b), Prior Statements of Witnesses, Limited Admissibility: Prior Consistent Statements. Cross-Reference: Section 105, Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes.

Nonverbal Conduct Excluded as Hearsay. See Commonwealth v. Todd, 394 Mass. 791, 797 (1985) (explaining that the destruction of her marriage license could be considered "an extrajudicial, nonverbal assertion of the victim's intent which, if introduced for the truth of the matter asserted, would be, on its face, objectionable as hearsay"); Bartlett v. Emerson, 73 Mass. 174, 175–176 (1856) (testimony about another person's act of pointing out a boundary marker was an assertion of a fact and thus inadmissible as hearsay); Commonwealth v. Ramirez, 55 Mass. App. Ct. 224, 227 (2002) (a business card offered to establish a connection between the defendant and a New York address on the card was hearsay because it was used as an assertion of a fact); Commonwealth v. Kirk, 39 Mass. App. Ct. 225, 229–230 (1995) (conduct of a police officer who served a restraining order on the defendant offered to establish the identity of that person as the perpetrator was hearsay because its probative value depended on the truth of an assertion made in the papers by the victim that the defendant was the same person named in the complaint).

When an out-of-court statement is offered for a nonhearsay purpose, after considering the effectiveness of a Section 105 limiting instruction it is necessary to weigh the risk of unfair prejudice that would likely result if the jury misused the statement. See Section 403, Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reason. In criminal cases, that risk can have confrontation clause implications.

Cross-Reference: Section 105, Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes; Section 803(3)(B)(ii), Hearsay Exceptions; Availability of Declarant Immaterial: Then-Existing Mental, Emotional, or Physical Condition.

Subsection (d). This subsection addresses out-of-court statements that are admissible for their truth. Section 613, Prior Statements of Witnesses, Limited Admissibility, addresses prior statements for the limited purposes only of impeachment and rehabilitation.

Subsection (d)(1)(A). Massachusetts generally adheres to the orthodox rule that prior inconsistent statements are admissible only for the limited purpose of impeaching the credibility of a witness's testimony at trial and are inadmissible hearsay when offered to establish the truth of the matters asserted. See Section 613(a)(1), Prior Statements of Witnesses, Limited Admissibility: Prior Inconsistent Statements: Examining Own Witness, and Section 613(a)(2), Prior Statements of Witnesses, Limited Admissibility: Prior Inconsistent Statements: Examining Other Witness. However, in Commonwealth v. Daye, 393 Mass. 55, 66 (1984), the Supreme Judicial Court adopted the principles of Proposed Mass. R. Evid. 801(d)(1)(A) allowing prior inconsistent statements made before a grand jury to be admitted substantively. The Daye rule has been extended to cover prior inconsistent statements made in other proceedings as well. See Commonwealth v. Sineiro, 432 Mass. 735 (2000) (probable cause hearings); Commonwealth v. Newman, 69 Mass. App. Ct. 495 (2007) (testimony given at an accomplice's trial). Commonwealth v. Ragland, 72 Mass. App. Ct. 815, 823 n.9 (2008), made it clear in dicta that the same principles would apply to admission of prior inconsistent deposition evidence given under oath. See also Commonwealth v. Belmer, 78 Mass. App. Ct. 62, 64 (2010) (prior inconsistent statement may be admissible for its full probative value where the witness has signed a written affidavit under penalties of perjury in support of an application for a restraining order pursuant to G. L. c. 209A and that witness is subject to cross-examination).

Two general requirements for the substantive use of such statements are (1) that there is an opportunity to cross-examine the declarant and (2) that the prior testimony was in the declarant's own words and was not coerced. In addition, if the prior inconsistent statement is relied on to establish an essential element of a crime, the Commonwealth must offer at least some additional evidence on that element in order to support a conclusion of guilt beyond a reasonable doubt. Commonwealth v. Daye, 393 Mass. at 73–75. However, the additional evidence need not be sufficient in itself to establish the element. Commonwealth v. Noble, 417 Mass. 341, 345 & n.3 (1994). The corroboration requirement thus concerns the sufficiency of the evidence, not its admissibility. Commonwealth v. McGhee, 472 Mass. 405, 422–423 (2015); Commonwealth v. Clements, 436 Mass. 190, 193 (2002).

***Feigning Lack of Memory*.** Prior statements included in Section 801(d)(1)(A) may be admitted substantively against a witness as inconsistent with a claimed lack of memory if that witness is available for cross-examination and subject to the requirements of this subsection, Section 801(d)(1)(A), provided the trial judge follows the requirements set forth in Commonwealth v. Daye, 393 Mass. 55, 73–74 (1984), and Commonwealth v. Sineiro, 432 Mass. 735, 745 & n.12 (2000). Before admitting such testimony, the judge must make preliminary findings of fact that (1) the witness is in fact feigning lack of memory, (2) the testimony was not coerced, and (3) the testimony was in the witness's own words and is more than a mere confirmation or denial of an allegation by the interrogator. Commonwealth v. DePina, 476 Mass. 614, 620–621 (2017). See Commonwealth v. Evans, 439 Mass. 184, 190 (2003); Commonwealth v. Silvester, 89 Mass. App. Ct. 350, 355–356 (2016). At a party's request, the judge may conduct a voir dire to make these findings. Commonwealth v. Sineiro, 432 Mass. at 739. A trial judge's findings are "entitled to substantial deference and are 'conclusive as long as . . . supported by the evidence.'" Commonwealth v. DePina, 476 Mass. at 621, quoting Commonwealth v. Maldonado, 466 Mass. 742, 756, cert. denied, 134 S. Ct. 2312 (2014), quoting Commonwealth v. Sineiro, 432 Mass. at 742 n.6. "[W]here grand jury testimony relates to

an essential element of the offense, the Commonwealth must offer corroborative evidence, in addition to that testimony, in order to sustain a conviction." Id. at 621 n.5 (corroboration requirement "goes to the sufficiency of the evidence rather than to its admissibility"). A judge's finding of witness feigning is often based on a careful examination of the witness's demeanor and testimony in light of the judge's experience. See Commonwealth v. Sineiro, 432 Mass. at 740; Commonwealth v. Newman, 69 Mass. App. Ct. 495, 497 (2007). See, e.g., Commonwealth v. Figueroa, 451 Mass. 566, 573–574, 576–577 (2008) (judge concluded that witness was feigning when he was able to recall many specific events of the evening in question but was unable to recall the portion of his grand jury testimony in which he said the defendant admitted to shooting someone, and a transcript failed to refresh his memory); Commonwealth v. Tiexeira, 29 Mass. App. Ct. 200, 204 (1990) (judge observed how the witness's detailed account of the evening was conspicuously vague regarding the defendant's encounter with the victim). Regardless of the judge's conclusion at voir dire, the jury shall not be told of the judge's preliminary determination that the witness is feigning. Commonwealth v. Sineiro, 432 Mass. at 742 n.6.

"Where a witness testifies at trial and is cross-examined, any limitation on the effectiveness or substance of that cross-examination stemming from feigned memory loss generally does not implicate the confrontation clause." Commonwealth v. DePina, 476 Mass. at 622. See also Commonwealth v. Stewart, 454 Mass. 527, 533 (2009) (genuine total loss of memory preventing cross-examination may preclude admission of grand jury testimony).

Cross-Reference: Introductory Note (a) to Article VIII, Hearsay.

Subsection (d)(1)(B). In Commonwealth v. Cruz, 53 Mass. App. Ct. 393, 401 & n.10 (2001), the Appeals Court noted that the Supreme Judicial Court has not adopted Proposed Mass. R. Evid. 801(d)(1)(B) as to the admission of prior consistent statements as substantive evidence, rather than merely for the purpose of rehabilitating the credibility of a witness-declarant who has been impeached on the ground that his or her trial testimony is of recent contrivance. See also Commonwealth v. Thomas, 429 Mass. 146, 161–162 (1999) (prior consistent statement admissible to rebut suggestion of recent contrivance); Commonwealth v. Kater, 409 Mass. 433, 448 (1991) ("prior consistent statements of a witness may be admitted where the opponent has raised a claim or inference of recent contrivance, undue influence, or bias"); Commonwealth v. Zukoski, 370 Mass. 23, 26–27 (1976) ("[A] witness's prior consistent statement is admissible where a claim is made that the witness's in-court statement is of recent contrivance or is the product of particular inducements or bias. . . . Unless admissible on some other ground to prove the truth of the facts asserted, such a prior consistent statement is admissible only to show that the witness's in-court testimony is not the product of the asserted inducement or bias or is not recently contrived as claimed").

Cross-Reference: Section 413, First Complaint of Sexual Assault.

Subsection (d)(1)(C). This subsection is derived from Commonwealth v. Cong Duc Le, 444 Mass. 431, 432, 436–437 (2005), where the Supreme Judicial Court "adopt[ed] the modern interpretation of the rule" expressed in Proposed Mass. R. Evid. 801(d)(1)(C), which, like its Federal counterpart, states that "[a] statement is not hearsay . . . if '[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person [made] after perceiving [the person].'" It is not necessary that the declarant make an in-court identification. See Commonwealth v. Machorro, 72 Mass. App. Ct. 377, 379–380 (2008) (police officer allowed to testify to extrajudicial identification of the assailant by two victims who were present at trial and subject to cross-examination even though one victim could not identify the assailant [although she recalled being present at his arrest and was certain that the person arrested was the assailant] and the other victim was not asked to make an identification at trial). The third party's testimony about the identification may not be admitted until after the Commonwealth has questioned the eyewitness about the identification. Commonwealth v. Herndon, 475 Mass. 324, 335 (2016). This subsection applies to an out-of-court identification based on a witness's familiarity with the person identified and is not limited to a photographic array, showup, or other identification procedure. Commonwealth v. Adams, 458 Mass. 766, 770–776 (2011). Multiple versions of an extrajudicial identification may be admissible for substantive purposes. Id. at 773.

Under this subsection, whether and to what extent third-party testimony about a witness's out-of-court identification may be admitted in evidence no longer turns on whether the identifying witness acknowledges or denies the extrajudicial identification at trial. See Commonwealth v. Cong Duc Le, 444 Mass. at 439–440. The third-party testimony will be admitted for substantive purposes as long as the cross-examination requirement is satisfied. Id. As the court explained, it is for the jury to "determine whose version to believe—the witness who claims not to remember or disavows the prior identification (including that witness's version of what transpired during the identification procedure), or the observer who testifies that the witness made a particular prior identification." Id. at 440. The court concluded that

> "evidence of the prior identification will be considered along with all the other evidence that bears on the issue of the perpetrator's identity. The mere fact that the prior identification is disputed in some manner does not make it unhelpful to the jury in evaluating the over-all evidence as to whether the defendant on trial was the one who committed the charged offense."

Id. See also Commonwealth v. Silvester, 89 Mass. App. Ct. 350, 357 (2016) (admission of videotape of witness selecting photograph of defendant from photo array did not violate defendant's confrontation rights where witness was available for cross-examination).

Cross-Reference: Section 1112(d), Eyewitness Identification: Testimony of Third-Party Observer.

***Facts Accompanying an Identification*.** In Commonwealth v. Adams, 458 Mass. 766, 772 (2011), the Supreme Judicial Court held as follows:

> "Absent context, an act or statement of identification is meaningless. . . . [I]dentification evidence must be accompanied either by some form of accusation relevant to the issue before the court, or some form of exclusionary statement, in order to be relevant to the case. The extent of the statement needed to provide context will vary from case to case . . . . We emphasize that the rule [is] not intended to render a witness's entire statement admissible but only so much as comprises relevant evidence on the issue of identification."

This issue should be the subject of a motion in limine. See also Commonwealth v. Walker, 460 Mass. 590, 608–609 (2011).

Cross-Reference: Section 1112, Eyewitness Identification.

Subsection (d)(2). This subsection defines admissions by a party-opponent as not hearsay, consistent with recent Supreme Judicial Court decisions, the Federal Rules of Evidence, and the Proposed Massachusetts Rules of Evidence. See Commonwealth v. Mendes, 441 Mass. 459, 467 (2004); Commonwealth v. Allison, 434 Mass. 670, 676 n.5 (2001); Commonwealth v. DiMonte, 427 Mass. 233, 243 (1998), citing Proposed Mass. R. Evid. 801(d)(2); Fed. R. Evid. 801(d)(2); Proposed Mass. R. Evid. 801(d)(2). In some cases, the court has ruled that out-of-court statements by a party-opponent are admissible as an exception to the hearsay rule. See Commonwealth v. DeBrosky, 363 Mass. 718, 724 (1973); Commonwealth v. McKay, 67 Mass. App. Ct. 396, 403 n.13 (2006).

Subsection (d)(2)(A). This subsection is derived from Commonwealth v. Marshall, 434 Mass. 358, 365–366 (2001), quoting P.J. Liacos, Massachusetts Evidence § 8.8.1 (7th ed. 1999). See also Commonwealth v. McCowen, 458 Mass. 461, 485–486 (2010) (defendant's out-of-court statement offered for its truth is hearsay and not admissible when not offered by the Commonwealth); Care & Protection of Sophie, 449 Mass. 100, 110 n.14 (2007) (no requirement that the statement of a party-opponent be contradictory or against the party-opponent's interest); Commonwealth v. Bonomi, 335 Mass. 327, 347 (1957) ("An admission in a criminal case is a statement by the accused, direct or implied, of facts pertinent to the issue, which although insufficient in itself to warrant a conviction tends in connection with proof of other facts to establish his guilt"); Hopkins v. Medeiros, 48 Mass. App. Ct. 600, 613 (2000) ("The evidence of [the defendant's] admission to sufficient facts was admissible as an admission of a party opponent."); Section 410, Pleas, Offers of Pleas, and Related Statements. Compare Commonwealth v. Nawn, 394 Mass. 1, 4 (1985) (The

"longstanding rule [is] that if a defendant is charged with a crime and unequivocally denies it, that denial is not admissible in evidence."), with Commonwealth v. Lavalley, 410 Mass. 641, 649 (1991) ("It is well-settled that false statements made by a defendant are admissible to show consciousness of guilt."). In Lavalley, the Supreme Judicial Court stated that the Commonwealth could show that a defendant's failure to include certain facts in his pretrial statement to the police that the defendant included in his testimony at trial was evidence of his consciousness of guilt and did not amount to an impermissible comment on his denial or failure to deny the offense. Id. at 649–650. See also Commonwealth v. Lewis, 465 Mass. 119, 127 (2013) (when the defendant's statement is ambiguous but could be construed as consciousness of guilt ["I'll beat this"], it is admissible, and it is left to the parties to argue what meaning it should be given). However, if an extrajudicial statement of the defendant is an unequivocal denial of an accusation, that statement and the accusation it denies are inadmissible as hearsay. Commonwealth v. Spencer, 465 Mass. 32, 46 (2013).

While a discussion of the constitutional and common-law principles governing the admissibility of confessions is beyond the scope of this Guide, the law is that a statement, admission, or confession by a person is not admissible in a criminal proceeding if it was not made voluntarily. See, e.g., Commonwealth v. Cryer, 426 Mass. 562, 571 (1998); Commonwealth v. Tavares, 385 Mass. 140, 146 (1982); Commonwealth v. Mahnke, 368 Mass. 662, 679–691 (1975).

Under this subsection, deposition answers by an opposing party, Mass. R. Civ. P. 32(a)(2), interrogatory answers by an opposing party, G. L. c. 231, § 89, and responses to requests for admission of facts, Mass. R. Civ. P. 36(b), are not subject to a hearsay objection. See Federico v. Ford Motor Co., 67 Mass. App. Ct. 454, 460–461 (2006); Beaupre v. Cliff Smith & Assocs., 50 Mass. App. Ct. 480, 484 n.8 (2000).

The use of deposition testimony at a trial or hearing is governed by Mass. R. Civ. P. 32, which incorporates various principles set forth in Article VIII of this Guide. Thus, the deposition of an adverse party or the party's agent may be used by the opponent for any permissible purpose. A deposition may be used for impeachment of any witness who testifies at trial. Rule 32(a)(3) also permits the use of deposition testimony in several enumerated situations where the witness is unavailable. Rule 32(a)(4) allows the trial judge to permit the use of deposition testimony in "exceptional circumstances." An audiovisual deposition may be used in the same manner as a stenographic deposition. Mass. R. Civ. P. 30A(i).

Rule 30A(m) of the Massachusetts Rules of Civil Procedure establishes a special procedure for recording the testimony of a party's treating physician or expert witness by audiovisual means. An audiovisual deposition taken under this rule is admissible without regard to the availability of the witness at trial. Mass. R. Civ. P. 30A(m)(5).

***Criminal Cases*.** The principle that the admission of a party-opponent, without more, is admissible is superseded by the requirements of the confrontation clause:

> "[W]here a nontestifying codefendant's statement expressly implicates the defendant, leaving no doubt that it would prove to be powerfully incriminating, the confrontation clause of the Sixth Amendment to the United States Constitution has been offended, notwithstanding any limiting instruction by the judge that the jury may consider the statement only against the codefendant."

Commonwealth v. Vallejo, 455 Mass. 72, 83 (2009) (discussing Bruton v. United States, 391 U.S. 123 [1968]). See also Commonwealth v. Resende, 476 Mass. 141, 150 (2017) ("Where a nontestifying codefendant's statement does not inculpate a defendant directly, but does inculpate the defendant when combined with other evidence, a limiting instruction [that the statement may not be used as evidence against the defendant] may be sufficient to cure the prejudice."); Commonwealth v. Vasquez, 462 Mass. 827, 842–844 (2012) (statement made by nontestifying defendant to police admissible where statement did not expressly or "obviously" refer directly to defendant).

Subsection (d)(2)(B). This subsection is taken verbatim from Fed. R. Evid. 801(d)(2)(B) and is consistent with Massachusetts law. See also Proposed Mass. R. Evid. 801(d)(2)(B). "Where a party is confronted with an accusatory statement which, under the circumstances, a reasonable person would challenge, and the party remains silent or responds equivocally, the accusation and the reply may be admissible on the theory

that the party's response amounts to an admission of the truth of the accusation." Commonwealth v. MacKenzie, 413 Mass. 498, 506 (1992). Accord Commonwealth v. Braley, 449 Mass. 316, 320–321 (2007); Zucco v. Kane, 439 Mass. 503, 507–508 (2003); Commonwealth v. Silanskas, 433 Mass. 678, 694 (2001). This is commonly referred to as an "adoptive admission."

Admission by Silence. For an admission by silence to be admissible it must be apparent that the party has heard and understood the statement, had an opportunity to respond, and the context was one in which the party would have been expected to respond. Commonwealth v. Olszewski, 416 Mass. 707, 719 (1993), cert. denied, 513 U.S. 835 (1994). See Commonwealth v. DePina, 476 Mass. 614, 624 (2017); Leone v. Doran, 363 Mass. 1, 16, modified on other grounds, 363 Mass. 886 (1973). "Because silence may mean something other than agreement or acknowledgment of guilt (it may mean inattention or perplexity, for instance), evidence of adoptive admissions by silence must be received and applied with caution." Commonwealth v. Babbitt, 430 Mass. 700, 705 (2000). See generally Commonwealth v. Nickerson, 386 Mass. 54, 61 n.6 (1982) (cautioning against use of a defendant's prearrest silence to show consciousness of guilt and indicating such evidence is admissible only in "unusual circumstances"). Accordingly, adoption by silence can be imputed to a defendant only for statements that "clearly would have produced a reply or denial on the part of an innocent person." Commonwealth v. Brown, 394 Mass. 510, 515 (1985).

> "No admission by silence may be inferred, however, if the statement is made after the accused has been placed under arrest[, see Commonwealth v. Kenney, 53 Mass. 235, 238 (1847); Commonwealth v. Morrison, 1 Mass. App. Ct. 632, 634 (1973); Commonwealth v. Cohen, 6 Mass. App. Ct. 653, 657 (1978)], after the police have read him his Miranda rights[, see Commonwealth v. Rembiszewski, 363 Mass. 311, 316 (1973)], or after he has been so significantly deprived of his freedom that he is, in effect, in police custody[, see Commonwealth v. Corridori, 11 Mass. App. Ct. 469, 480 (1981)]."

Commonwealth v. Stevenson, 46 Mass. App. Ct. 506, 510 (1999), quoting Commonwealth v. Ferrara, 31 Mass. App. Ct. 648, 652 (1991).

Admission by Conduct. "An admission may be implied from conduct as well as from words." Commonwealth v. Bonomi, 335 Mass. 327, 348 (1957). For instance,

> "[a]ctions and statements that indicate consciousness of guilt on the part of the defendant are admissible and together with other evidence, may be sufficient to prove guilt. . . . [T]his theory usually has been applied to cases where a defendant runs away . . . or makes intentionally false and misleading statements to police . . . or makes threats against key witnesses for the prosecution . . . ."

Commonwealth v. Montecalvo, 367 Mass. 46, 52 (1975). See also Olofson v. Kilgallon, 362 Mass. 803, 806 (1973), citing Hall v. Shain, 291 Mass. 506, 512–513 (1935). For a thorough discussion of the evidentiary and constitutional issues surrounding the use of a defendant's prearrest silence or conduct to establish consciousness of guilt, see Commonwealth v. Irwin, 72 Mass. App. Ct. 643, 648–656 (2008). "[A] judge should instruct the jury [1] that they are not to convict a defendant on the basis of evidence of [conduct] alone, and [2] that they may, but need not, consider such evidence as one of the factors tending to prove the guilt of the defendant" (citation omitted). Commonwealth v. Toney, 385 Mass. 575, 585 (1982).

Subsection (d)(2)(C). This subsection is derived from Sacks v. Martin Equip. Co., 333 Mass. 274, 279–280 (1955).

This subsection covers the admissibility of statements by an agent who has been authorized by the principal to speak on his behalf. See Simonoko v. Stop & Shop, Inc., 376 Mass. 929, 929 (1978) (concluding there was no showing of the manager's authority to speak for the defendant). Contrast Subsection (d)(2)(D), which deals with statements of agents.

Subsection (d)(2)(D). This subsection is derived from Ruszcyk v. Secretary of Pub. Safety, 401 Mass. 418, 420–423 (1988), in which the Supreme Judicial Court adopted Proposed Mass. R. Evid. 801(d)(2)(D). Under

some circumstances, inconsistent statements by a prosecutor at successive trials may be admissible as admissions of a party-opponent. See Commonwealth v. Keo, 467 Mass. 25, 33 n.21 (2014).

To determine whether a statement qualifies as a vicarious admission, the judge first must decide as a preliminary question of fact whether the declarant was authorized to act on the matters about which he or she spoke. See Herson v. New Boston Garden Corp., 40 Mass. App. Ct. 779, 791 (1996). If the judge finds that the declarant was so authorized, the judge must then decide whether the probative value of the statement was substantially outweighed by its potential for unfair prejudice. Id. In so doing,

> "the judge should consider the credibility of the witness; the proponent's need for the evidence, e.g., whether the declarant is available to testify; and the reliability of the evidence offered, including consideration of whether the statement was made on firsthand knowledge and of any other circumstances bearing on the credibility of the declarant. Ruszcyk v. Secretary of Pub. Safety, [401 Mass.] at 422–423" (footnote and quotation omitted).

Thorell v. ADAP, Inc., 58 Mass. App. Ct. 334, 339–340 (2003). The out-of-court statements of the agent are hearsay and thus inadmissible for the purpose of proving the existence of the agency; however, the agency may be shown through the agent's testimony at trial. Campbell v. Olender, 27 Mass. App. Ct. 1197, 1198 (1989).

Subsection (d)(2)(E). This subsection is derived from Commonwealth v. Bongarzone, 390 Mass. 326, 340 (1983), which relied on Proposed Mass. R. Evid. 801(d)(2)(E) and the identical Fed. R. Evid. 801(d)(2)(E). See also Commonwealth v. Rakes, 478 Mass. 22, 38–43 (2017); Commonwealth v. Carriere, 470 Mass. 1, 10 (2014).

> "This exception to the rule against hearsay is premised on a belief that '[t]he community of activities and interests which exists among the coventurers during the enterprise tends in some degree to assure that their statements about one another will be minimally reliable.' Commonwealth v. White, 370 Mass. [703], 712 [(1976)]."

Commonwealth v. Bongarzone, 390 Mass. at 340.

"[A] statement made by a coconspirator or joint venturer may be admitted for its truth against the other coconspirators or joint venturers." Commonwealth v. Mattier, 474 Mass. 261, 276–277 (2016). Before admitting such evidence, a judge "must find, by a preponderance of the evidence, the existence of a joint venture independent of the statement being offered." Commonwealth v. Holley, 478 Mass. 508, 534–535 (2017). "This determination permits the statement to be placed in front of the jury, but does not suffice for the jury to consider it as bearing on the defendant's guilt." Commonwealth v. Rakes, 478 Mass. 22, 37 (2017). Instead, before they consider the statement for such purpose, "the jury must make their own independent determination, again based on a preponderance of the evidence other than the statement itself, that a joint venture existed and that the statement was made in furtherance thereof" (quotation omitted). Commonwealth v. Holley, 478 Mass. at 534. "Alternatively, the statement may be admitted provisionally, subject to a motion to strike should the evidence presented . . . fail to establish the existence of a joint venture." Commonwealth v. Rakes, 478 Mass. at 37 n.11. A statement otherwise inadmissible under the joint venture exception may be admissible for nonhearsay purposes. Commonwealth v. Brown, 474 Mass. 576, 587–588 (2016) (statement may serve as "foundation for later showing, through other admissible evidence," that defendant's statements were false).

Statements probative of a declarant's intent to enter into a joint venture are admissible under the joint venture exception even if the joint venture has not yet begun. Commonwealth v. Rakes, 478 Mass. at 39. Statements made after completion of a crime may be admissible if made in an effort to conceal a crime, even if made years after the crime. Commonwealth v. Winquist, 474 Mass. 517, 522–524 (2016). This exception extends to situations where "the joint venturers are acting to conceal the crime that formed the basis of the criminal enterprise," Commonwealth v. Ali, 43 Mass. App. Ct. 549, 561 (1997), quoting Commonwealth v. Angiulo, 415 Mass. 502, 519 (1993), but it "does not apply after the criminal enterprise has ended, as where a joint venturer has been apprehended and imprisoned." Commonwealth v. Colon-Cruz,

408 Mass. 533, 543 (1990). Cf. Commonwealth v. Rakes, 478 Mass. at 41–42 (statement made by incarcerated coventurer approximately fifteen years after commission of the crime deemed admissible because it demonstrated that joint venturers "remained actively engaged in an effort to conceal their . . . crimes"). Thus, a confession or admission of a coconspirator or joint venturer made after the termination of the conspiracy or joint venture is not admissible as a vicarious statement of another member of the conspiracy or joint venture. Commonwealth v. Bongarzone, 390 Mass. 326, 340 n.11 (1983), citing Commonwealth v. White, 370 Mass. 703, 708–712 (1976). Cf. Commonwealth v. Leach, 73 Mass. App. Ct. 758, 766 (2009) (although statements made by codefendants occurred after they were in custody, statements were made shortly after crime and for purpose of concealing crime and thus became admissible against each defendant).

Section 802. The Rule Against Hearsay

Hearsay is not admissible unless any of the following provides otherwise:

(a) case law,

(b) a statute, or

(c) a rule prescribed by the Supreme Judicial Court.

NOTE

This section is derived from Commonwealth v. Markvart, 437 Mass. 331, 335 (2002) ("hearsay not otherwise admissible under the rules of evidence is inadmissible at the trial . . . unless specifically made admissible by statute"). There is no "innominate" or catchall exception to the hearsay rule in Massachusetts whereby hearsay may be admitted on an ad hoc basis provided that there are circumstantial guarantees of trustworthiness. See Commonwealth v. Pope, 397 Mass. 275, 281–282 (1986); Commonwealth v. Meech, 380 Mass. 490, 497 (1980); Commonwealth v. White, 370 Mass. 703, 713 (1976). Contrast Fed. R. Evid. 807.

In addition to exceptions established by case law, several Massachusetts statutes and rules provide exceptions to the rule against hearsay, including, but not limited to the following:

G. L. c. 79, § 35 (assessed valuation of real estate);

G. L. c. 111, § 195 (certain lead inspection reports);

G. L. c. 119, § 24 (court investigation reports);

G. L. c. 119, §§ 51A, 51B (Department of Children and Families reports);

G. L. c. 123A, §§ 6A, 9 (sexually dangerous person statute);

G. L. c. 152, §§ 20A, 20B (medical reports);

G. L. c. 175, § 4(7) (report of Commissioner of Insurance);

G. L. c. 185C, § 21 (housing inspection report);

G. L. c. 233, § 65 (declaration of deceased person);

G. L. c. 233, § 65A (answers to interrogatories of deceased party);

G. L. c. 233, § 66 (declarations of testator);

G. L. c. 233, § 69 (records of other courts);

G. L. c. 233, § 70 (judicial notice of law);

G. L. c. 233, § 79B (publicly issued compilations of fact);

G. L. c. 233, § 79C (treatises in malpractice actions);

G. L. c. 233, § 79F (certificate of public way);

G. L. c. 233, § 79G (medical and hospital bills);

G. L. c. 233, § 79H (medical reports of deceased physicians);

G. L. c. 239, § 8A, ¶ 3 (board of health inspection report if certified by inspector who conducted the inspection);

Mass. R. Civ. P. 32(a)(3) (depositions); and

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

If no objection to the hearsay statement is made and it has been admitted, it "may be weighed with the other evidence, and given any evidentiary value which it may possess." Mahoney v. Harley Private Hosp., Inc., 279 Mass. 96, 100 (1932). In a criminal case, the admission of such a statement will be reviewed to determine whether its admission created a substantial risk of a miscarriage of justice. See Commonwealth v. Keevan, 400 Mass. 557, 562 (1987).

Section 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present Sense Impression. [Exception not recognized]

(2) Excited Utterance (Spontaneous Utterance). A spontaneous utterance if (A) there is an occurrence or event sufficiently startling to render inoperative the normal reflective thought processes of the observer, and (B) the declarant's statement was a spontaneous reaction to the occurrence or event and not the result of reflective thought.

(3) Then-Existing Mental, Emotional, or Physical Condition.

(A) Expressions of present physical condition such as pain and physical health.

(B) **(i)** Statements of a person as to his or her present friendliness, hostility, intent, knowledge, or other mental condition are admissible to prove such mental condition.

(ii) Statements, not too remote in time, which indicate an intention to engage in particular conduct, are admissible to prove that the conduct was, in fact, put in effect. Statements of memory or belief to prove the fact remembered or believed do not fall within this exception.

(iii) Declarations of a testator cannot be received to prove the execution of a will, but may be shown to show the state of mind or feelings of the testator.

(4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for the purpose of medical diagnosis or treatment describing medical history, pain, symptoms, condition, or cause, but not as to the identity of the person responsible or legal significance of such symptoms or injury.

(5) Past Recollection Recorded.

(A) A previously recorded statement may be admissible if (i) the witness has insufficient memory to testify fully and accurately, (ii) the witness had firsthand knowledge of the facts recorded, (iii) the witness can testify that the recorded statement was truthful when made, and (iv) the witness made or adopted the recorded statement when the events were fresh in the witness's memory.

(B) The recorded statement itself may be admitted in evidence, although the original of the statement must be produced if procurable.

(6) Business and Hospital Records.

(A) Entry, Writing, or Record Made in Regular Course of Business. A business record shall not be inadmissible because it is hearsay or self-serving if the court finds that (i) the entry, writing, or record was made in good faith; (ii) it was made in the regular course of business; (iii) it was made before the beginning of the civil or criminal proceeding in which it is offered; and (iv) it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event, or within a reasonable time thereafter.

(B) Hospital Records. Records kept by hospitals pursuant to G. L. c. 111, § 70, shall be admissible as evidence so far as such records relate to the treatment and medical history of such cases, but nothing contained therein shall be admissible as evidence which has reference to the question of liability. Records required to be kept by hospitals under the law of any other United States jurisdiction may be admissible.

(C) Medical and Hospital Services.

(i) Definitions.

(a) Itemized Bills, Records, and Reports. As used in this section, "itemized bills, records, and reports" means itemized hospital or medical bills; physician or dentist reports; hospital medical records relating to medical, dental, hospital services, prescriptions, or orthopedic appliances rendered to or prescribed for a person injured; or any report of any examination of said injured person including, but not limited to, hospital medical records.

(b) Physician or Dentist. As used in this section, "physician or dentist" means a physician, dentist, or any person who is licensed to practice as such under the laws of the jurisdiction within which such services were rendered, as well as chiropodists, chiropractors, optometrists, osteopaths, physical therapists, podiatrists, psychologists, and other medical personnel licensed to practice under the laws of the jurisdiction within which such services were rendered.

(c) Hospital. As used in this section, "hospital" means any hospital required to keep records under G. L. c. 111, § 70, or which is in any way licensed or regulated by the laws of any other State, or by the laws and regulations of the United

States of America, including hospitals of the Veterans Administration or similar type institutions, whether incorporated or not.

(d) Health Maintenance Organization. As used in this section, "health maintenance organization" shall have the same meaning as defined in G. L. c. 176G, § 1.

(ii) Admissibility of Itemized Bills, Records, and Reports. In any civil or criminal proceeding, itemized bills, records, and reports of an examination of or for services rendered to an injured person are admissible as evidence of the fair and reasonable charge for such services, the necessity of such services or treatments, the diagnosis, prognosis, opinion as to the proximate cause of the condition so diagnosed, or the opinion as to disability or incapacity, if any, proximately resulting from the condition so diagnosed, provided that

(a) the party offering the evidence gives the opposing party written notice of the intention to offer the evidence, along with a copy of the evidence, by mailing it by certified mail, return receipt requested, not less than ten days before the introduction of the evidence;

(b) the party offering the evidence files an affidavit of such notice and the return receipt is filed with the clerk of the court after said receipt has been returned; and

(c) the itemized bill, record, or report is subscribed and sworn to under the penalties of perjury by the physician, dentist, authorized agent of a hospital or health maintenance organization rendering such services, or by the pharmacist or retailer of orthopedic appliances.

(iii) Calling the Physician or Dentist as a Witness. Nothing contained in this subsection limits the right of a party to call the physician or dentist, or any other person, as a witness to testify about the contents of the itemized bill, record, or report in question.

(7) Absence of Entry in Records Kept in Accordance with Provisions of Section 803(6). The absence of an entry in records of regularly conducted activity, or testimony of a witness that he or she has examined records and not found a particular entry or entries, is admissible for purposes of proving the nonoccurrence of the event.

(8) Official/Public Records and Reports.

(A) Record of Primary Fact. A record of a primary fact, made by a public officer in the performance of an official duty, is competent evidence as to the existence of that fact.

(B) Prima Facie Evidence. Certain statutes provide that the admission of facts contained in certain public records constitute prima facie evidence of the existence of those facts.

(C) Record of Investigations. Record of investigations and inquiries conducted, either voluntarily or pursuant to requirement of law, by public officers concerning causes and effects involving the exercise of judgment and discretion, expressions of opinion, and

making conclusions are not admissible in evidence as public records, unless specifically authorized by statute.

(9) Public Records of Vital Statistics. A town clerk's record of birth, marriage, or death is prima facie evidence of the facts recorded, but nothing contained in the record of a death that refers to the question of liability for causing the death is admissible in evidence.

(10) Absence of a Public Record. Testimony—or a certification under Section 902—that a diligent search failed to disclose a public record or statement is admissible in evidence if the testimony or certification is offered to prove that

(A) the record or statement does not exist, or

(B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

(11) Records of Religious Organizations. [Exception not recognized]

(12) Marriage, Baptismal, and Similar Certificates. [Exception not recognized]

(13) Family Records. A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker or a similar item is admissible in evidence.

(14) Records or Documents Affecting an Interest in Property. A registry copy of a document purporting to prove or establish an interest in land is admissible as proof of the content of the original recorded document and its execution and delivery by each person who signed it. However, the grantee or entity claiming present ownership interest of the property must account for the absence of the original document before offering the registry copy.

(15) Statements in Documents Affecting an Interest in Property. Statements of a person's married or unmarried status, kinship or lack of kinship, or of the date of the person's birth or death which relate or purport to relate to the title to land and are sworn to before any officer authorized by law to administer oaths may be filed for record and shall be recorded in the registry of deeds for the county where the land or any part thereof lies. Any such statement, if so recorded, or a certified copy of the record thereof, insofar as the facts stated therein bear on the title to land, shall be admissible in evidence in support of such title in any court in the Commonwealth in proceedings relating to such title.

(16) Statements in Ancient Documents. A statement in a document that is at least thirty years old and whose authenticity is established is admissible in evidence.

(17) Statements of Facts of General Interest. Statements of facts of general interest to persons engaged in an occupation contained in a list, register, periodical, book, or other compilation, issued to the public, shall, in the discretion of the court, if the court finds that the compilation is published for the use of persons engaged in that occupation and commonly is used and relied upon by them, be admissible in civil cases as evidence of the truth of any fact so stated.

(18) Learned Treatises.

(A) Use in Medical Malpractice Actions. Statements of facts or opinions on a subject of science or art contained in a published treatise, periodical, book, or pamphlet shall, insofar as the court shall find that the said statements are relevant and that the writer of such statements is recognized in his or her profession or calling as an expert on the subject, be admissible in actions of contract or tort for malpractice, error, or mistake against physicians, surgeons, dentists, optometrists, hospitals, and sanitaria, as evidence tending to prove said facts or as opinion evidence; provided, however, that the party intending to offer as evidence any such statements shall, not less than thirty days before the trial of the action, give the adverse party or that party's attorney notice of such intention, stating the name of the writer of the statements; the title of the treatise, periodical, book, or pamphlet in which they are contained; the date of publication of the same; the name of the publisher of the same; and wherever possible or practicable the page or pages of the same on which the said statements appear.

(B) Use in Cross-Examination of Experts. To the extent called to the attention of an expert witness upon cross-examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence, but may not be received as exhibits.

(19) Reputation Concerning Personal or Family History. A reputation within a family as to matters of pedigree, such as birth, marriage, and relationships between and among family members, may be testified to by any member of the family.

(20) Reputation Concerning Boundaries or General History. Evidence of a general or common reputation concerning the existence or nonexistence of a boundary or other matter of public or general interest concerning land or real property is admissible.

(21) Reputation Concerning Character. A witness with knowledge may testify to a person's reputation as to a trait of character, as provided in Sections 404, 405, and 608.

(22) Judgment of a Previous Conviction. Evidence of a final judgment of conviction is admissible if

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death or by confinement for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to Personal, Family, or General History, or Boundaries. [Exception not recognized]

(24) Out-of-Court Statement of Child Describing Sexual Contact in Proceeding to Place Child in Foster Care.

(A) Admissibility in General. Any out-of-court statements of a child under the age of ten describing any act of sexual contact performed on or with the child, or the circumstances under which it occurred, or identifying the perpetrator offered in an action brought under G. L. c. 119, §§ 23(C) and 24, shall be admissible; provided, however that

(i) the person to whom the statement was made, or who heard the child make the statement, testifies;

(ii) the judge finds that the statement is offered as evidence of a material fact and is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable effort;

(iii) the judge finds pursuant to Subsection (24)(B) that such statement is reliable; and

(iv) the judge's reasons for relying on the statement appear in the judge's findings pursuant to Subsection (24)(C).

(B) Reliability of Statement. A judge must assess the reliability of the out-of-court statement by considering the following factors:

(i) the timing of the statement, the circumstances in which it was made, the language used by the child, and the child's apparent sincerity or motive in making the statement;

(ii) the consistency over time of a child's statement concerning abuse, expert testimony about a child's ability to remember and to relate his or her experiences, or other relevant personality traits;

(iii) the child's capacity to remember and to relate, and the child's ability to perceive the necessity of telling the truth; and

(iv) whether other admissible evidence corroborates the existence of child abuse.

(C) Findings on the Record. The judge's reasons for relying on the statement must appear clearly in the specific and detailed findings the judge is required to make in a care and protection case.

(D) Admissibility by Common Law or Statute. An out-of-court statement admissible by common law or by statute shall remain admissible notwithstanding the provisions of this section.

NOTE

Confrontation Clause. In a criminal case, a hearsay statement offered against the defendant must satisfy both the confrontation clause and one of the hearsay exceptions. For a discussion of the relationship between the confrontation clause and the hearsay exceptions stated in Section 803, refer to the Introductory Note to Article VIII, Hearsay.

Subsection (1). To date, the present sense impression exception has not been adopted in Massachusetts. See Commonwealth v. Mandeville, 386 Mass. 393, 398 n.3 (1982).

Subsection (2). This subsection is taken nearly verbatim from Commonwealth v. Santiago, 437 Mass. 620, 623 (2002). See also Commonwealth v. McLaughlin, 364 Mass. 211, 221–222 (1973). In determining whether a statement qualifies under this exception, the trial judge should consider whether the statement was made "under the stress of an exciting event and before the declarant has had time to contrive or fabricate the remark" (citations omitted). Commonwealth v. Baldwin, 476 Mass. 1041, 1042 (2017). The judge should consider such factors as whether the statement was made in the same location as the precipitating event, the temporal proximity to the event, and the age, spontaneity, and degree of excitement of the declarant. Id. "The statement itself may be taken as proof of the exciting event." Commonwealth v. Nunes, 430 Mass. 1, 4 (1999). See Commonwealth v. King, 436 Mass. 252, 255 (2002). The proponent of the evidence is not required to show that the spontaneous utterance qualifies, characterizes, or explains the underlying event as long as the court is satisfied that the statement was the product of a startling event and not the result of conscious reflection. See Commonwealth v. Santiago, 437 Mass. at 624–627.

> "[T]he nexus between the statement and the event that produced it is but one of many factors to consider in determining whether the declarant was, in fact, under the sway of the exciting event when she made the statement. . . . It illuminates the second aspect of the test; it is not an independent requirement, in the same respect that the lapse of time between the startling event and the declarant's statement is not an independent requirement."

Commonwealth v. Santiago, 437 Mass. at 625–626. See Commonwealth v. Gomes, 475 Mass. 775, 788 ("[t]he circumstances of being the target of a drive-by shooting and actually being shot were certainly enough to permit a reasonable finding" that declarant was "sufficiently startled to render inoperative his normal reflective thought processes").

"[T]here can be no definite and fixed limit of time [between the incident and the statement]. Each case must depend upon its own circumstances." Commonwealth v. McLaughlin, 364 Mass. at 223, quoting Rocco v. Boston-Leader, Inc., 340 Mass. 195, 196–197 (1960). See Commonwealth v. Crawford, 417 Mass. 358, 362 (1994) (statements need not be strictly contemporaneous with the exciting cause; a child's statement five hours later correctly admitted). See also Commonwealth v. Grant, 418 Mass. 76, 81 (1994) (same). "But the length of time between the incident and statement is important; the further the statement from the event, the more difficult it becomes to determine whether the statement is the result of reflection, influenced by other factors." Commonwealth v. DiMonte, 427 Mass. 233, 239 (1998). See Commonwealth v. Barbosa, 477 Mass. 658, 672–673 (2017) (witness's emotional demeanor and physical illness sufficient to demonstrate that statements were spontaneous reaction to murder).

A writing may qualify as a spontaneous utterance. See Commonwealth v. DiMonte, 427 Mass. at 238–240. See also Commonwealth v. Mulgrave, 472 Mass. 170, 176 (2015) (text message). However, "[b]ecause a writing is more suspect as a spontaneous exclamation than is an oral statement, the circumstances of the writing would have to include indicia of reliability even more persuasive than those required for an oral statement before [the court] could conclude that the writing qualified as a spontaneous exclamation." Commonwealth v. DiMonte, 427 Mass. at 239. The "heightened indicia of reliability" requirement does not impose an additional test for written statements but is meant "only to ensure that a writing, which generally is a product of reflection, meets the spontaneity requirement." Commonwealth v. Mulgrave, 472 Mass. at 177. Other than increased scrutiny on the spontaneity element, "the analysis is the same as for an oral statement." Id.

A bystander's spontaneous utterance may be admissible. See Commonwealth v. Harbin, 435 Mass. 654, 657–658 (2002). "Although witnesses may not testify unless evidence is introduced sufficient to support a finding that they have personal knowledge of the matter about which they are testifying, there is no requirement that the declarant have been a participant in the exciting event" (citation omitted). Id. at 657. But see Commonwealth v. Alcantara, 471 Mass. 550, 558–559 (2015) (recording of 911 call containing information outside of caller's personal knowledge was admissible as excited utterance where information was acquired by caller from person who had personal knowledge and whose statement to caller also was excited utterance).

A statement made in response to a question may qualify as a spontaneous utterance. See Commonwealth v. Simon, 456 Mass. 280, 296 (2010); Commonwealth v. Guaman, 90 Mass. App. Ct. 36, 42–43 (2016) (nine-year-old's call to 911 to report her uncle was driving drunk with his young son in the car, made because of caller's concern that her cousin was in danger, was admissible as excited utterance even though some statements were made in response to dispatcher's questions). But see Commonwealth v. McCoy, 456 Mass. 838, 849 (2010) (statement by the victim of a sexual assault to a SANE [sexual assault nurse examiner] at the hospital made in the context of a question-and-answer format did not qualify as an excited utterance because "the requisite level of spontaneity was not present").

***Confrontation in Criminal Cases*.** "When the Commonwealth in a criminal case seeks to admit the excited utterance of a declarant who is not a witness at trial or has completed his testimony at trial, the judge should conduct a careful voir dire, evidentiary if needed, before admitting the excited utterance in evidence." Commonwealth v. Hurley, 455 Mass. 53, 68 n.14 (2009) (statement, if testimonial, would be barred by the confrontation clause).

Subsection (3)(A). This subsection is derived from Murray v. Foster, 343 Mass. 655, 658 (1962). See Weeks v. Boston Elevated Ry. Co., 190 Mass. 563, 564–565 (1906) (witness permitted to testify that decedent remarked that the "carriage never rode so hard before"; "[t]his may well be regarded as an expression and indication of then present pain or weakness"); Simmons v. Yurchak, 28 Mass. App. Ct. 371, 373–375, 375 n.6 (1990) (upholding trial court's refusal to apply Proposed Mass. R. Evid. 803[3] while noting that "[i]t is not self-evident that Proposed Mass. R. Evid. 803[3] propounds a more expansive hearsay exception than the common law 'expression of pain'").

Subsection (3)(B). The principle contained in the following three subsections is also known as the "state-of-mind exception." This exception applies only to statements that assert the declarant's own state of mind directly (usually by words describing the state of mind). See, e.g., Commonwealth v. Woollam, 478 Mass. 493, 499 (2017) (text messages were admissible under state of mind exception to hearsay rule because they "were offered to show proof of motive for the killing"); Pardo v. General Hosp. Corp., 446 Mass. 1, 18–19 (2006) (memorandum and letter admissible to show nondiscriminatory state of mind at time employment actions were taken); Commonwealth v. White, 32 Mass. App. Ct. 949, 949 (1992) (in prosecution for sexual abuse of a child, mother's out-of-court statement that, even if defendant didn't do it, "I still hope that all sorts of nasty things happen to him" was admissible under state-of-mind exception as an expression of her hostility toward defendant to prove her bias as prosecution witness). But see Commonwealth v. Whitman, 453 Mass. 331, 341–342 (2009) (defendant's statement that he heard voices inadmissible, as it pertained to the past, not the present). For statements that convey the declarant's state of mind circumstantially or that are probative of another's state of mind, see the Note "Evidence Admitted for Nonhearsay Purpose" to Section 801(c), Definitions: Hearsay.

Evidence of a person's state of mind, whether hearsay (and offered under this exception) or nonhearsay, is admissible only if the state of mind is relevant and if the probative value of the proffered evidence is not substantially outweighed by the risk of unfair prejudice to the opponent. See Section 403, Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reason. Statements offered to show state of mind often include assertions of facts that led to that state of mind (e.g., the victim's out-of-court statements describing the defendant's threats or assaults offered as evidence of the victim's determination to end the relationship with the defendant). The out-of-court statement of those facts would ordinarily be inadmissible hearsay, and the trier of fact's reliance on the truth of those facts would therefore be unfairly

prejudicial to the opponent. This danger is especially acute in criminal cases, where confrontation clause rights are also at stake when hearsay is admitted against a defendant. See Introductory Note to Article VIII, Hearsay. Before such evidence is admitted, the trial court must conduct a careful review of the probative value of the evidence and the risk of unfair prejudice under Section 403. See Commonwealth v. Magraw, 426 Mass. 589 (1998) (new trial granted because of erroneous admission of murder victim's statements to show her fear of defendant). In addition to carrying this enhanced risk of unfair prejudice, evidence of the victim's state of mind often has limited probative value. A murder victim's statements of fear of the defendant alone are not relevant to prove motive. Commonwealth v. Qualls, 425 Mass. 163, 169 (1997). When a victim's state of mind is offered to prove a defendant's motive, it is usually not relevant unless the state of mind was known to the defendant, and the defendant was likely to respond to it. Id. at 167. See Commonwealth v. Watkins, 473 Mass. 222, 238 (2015). See also Commonwealth v. Castano, 478 Mass. 75, 85–86 (2017) (victim's intent to end relationship with defendant). However,

> "[a] murder victim's state of mind becomes a material issue if the defendant opens the door by claiming that the death was a suicide or a result of self-defense, that the victim would voluntarily meet with or go someplace with the defendant, or that the defendant was on friendly terms with the victim."

Commonwealth v. Magraw, 426 Mass. at 594.

> "Where evidence of the victim's state of mind is admitted, it may only be used to prove that state of mind, and not to prove the truth of what was stated or that a defendant harbored certain thoughts or acted in a certain way. Therefore, on the defendant's request, the jury must be given an instruction on the limited use of state of mind evidence."

Id. at 594–595, citing Commonwealth v. Costa, 354 Mass. 757 (1968).

Subsection (3)(B)(i). This subsection is taken nearly verbatim from Commonwealth v. Caldron, 383 Mass. 86, 91 (1981). See Commonwealth v. Mendes, 441 Mass. 459, 466 (2004); Commonwealth v. Ferreira, 381 Mass. 306, 310–311 (1980); Commonwealth v. Wampler, 369 Mass. 121, 123 (1975).

Subsection (3)(B)(ii). The first sentence of this subsection is taken verbatim from Commonwealth v. Ferreira, 381 Mass. 306, 310 (1980). Accord Commonwealth v. Trefethen, 157 Mass. 180, 183–184 (1892) (murder conviction reversed because trial judge improperly excluded evidence that victim, who was unmarried and pregnant at time of her death, told fortune teller the day before her drowning that she was going to drown herself). See Commonwealth v. Ortiz, 463 Mass. 402, 409–410 (2012) (murder victim told family she was going to go meet defendant after dinner); Commonwealth v. Fernandes, 427 Mass. 90, 95 (1998) ("A declarant's threat to 'get' or kill someone is admissible to show that the declarant had a particular state of mind and that he carried out his intent."); Commonwealth v. Vermette, 43 Mass. App. Ct. 789, 801–802 (1997) (proper to admit statement of intention to lie and confess to shooting for purpose of showing that declarant carried out that intent). In a prosecution for murder, a victim's statement of intent to meet with the defendant, made immediately before the murder, is sometimes admissible. See Commonwealth v. Britt, 465 Mass. 87, 90 (2013) (admission of victim's statement that he was going to meet defendant to get his money not error, as statement did not necessarily mean that defendant had previously agreed to a meeting, and it was cumulative of other evidence of a preplanned meeting). See also Commonwealth v. Ortiz, 463 Mass. at 409–410 (murder victim's statement to daughter that she was going to pick up defendant at a restaurant admissible, because statement expressed only victim's "present intent to act," not defendant's, and there was other evidence that defendant was with victim at time of murder). In each of the above cases, there was independent evidence of the defendant's presence at the place in question.

The second sentence of this subsection is derived from Commonwealth v. Lowe, 391 Mass. 97, 104–105, cert. denied, 469 U.S. 840 (1984). See Commonwealth v. Pope, 397 Mass. 275, 281 (1986) ("exception applies only to the declarant's present intent to act, not to past conduct"). See also Commonwealth v. Seabrooks, 425 Mass. 507, 512 (1997) ("[a]llowing hearsay statements generally under the state-of-mind exception would entirely eviscerate the hearsay rule and its important purpose of securing

the correctness and completeness of testimony through cross-examination"). Accord Shepard v. United States, 290 U.S. 96, 105–106 (1933).

Subsection (3)(B)(iii). This subsection is taken nearly verbatim from Mahan v. Perkins, 274 Mass. 176, 179–180 (1931). See id. at 180 ("[Testator's] declarations showing her intention, plan or purpose should not be received to support the proponent's contention that the will was signed by her and attested by [the witness].")

Subsection (4). This subsection is derived from Commonwealth v. Comtois, 399 Mass. 668, 675 (1987), and Commonwealth v. Howard, 355 Mass. 526, 528–529 (1969). See Commonwealth v. Arana, 453 Mass. 214, 231 (2009); Commonwealth v. DeOliveira, 447 Mass. 56, 62 (2006). If made for the purpose of receiving medical advice, the statements are admissible under this subsection even if made after the commencement of the action. Barber v. Merriam, 93 Mass. 322, 326 (1865).

While the appellate cases cited in this note related to physicians, nothing in the reasoning of those cases exclude other health care professionals. See Bouchie v. Murray, 376 Mass. 524, 527–528 (1978).

Cross-Reference: Section 803(6)(C), Hearsay Exceptions; Availability of Declarant Immaterial: Business and Hospital Records: Medical and Hospital Services.

Subsection (5)(A). This subsection is derived from Commonwealth v. Nolan, 427 Mass. 541, 543 (1998), and Commonwealth v. Bookman, 386 Mass. 657, 663–664 (1982). A witness does not have to have a complete lack of memory; all that is required is that the witness cannot testify fully. Commonwealth v. Nolan, 427 Mass. at 544.

"As to the fourth element of the foundation, where the recording was made by another, it must be shown that the witness adopted the writing 'when the events were fresh in [the witness's] mind'" (emphasis omitted). Commonwealth v. Evans, 439 Mass. 184, 189–190 (2003), quoting Commonwealth v. Bookman, 386 Mass. at 664. See Commonwealth v. Fryar, 414 Mass. 732, 746 (1993), cert. denied, 522 U.S. 1033 (1997). The requirement that the recording be made when the events were fresh in the witness's memory has been interpreted broadly. See Catania v. Emerson Cleaners, Inc., 362 Mass. 388, 389–390 (1972) (holding that statement given approximately eight months after accident admissible as a past recollection recorded). But see Kirby v. Morales, 50 Mass. App. Ct. 786, 791–792 (2001) (one year insufficient).

Subsection (5)(B). This subsection is derived from Fisher v. Swartz, 333 Mass. 265, 267–271 (1955). In Fisher, the court cautioned that it was not

> "laying down a hard and fast rule that in every 'past recollection recorded' situation the writing used by the witness must always be admitted in evidence, and that it is error to exclude it . . . . It is conceivable that there might be situations where the probative value of the writing as evidence might be outweighed by the risk that its admission might create substantial danger of undue prejudice or of misleading the jury. In such a case the trial judge in the exercise of sound discretion might be justified in excluding the writing."

Id. at 270. See Commonwealth v. Bookman, 386 Mass. 657, 664 (1982) (error to admit grand jury testimony of the witness as past recollection recorded). The witness may read from the writing during the witness's testimony, or the writing may be admitted.

The past recollection recorded exception should not be confused with the doctrine of refreshing memory. See Section 612, Writing or Object Used to Refresh Memory. For a discussion of the distinction between the two, see Fisher v. Swartz, 333 Mass. at 267.

Subsection (6)(A). This subsection is taken nearly verbatim from G. L. c. 233, § 78. See Beal Bank, SSB v. Eurich, 444 Mass. 813, 815 (2005); Commonwealth v. Trapp, 396 Mass. 202, 208 (1985). See, e.g., Commonwealth v. Fulgiam, 477 Mass. 20, 39–43 (2017) ("ten-print" fingerprint cards); Adoption of Paula, 420 Mass. 716 (1995) (in care and protection proceeding, police report containing officer's firsthand account of conditions in the marital home during execution of search warrant was admissible as business record);

Johnson v. MBTA, 418 Mass. 783, 786 (1994) (results of laboratory test); Commonwealth v. Sellon, 380 Mass. 220, 230 & n.15 (1980) (In admitting police journal entry fixing the time a telephone call was received, the Supreme Judicial Court noted that "[t]he operations of the instrumentalities of government constitute 'business' within the meaning of the statute" [citation omitted].); Commonwealth v. Walker, 379 Mass. 297, 302 (1979) (police record of stolen car report); Commonwealth v. Albino, 81 Mass. App. Ct. 736, 737–738 (2012) (notification letters from Sex Offender Registry Board to police department). In a criminal proceeding where the judge admits a business record under this exception, the questions of fact serving as a basis for its admissibility must be submitted to the jury. G. L. c. 233, § 78. See Commonwealth v. Reyes, 19 Mass. App. Ct. 1017, 1019 (1985). Cf. G. L. c. 233, § 79J (certification, inspection, and copies of business records).

The trial judge may, as a condition to admissibility of business records, require the party offering the business record into evidence to call a witness who has personal knowledge of the facts stated in the record. G. L. c. 233, § 78. See Burns v. Combined Ins. Co. of Am., 6 Mass. App. Ct. 86, 92 (1978). The foundation for the admission of a business record need not be established through the testimony of a designated keeper of records, provided that the testifying witness has an adequate understanding of the business's record-keeping system. Commonwealth v. Driscoll, 91 Mass. App. Ct. 474, 480 (2017). A trial judge must first determine if the writing itself qualifies as a business record, and then determine "whether all or only some of the material and information contained in the document qualifies as being within the scope of the statutory exception." Wingate v. Emery Air Freight Corp., 385 Mass. 402, 408 (1982) (Liacos, J., concurring). A business record is admissible even when its preparer has relied on the statements of others because the personal knowledge of the entrant or maker affects only the weight of the record, not its admissibility. Id. at 406. However, "unless statements on which the preparer relies fall within some other exception to the hearsay rule, the proponent must show that all persons in the chain of communication, from the observer to the preparer, reported the information as a matter of business duty or business routine." Id. See NationsBanc Mtge. Corp. v. Eisenhauer, 49 Mass. App. Ct. 727, 733–735 (2000) (where records made by one business were transferred to another, latter business unable to admit the records under business record exception because records were made by former business). But see Commonwealth v. Albino, 81 Mass. App. Ct. 736, 738 (2012) (business record of one business may be admissible as business record of second business where record is integrated into records of second business and relied on by that business), citing Beal Bank SSB v. Eurich, 444 Mass. 813, 815 (2005).

"[T]he business records hearsay exception in [G. L. c. 233,] § 78 may not be used to expand the scope of the hearsay exception for hospital medical records." Commonwealth v. Irene, 462 Mass. 600, 616 (2012). "The admissibility of statements in medical records is limited by the provisions in G. L. c. 233 relating to hospital records, including §§ 79 and 79G." Id.

Opinions contained in business records are not admissible unless they fall within some other exception to the hearsay rule. See Julian v. Randazzo, 380 Mass. 391, 392–393 (1980); Burke v. Memorial Hosp., 29 Mass. App. Ct. 948, 949–950 (1990). Cf. Section 803(6)(C), Hearsay Exceptions; Availability of Declarant Immaterial: Business and Hospital Records: Medical and Hospital Services (provides, under certain circumstances, for the admission of opinion contained in medical, dental, and other identified records and reports). Even if a document satisfies the business record exception, the trial judge retains the discretion to consider the reliability of the evidence offered. N.E. Physical Therapy Plus, Inc. v. Liberty Mut. Ins. Co., 466 Mass. 358, 367 n.10 (2013). Cross-Reference: Section 803(17), Hearsay Exceptions; Availability of Declarant Immaterial: Statements of Facts of General Interest.

***Police Reports*.** Police reports are generally admissible as business records under this subsection. Commonwealth v. Walker, 379 Mass. 297, 302 (1979); Carey v. New Yorker of Worcester, Inc., 355 Mass. 450, 453 (1969). Thus, the reporting officers' firsthand observations as recorded in their reports are admissible. Adoption of Paula, 420 Mass. 716, 727 (1995) (responding officers' description of open beer cans, drinking by underage guests, inadequate sleeping arrangements for the children, broken window, and weapons openly displayed). Such reports are admissible as an exception to the hearsay rule even when the preparer has relied on statements made by others in the regular course of the preparer's record-keeping duties (such as fellow police officers) because, under G. L. c. 233, § 78, "'personal knowledge by the entrant or maker' is a matter affecting the weight (rather than the admissibility) of the record." Wingate v.

Emery Air Freight Corp., 385 Mass. 402, 406 (1982), quoting G. L. c. 233, § 78. However, "second-level" hearsay, such as statements of bystanders or witnesses, should be redacted, as these statements are not made admissible by G. L. c. 233, § 78. See Commonwealth v. Happnie, 3 Mass. App. Ct. 193, 199 (1975), overruled in part on other grounds by Commonwealth v. Szerlong, 457 Mass. 858, 869 (2010); Kelly v. O'Neil, 1 Mass. App. Ct. 313, 316–317 (1973). Cf. Commonwealth v. Walker, 379 Mass. at 302 (statements made by unidentified caller to police cadet who authored report not offered for their truth). Further, the admittance of police reports as business records applies only to factual observations and does not permit the admission of opinions contained in the report. Julian v. Randazzo, 380 Mass. 391, 393 (1980). Police reports may be considered as evidence at a probation revocation hearing even when the reporting officer does not testify and even when they contain second-level hearsay, so long as they are deemed sufficiently reliable. See Commonwealth v. Durling, 407 Mass. 108, 120–122 (1990) (personal observations of non-testifying officer); Commonwealth v. Foster, 77 Mass. App. Ct. 444, 450 (2010) (witness statement contained in police report). Police reports relating to prior sexual offenses are admissible in Sexually Dangerous Person proceedings pursuant to G. L. c. 123A, § 14(c), even when they contain hearsay statements. Commonwealth v. Given, 441 Mass. 741, 745–746 (2004).

Criminal Cases. A record or report that qualifies as an exception to the hearsay rule under this subsection may nevertheless be inadmissible if it contains testimonial statements in violation of the confrontation clause. See Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310–311 (2009). Additionally, Massachusetts statutory law provides that in criminal cases tried to a jury, "all questions of fact which must be determined by the court as the basis for the admissibility of the evidence involved shall be submitted to the jury." G. L. c. 233, § 78. As a result, in criminal cases involving business records, unless the defendant agrees otherwise, the judge not only must make the four preliminary determinations of fact set forth in Subsection (6)(A), but must instruct the jury that they too must find these facts by a preponderance of the evidence before they consider the contents of the business record. See Commonwealth v. Oppenheim, 86 Mass. App. Ct. 359, 367 (2014).

Subsection (6)(B). This subsection is derived from G. L. c. 233, § 79. See Commonwealth v. Sheldon, 423 Mass. 373, 376 (1996). A hospital record is admissible at trial if the trial judge finds that (1) it is the type of record contemplated by G. L. c. 233, § 79; (2) the information is germane to the patient's treatment or medical history; and (3) the information is recorded from the personal knowledge of the entrant or from a compilation of the personal knowledge of those under a medical obligation to transmit such information. Bouchie v. Murray, 376 Mass. 524, 531 (1978). See Commonwealth v. Ackerman, 476 Mass. 1033, 1034 (2017) (even where medical record does not expressly state that blood alcohol test was performed as part of medical treatment, circumstances surrounding test may permit that inference). Compare Commonwealth v. Sheldon, 423 Mass. at 375–377 (blood alcohol tests conducted solely to prove the defendant's sobriety, in circumstances in which there was no hospital protocol for conducting such a test, do not qualify for admission under G. L. c. 233, § 79), with Commonwealth v. Dyer, 77 Mass. App. Ct. 850, 855–856 (2010) (blood alcohol test results ordered by physician exclusively for the medical evaluation and treatment of the defendant qualify for admission under G. L. c. 233, § 79). The party offering the record into evidence has the burden of proving the statutory requirements, Commonwealth v. Dunne, 394 Mass. 10, 16 (1985), and need not give advance notice of the intent to offer the record in evidence, Commonwealth v. McCready, 50 Mass. App. Ct. 521, 524–525 (2000). Cf. G. L. c. 233, § 79G (ten days' advance notice required). The trial judge has discretion to exclude portions of an otherwise admissible medical record in accordance with Sections 402, General Admissibility of Relevant Evidence; 403, Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons; and 611(a), Mode and Order of Examining Witnesses and Presenting Evidence: Control by the Court. See Commonwealth v. Francis, 450 Mass. 132, 138–139 (2007). See also Commonwealth v. Hamel, 91 Mass. App. Ct. 349, 352 (2017) (in prosecution for sexual assault of child, error to admit medical records with diagnosis of "irritant dermatitis" of penis in absence of expert testimony that condition was caused by rubbing described by alleged victim).

"[V]oluntary statements of third persons appearing in the record are not admissible unless they are offered for reasons other than to prove the truth of the matter contained therein or, if offered for their truth, come within another exception to the hearsay rule . . . ." Bouchie v. Murray, 376 Mass. at 531. The Supreme Judicial Court has noted that G. L. c. 233, § 79,

> "may be read to permit the admission of a medical history taken from a person with reason to know of the patient's medical history by virtue of his or her relationship to the patient. Such a history may contain personal knowledge gained from observation or knowledge gained from an intimate relationship. We think that [G. L. c. 233, § 79] should be read to include such statements if made for purposes of medical diagnosis or treatment and if the declarant's relationship to the patient and the circumstances in which the statements are made guarantees their trustworthiness."

Id. at 531.

> "[General Laws c. 233, § 79,] has long been construed to permit the admission of a record that relates directly and primarily to the treatment and medical history of the patient, 'even though incidentally the facts recorded may have some bearing on the question of liability.' . . . In application this liberal construction has permitted the admission in evidence of statements in hospital records bearing on criminal culpability that seem to relate at most only incidentally to medical treatment" (citations omitted).

Commonwealth v. Dube, 413 Mass. 570, 573 (1992). See Commonwealth v. DiMonte, 427 Mass. 233, 242 (1998).

> "[General Laws c. 233, § 79,] relies on a 'pragmatic test of reliability' that permits the introduction of records containing even second level hearsay provided the information in the record is of a nature that is relied on by medical professionals in administering health care. . . . While creating an exception to the hearsay rule, the statute does not permit the admission of hospital records that are facially unreliable."

Commonwealth v. Johnson, 59 Mass. App. Ct. 164, 167 (2003), citing Doyle v. Dong, 412 Mass. 682, 687 (1992). See generally Petitions of the Dep't of Social Servs. to Dispense with Consent to Adoption, 399 Mass. 279, 287–288 (1987) (privileged material should be redacted).

***Illustrations*.** Notations on Form 2 in the "Sexual Assault Evidence Collection Kit" made by the SANE (sexual assault nurse examiner) based on statements by the complainant about how he or she received his or her injuries are admissible because they assist the SANE in conducting the examination, even though the information is also collected to assist investigators. Commonwealth v. Dargon, 457 Mass. 387, 396 (2010). However, the printed form should not be admitted because it suggests a sexual assault occurred. Id. Notations on hospital intake forms stating that a patient was "assaulted" should be redacted. Commonwealth v. DiMonte, 427 Mass. at 241–242. In DiMonte, several references to the facts of the alleged assault, including "Pt. struck in the face [with] fist" and "reports having a plastic container thrown [at] her which struck her [right] forehead," were admissible. Id. at 241. Statements consisting of self-diagnosis should be redacted. Commonwealth v. Hartman, 404 Mass. 306, 316–317 (1989). In Commonwealth v. Concepcion, 362 Mass. 653, 654–655 (1972), hospital records where (a) under the heading "Nature of Illness" appeared the words "? Assaulted- ? Raped," (b) under the heading "History and Physical Exam" appeared the words "History of recent rape," and (c) under the heading "Diagnosis" appeared the notation "? Rape," the doctor's opinions were related to the treatment and medical history. Blood tests bearing on the patient's degree of intoxication are admissible; entries made by observing nurses are also admissible. Commonwealth v. McCready, 50 Mass. App. Ct. 521, 524 (2000). In Commonwealth v. Baldwin, 24 Mass. App. Ct. 200, 202 (1987), a "[d]iagnosis" of "sexual molestation," a term "synonymous to laymen with indecent assault and battery," should have been redacted. Cf. Commonwealth v. Patton, 458 Mass. 119 (2010) (SAIN [Sexual Abuse Intervention Network] report may be admissible in probation violation hearings).

Subsection (6)(C). This subsection is derived from G. L. c. 233, § 79G. The text in this subsection places the statutory language in more straightforward language and also incorporates the case law. The practitioner, however, is cautioned to check the precise statutory language.

This statute applies to criminal cases as well as to civil cases, and its scope is much broader than that of G. L. c. 233, § 79. Commonwealth v. Schutte, 52 Mass. App. Ct. 796, 798–800 (2001). See generally

Grant v. Lewis/Boyle, Inc., 408 Mass. 269, 274 (1990) (declining to adopt Proposed Mass. R. Evid. 803[6] for the purpose of admitting physician's reports given the "carefully crafted provisions of § 79G").

Scope. This subsection establishes a broad exception to the hearsay rule which overlaps to some degree with the hospital records exception provided in Section 803(6)(B), Hearsay Exceptions; Availability of Declarant Immaterial: Business and Hospital Records: Hospital Records. See McHoul, petitioner, 445 Mass. 143, 151 (2005); Ortiz v. Stein, 31 Mass. App. Ct. 643, 645 (1991). But see Brusard v. O'Toole, 45 Mass. App. Ct. 288, 295 (1998) (G. L. c. 233, § 79G, would not allow the admission in evidence of hospital policies and procedures). In some respects, however, this subsection is broader than the exception for hospital records found in Section 803(6)(B) because

> "reports admissible under § 79G may include the 'opinion of such physician . . . as to proximate cause of the condition so diagnosed, . . .' and 'the opinion of such physician . . . as to disability or incapacity, if any, proximately resulting from the condition so diagnosed. . . .' These are not matters usually found in a medical record but do pertain to issues commonly involved in personal injury claims and litigation. Thus, the concerns that require redaction of information not germane to the patient's treatment in medical records under § 79, see, e.g., Bouchie v. Murray, 376 Mass. 524, 531 (1978), are overridden by express language in § 79G."

Commonwealth v. Schutte, 52 Mass. App. Ct. at 799–800. Also, since the term "report" is not defined in G. L. c. 233, § 79G, a properly attested letter from a person's treating physician explaining the patient's medical condition and its effects based on the physician's personal observations can be qualified as a report. Id. Ambulance records are admissible under Section 79G, as the certification requirements for EMTs are similar in nature to the licensure requirements for other medical personnel contained in the statute whose reports are admissible. Commonwealth v. Palacios, 90 Mass. App. Ct. 722, 726 (2016).

The full amount of a medical or hospital bill is admissible as evidence of the reasonable value of the services rendered to the injured person, even where the amount actually paid by a private or public insurer is less than that amount. Law v. Griffith, 457 Mass. 349, 353–354 (2010), citing G. L. c. 233, § 79G.

Cross-Reference: G. L. c. 233, § 79H (medical records of deceased physicians); Section 411, Insurance; Section 902(k), Evidence That is Self-Authenticating: Certified Copies of Hospital and Other Records of Treatment and Medical History.

Requirements for Admissibility. Reports offered under G. L. c. 233, § 79G, as opposed to G. L. c. 233, § 78, are admissible even if prepared in anticipation of litigation. See O'Malley v. Soske, 76 Mass. App. Ct. 495, 498–499 (2010); Commonwealth v. Schutte, 52 Mass. App. Ct. 796, 799 n.3 (2001). Medical reports which deal with an injured person's "diagnosis, prognosis, opinion as to the proximate cause of the condition so diagnosed, or the opinion as to disability or incapacity," see Section 803(6)(C)(ii), must be by a physician, as that term is defined in the subsection, who treated or examined the injured person. See Ortiz v. Stein, 31 Mass. App. Ct. at 645–646. See also Gompers v. Finnell, 35 Mass. App. Ct. 91, 93 (1993) ("Nothing in § 79G authorizes one not a physician or dentist to offer an expert opinion that a patient's physical symptoms resulted from a particular accident or incident."). If a record contains such an opinion, however, it may satisfy the plaintiff's burden of proof on the issue of causation in a medical negligence case. See Bailey v. Cataldo Ambulance Serv., Inc., 64 Mass. App. Ct. 228, 234–236 (2005) (explaining that there is no requirement that an expert opinion on causation contain the phrase "to a reasonable degree of medical certainty").

General Laws c. 233, § 79G, requires that a party who seeks to offer the report of a physician or dentist at trial must serve opposing counsel at least ten days in advance of trial with notice and a copy of the report by the physician or dentist. See Adoption of Seth, 29 Mass. App. Ct. 343, 351–352 (1990). However, the attestation by the physician or dentist does not have to be included with the notice so long as it is present when the evidence is offered at trial. See Grant v. Lewis/Boyle, Inc., 408 Mass. 269, 274 (1990); Knight v. Maersk Container Serv. Co., 49 Mass. App. Ct. 254, 256 (2000).

Cross-Reference: G. L. c. 233, § 79H; Section 902(k), Evidence That is Self-Authenticating: Certified Copies of Hospital and Other Records of Treatment and Medical History.

Subsection (7). This subsection is derived from McNamara v. Honeyman, 406 Mass. 43, 54 n.10 (1989), and Commonwealth v. Scanlan, 9 Mass. App. Ct. 173, 182 (1980). See Johnson v. Wilmington Sales, Inc., 5 Mass. App. Ct. 858, 858 (1977). Where testimony is offered, proof of the fact that an entry does not exist does not require the production of the records themselves or the laying of a foundation for the introduction of secondary evidence. Commonwealth v. Scanlan, 9 Mass. App. Ct. at 182. See Commonwealth v. Torrealba, 316 Mass. 24, 30 (1944); Johnson v. Wilmington Sales, Inc., 5 Mass. App. Ct. at 858.

Subsection (8). This subsection is derived from Commonwealth v. Slavski, 245 Mass. 405, 415 (1923). See Custody of Two Minors, 19 Mass. App. Ct. 552, 559 (1985) (noting that it is "sound practice" for judge to give notice to parties if judge intends to use court investigator or guardian ad litem report where neither party offered report into evidence). Cf. G. L. c. 233, § 76 (admissibility of authenticated government records); Mass. R. Civ. P. 44 (proof of official records); Mass. R. Crim. P. 40 (same). The admission of a record of a primary fact created for routine government administrative functions does not violate the confrontation clause. Commonwealth v. Shangkuan, 78 Mass. App. Ct. 827, 833–834 (2011) (officer's return of service, required by court rule to be completed and filed in court, is nontestimonial because it was not "created solely for use in a pending criminal prosecution," even though it might later be used for proving notice to a defendant).

Under the common law, a report or record does not become an official record for the purpose of this exception merely because it is filed with a governmental agency. See Commonwealth v. Williams, 63 Mass. App. Ct. 615, 619 (2005); Kelly v. O'Neil, 1 Mass. App. Ct. 313, 319 (1973). A hearsay statement recorded in an official record, if made by someone other than the public officer making the record, is not admissible under this exception, although it may be admissible if it falls within another hearsay exception. See Sklar v. Beth Israel Deaconess Med. Ctr., 59 Mass. App. Ct. 550, 556 n.8 (2003). Evaluative reports, opinions, and conclusions contained in a public report are not admissible at common law. Commonwealth v. Nardi, 452 Mass. 379, 387–395 (2008) (ruling that the findings of a medical examiner concerning the nature and extent of the victim's injuries and his or her ultimate opinion as to the cause of death were not statements of fact excluded by the hearsay rule, but instead were evaluative statements that fell outside the public record exception); Mattoon v. City of Pittsfield, 56 Mass. App. Ct. 124, 135 (2002). See Middlesex Supply, Inc. v. Martin & Sons, Inc., 354 Mass. 373, 374–375 (1968); Herson v. New Boston Garden Corp., 40 Mass. App. Ct. 779, 792–793 (1996).

The following statutes provide for the admission of facts contained in public records as prima facie evidence (examples of the records covered are in parentheses): G. L. c. 46, § 19 (birth, marriage, and death records); G. L. c. 79, § 35 (assessed valuation of real property); G. L. c. 90, § 30 (records of the Registry of Motor Vehicles); G. L. c. 123A, § 14(c) (public records at trial on whether person is sexually dangerous); and G. L. c. 185C, § 21 (report of housing inspector). But see Commonwealth v. Almonte, 465 Mass. 224, 242 (2013) (the preferred practice is to redact means and manner of death before admitting death certificate into evidence). Conclusions contained in public records may be made admissible by statute. Shamlian v. Equitable Acc. Co., 226 Mass. 67, 69–70 (1917).

Mortality Tables. In Harlow v. Chin, 405 Mass. 697, 714 (1989), the Supreme Judicial Court addressed the admissibility of mortality tables:

> "Mortality tables, though not conclusive proof of life expectancy, help furnish a basis for the jury's estimation. The tables themselves are admissible regardless of the poor health or extra-hazardous occupation of the person whose life expectancy is being estimated. When the opposing side believes that the person in question, because of poor health, has a lower life expectancy than that reflected in the mortality tables, the usual remedy is to offer evidence to that effect and argue the point to the jury." (Citations omitted.)

Criminal Cases. A record or report that qualifies as an exception to the hearsay rule under this subsection may nevertheless be inadmissible if it contains testimonial statements in violation of the confrontation clause. See Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310–311 (2009). See also Introductory Note to Article VIII, Hearsay.

Subsection (9). This subsection is taken nearly verbatim from G. L. c. 46, § 19. See Commonwealth v. Lykus, 406 Mass. 135, 144 (1989), cert. denied, 519 U.S. 1126 (1997). See also Miles v. Edward Tabor M.D., Inc., 387 Mass. 783, 786 (1982). Records from foreign countries are not admissible under G. L. c. 46, § 19, or G. L. c. 207, § 45. Vergnani v. Guidetti, 308 Mass. 450, 457 (1941). Cf. G. L. c. 46, § 19C ("The commissioner of public health shall use the seal of the department of public health for the purpose of authenticating copies of birth, marriage and death records in his department, and copies of such records when certified by him and authenticated by said seal, shall be evidence like the originals."). General Laws c. 46, § 19, makes the town clerk certificate admissible in evidence, but not with respect to liability. See Wadsworth v. Boston Gas Co., 352 Mass. 86, 93 (1967). See also G. L. c. 207, § 45 ("The record of a marriage made and kept as provided by law by the person by whom the marriage was solemnized, or by the clerk or registrar, or a copy thereof duly certified, shall be prima facie evidence of such marriage.").

Subsection (10). This subsection, which is taken from Proposed Mass. R. Evid. 803(10), reflects Massachusetts practice. See Mass. R. Civ. P. 44(b); Mass. R. Crim. P. 40(b); Blair's Foodland, Inc. v. Shuman's Foodland, Inc., 311 Mass. 172, 175–176 (1942).

Subsection (11). No cases or statutes were located on this issue. Cf. Section 803(6)(A), Hearsay Exceptions; Availability of Declarant Immaterial: Business and Hospital Records: Entry, Writing, or Record Made in Regular Course of Business.

Cross-Reference: Section 804(b)(7), Hearsay Exceptions; Declarant Unavailable: The Exceptions: Religious Records.

Subsection (12). No cases or statutes were located on this issue. Cf. Section 804(b)(7), Hearsay Exceptions; Declarant Unavailable: The Exceptions: Religious Records; Kennedy v. Doyle, 92 Mass. 161, 168 (1865) (baptismal record admissible where maker is deceased).

Subsection (13). This subsection, which is taken from Proposed Mass. R. Evid. 803(13), reflects Massachusetts practice. See North Brookfield v. Warren, 82 Mass. 171, 174–175 (1860). Cf. Section 803(9), Hearsay Exceptions; Availability of Declarant Immaterial: Public Records of Vital Statistics; Section 804(b)(5)(A), Hearsay Exceptions; Declarant Unavailable: The Exceptions: Statutory Exceptions in Civil Cases: Declarations of Decedent.

Subsection (14). This subsection is derived from Scanlan v. Wright, 30 Mass. 523, 527 (1833), and Commonwealth v. Emery, 68 Mass. 80, 81–82 (1854).

Subsection (15). This subsection is taken nearly verbatim from G. L. c. 183, § 5A.

Subsection (16). This subsection is derived from Cunningham v. Davis, 175 Mass. 213, 219 (1900) ("It is a general rule that deeds appearing to be more than 30 years old, which come from the proper custody, and are otherwise free from just grounds of suspicion, are admissible without any proof of execution."). See Whitman v. Shaw, 166 Mass. 451, 460–461 (1896) (ancient plan and field notes); Drury v. Midland R.R. Co., 127 Mass. 571, 581 (1879) (old plans admitted for purposes of establishing location of a creek). Cf. Section 901(b)(8), Authenticating or Identifying Evidence: Examples: Evidence About Ancient Documents.

Cross-Reference: Section 403, Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reason; Section 805, Hearsay within Hearsay.

Subsection (17). This subsection is taken verbatim from G. L. c. 233, § 79B. The word "'compilation,' as used in the statute, connotes simple objective facts, and not conclusions or opinions." Mazzaro v. Paull, 372 Mass. 645, 652 (1977). The trial judge must make "preliminary findings that the proposed exhibit is (1) issued to the public, (2) published for persons engaged in the applicable occupation, and (3) commonly used and relied on by such persons." Id. See Fall River Sav. Bank v. Callahan, 18 Mass. App. Ct. 76, 83–84 (1984); Torre v. Harris-Seybold Co., 9 Mass. App. Ct. 660, 672–673 (1980). The judge has the discretion to

consider the reliability of the information as a factor in determining the admissibility of the compilation, even where the statutory requirements are satisfied. See N.E. Physical Therapy Plus, Inc. v. Liberty Mut. Ins. Co., 466 Mass. 358, 366–367 (2013) (judge did not abuse his discretion in excluding statistical summaries derived from compilation of raw data voluntarily submitted by participating insurance companies where accuracy and reliability of raw data had not been established).

See generally G. L. c. 106, § 2-724 ("Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility.").

Subsection (18)(A). This subsection is taken nearly verbatim from G. L. c. 233, § 79C. See Commonwealth v. Johnson, 59 Mass. App. Ct. 164, 170 (2003) ("pill book" purchased from pharmacy purporting to describe effects of prescription drugs not admissible as learned treatise); Simmons v. Yurchak, 28 Mass. App. Ct. 371, 375–377 (1990) (instructional videotape not admissible as learned treatise). Statements from a treatise satisfying the requirements of G. L. c. 233, § 79C, may also be used in medical malpractice tribunals. See G. L. c. 231, § 60B.

"When determining the admissibility of a published treatise under G. L. c. 233, § 79C, we interpret the 'writer of such statements' to mean the treatise author, not the author of each individual item incorporated into the treatise text." Brusard v. O'Toole, 429 Mass. 597, 606 (1999). "[T]he 'writer' of a statement contained in an authored treatise is the author of the treatise, and the 'writer' of a statement contained in a periodical or similarly edited publication is the author of the specific article in which the statement is contained." Id. The biographical data about the author in the front of the treatise may not be used to establish the expertise of the author, see Reddington v. Clayman, 334 Mass. 244, 247 (1956), but an opponent witness who admits that the author of the treatise is a recognized expert in the field is sufficient, see Thomas v. Ellis, 329 Mass. 93, 98, 100 (1952). "The statutory notice of the intent to introduce a treatise required by G. L. c. 233, § 79C, requires that 'the date of publication' of the treatise be specified. The edition of a treatise, if applicable, should be specified, and parties should be permitted to introduce statements from only that edition." Brusard v. O'Toole, 429 Mass. at 606 n.13.

Subsection (18)(B). This subsection is derived from Commonwealth v. Sneed, 413 Mass. 387, 396 (1992), in which the Supreme Judicial Court adopted Proposed Mass. R. Evid. 803(18). Treatises are not available to bolster direct examination. Brusard v. O'Toole, 429 Mass. 597, 601 n.5 (1999). But see Commonwealth v. Sneed, 413 Mass. at 396 n.8 ("We can imagine a situation in which, in fairness, portions of a learned treatise not called to the attention of a witness during cross-examination should be admitted on request of the expert's proponent in order to explain, limit, or contradict a statement ruled admissible under [Section] 803[(18)]."). This subsection "contemplates that an authored treatise, and not the statements contained therein, must be established as a reliable authority." Brusard v. O'Toole, 429 Mass. at 602–603. The contents of the specific article, Web page, or other material must be shown to have been authored or prepared by a person established to be a "reliable authority" pursuant to one of the means spelled out in Section 803(18)(B). Kace v. Liang, 472 Mass. 630, 644 (2015).

> "[The] opponent of the expert witness [must] bring to the witness's attention a specific statement in a treatise that has been established, to the judge's satisfaction, as a reliable authority. The witness should be given a fair opportunity to assess the statement in context and to comment on it, either during cross-examination or on redirect examination. The judge, of course, will have to determine the relevance and materiality of the statement and should consider carefully any claimed unfairness or confusion that admission of the statement may create."

Commonwealth v. Sneed, 413 Mass. at 396. This is a preliminary question of fact for the judge. See Section 104(a), Preliminary Questions: In General.

Subsection (19). This subsection is derived from Butrick v. Tilton, 155 Mass. 461, 466 (1892). See Cadorette v. United States, 988 F.2d 215, 220–222 (1st Cir. 1993). But see Haddock v. Boston & Maine R.R., 85 Mass. 298, 301 (1862).

Subsection (20). This subsection is derived from Enfield v. Woods, 212 Mass. 547, 551–552 (1912) (admitting reputation evidence regarding existence or nonexistence of public ownership of land). See G. L. c. 139, § 9 ("For the purpose of proving the existence of the nuisance the general reputation of the place shall be admissible as evidence."); Commonwealth v. United Food Corp., 374 Mass. 765, 767 n.2 (1978) (G. L. c. 139, § 9, is a statutory exception to hearsay rule).

Subsection (21). This exception deals only with the hearsay aspect of evidence of reputation. For additional restrictions on the use of such evidence, see Sections 404, Character Evidence; Crimes or Other Act; 405, Methods of Proving Character; and 608, A Witness's Character for Truthfulness or Untruthfulness.

Subsection (22). This subsection is derived from Flood v. Southland Corp., 416 Mass. 62, 70 (1993), in which the Supreme Judicial Court adopted Proposed Mass. R. Evid. 803(22). See Commonwealth v. Powell, 40 Mass. App. Ct. 430, 435–436 (1996) (error where trial court instructed jury it could consider prior guilty plea of alleged joint venturer to charge of armed robbery as circumstantial evidence of presence of gun in subsequent trial of other joint venturer on same charge). "[A] plea of guilty is admissible in evidence as an admission in subsequent civil litigation, but is not conclusive." Aetna Cas. & Sur. Co. v. Niziolek, 395 Mass. 737, 747 (1985). Cf. Section 609, Impeachment by Evidence of Conviction of Crime; Section 410, Pleas, Offers of Pleas, and Related Statements; Mass. R. Crim. P. 12(f).

Subsection (23). No cases or statutes were located on this issue.

Subsection (24)(A). Subsections (24)(A) through (A)(ii) are taken nearly verbatim from G. L. c. 233, § 83(a). Subsections (24)(A)(iii) and (iv) are derived from Care & Protection of Rebecca, 419 Mass. 67, 78, 80 (1994). There is no requirement that the child be unavailable. Id. at 76–77. When a care and protection proceeding is joined with a petition to dispense with consent to adoption, admissibility of a child's out-of-court statements should comply with the stricter requirements of G. L. c. 233, § 82, not § 83. Adoption of Tina, 45 Mass. App. Ct. 727, 733 (1998).

Subsection (24)(B). This subsection is taken nearly verbatim from Care & Protection of Rebecca, 419 Mass. 67, 79–80 (1994). The judge may question the child through a voir dire. Id. The reliability of statements contained in an investigator's report can be assessed by cross-examining the investigator. Care & Protection of Leo, 38 Mass. App. Ct. 237, 241–242 (1995).

Subsection (24)(C). This subsection is taken nearly verbatim from Care & Protection of Rebecca, 419 Mass. 67, 80 (1994).

Subsection (24)(D). This subsection is taken verbatim from G. L. c. 233, § 83(b).

Section 804. Hearsay Exceptions; Declarant Unavailable

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant

> **(1)** is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
>
> **(2)** refuses to testify [this criterion not recognized];

(3) testifies to not remembering the subject matter [this criterion not recognized];

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able to procure the declarant's attendance by process or other reasonable means.

But this Subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) Prior Recorded Testimony. Testimony that

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one, and

(B) is now offered against a party who had—or, in a civil case, whose predecessor in interest had—an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) Statement Made Under the Belief of Imminent Death. In a prosecution for homicide, a statement that a declarant, who believed that the declarant's death was imminent and who died shortly after making the statement, made about the cause or circumstances of the declarant's own impending death or that of a co-victim.

(3) Statement Against Interest. A statement that a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else, or to expose the declarant to civil or criminal liability. In a criminal case, the exception does not apply to a statement that tends to expose the declarant to criminal liability and is offered to exculpate the defendant, or is offered by the Commonwealth to inculpate the defendant, unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of Personal History.

(A) A statement concerning the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, or relationship by blood, even though the declarant had no way of acquiring personal knowledge of the matter stated.

(B) A statement regarding those matters concerning another person to whom the declarant is related [exception not recognized].

(5) Statutory Exceptions in Civil Cases.

(A) Declarations of Decedent. In any action or other civil judicial proceeding, a declaration of a deceased person shall not be inadmissible in evidence as hearsay or as private conversation between husband and wife, as the case may be, if the court finds that it was made in good faith and upon the personal knowledge of the declarant.

(B) Deceased Party's Answers to Interrogatories. If a party to an action who has filed answers to interrogatories under any applicable statute or any rule of the Massachusetts Rules of Civil Procedure dies, so much of such answers as the court finds have been made upon the personal knowledge of the deceased shall not be inadmissible as hearsay or self-serving if offered in evidence in said action by a representative of the deceased party.

(C) Declarations of Decedent in Actions Against an Estate. If a cause of action brought against an executor or administrator is supported by oral testimony of a promise or statement made by the testator or intestate of the defendant, evidence of statements, written or oral, made by the decedent, memoranda and entries written by the decedent, and evidence of the decedent's acts and habits of dealing, tending to disprove or to show the improbability of the making of such promise or statement, shall be admissible.

(D) Reports of Deceased Physicians in Tort Actions. In an action of tort for personal injuries or death, or for consequential damages arising from such personal injuries, the medical report of a deceased physician who attended or examined the plaintiff, including expressions of medical opinion, shall, at the discretion of the trial judge, be admissible in evidence, but nothing therein contained which has reference to the question of liability shall be so admissible. Any opposing party shall have the right to introduce evidence tending to limit, modify, contradict, or rebut such medical report. The word "physician" as used in this section shall not include any person who was not licensed to practice medicine under the laws of the jurisdiction within which such medical attention was given or such examination was made.

(E) Medical Reports of Disabled or Deceased Physicians as Evidence in Workers' Compensation Proceedings. In proceedings before the industrial accident board, the medical report of an incapacitated, disabled, or deceased physician who attended or examined the employee, including expressions of medical opinion, shall, at the discretion of the member, be admissible as evidence if the member finds that such medical report was made as the result of such physician's attendance or examination of the employee.

(6) Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability. A statement offered against a party if the court finds (A) that the witness is unavailable; (B) that the party was involved in, or responsible for, procuring the unavailability of the witness; and (C) that the party acted with the intent to procure the witness's unavailability.

(7) Religious Records. Statements of fact made by a deceased person authorized by the rules or practices of a religious organization to perform a religious act, contained in a certificate that the maker performed such act, and purporting to be issued at the time of the act or within a reasonable time thereafter.

(8) Admissibility in Criminal Proceedings of a Child's Out-of-Court Statement Describing Sexual Contact. General Laws c. 233, § 81, was adopted prior to the United States Supreme Court's decisions in Crawford v. Washington, 541 U.S. 36 (2004), and Davis v. Washington, 547 U.S. 813 (2006), as well as the Supreme Judicial Court's decisions in Commonwealth v. Gonsalves, 445 Mass. 1 (2005), cert. denied, 548 U.S. 926 (2006), and Commonwealth v. Amirault, 424 Mass. 618 (1997). These decisions call into question the constitutionality of this subsection.

(A) Admissibility in General. An out-of-court statement of a child under the age of ten describing an act of sexual contact performed on or with the child, the circumstances under which it occurred, or which identifies the perpetrator shall be admissible as substantive evidence in any criminal proceeding; provided, however, that

(i) the statement is offered as evidence of a material fact and is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts,

(ii) the person to whom the statement was made or who heard the child make the statement testifies,

(iii) the judge finds pursuant to Subsection (b)(8)(B) that the child is unavailable as a witness,

(iv) the judge finds pursuant to Subsection (b)(8)(C) that the statement is reliable, and

(v) the statement is corroborated pursuant to Subsection (b)(8)(D).

(B) Unavailability of Child. The proponent of such statement shall demonstrate a diligent and good-faith effort to produce the child and shall bear the burden of showing unavailability. A finding of unavailability shall be supported by specific findings on the record, describing facts with particularity, demonstrating that

(i) the child is unable to be present or to testify because of death or physical or mental illness or infirmity;

(ii) by a ruling of the court, the child is exempt on the ground of privilege from testifying concerning the subject matter of such statement;

(iii) the child testifies to a lack of memory of the subject matter of such statement;

(iv) the child is absent from the hearing and the proponent of such statement has been unable to procure the attendance of the child by process or by other reasonable means;

(v) the court finds, based upon expert testimony from a treating psychiatrist, psychologist, or clinician, that testifying would be likely to cause severe psychological or emotional trauma to the child; or

(vi) the child is not competent to testify.

(C) Reliability of Statement. If a finding of unavailability is made, the out-of-court statement shall be admitted if the judge further finds,

(i) after holding a separate hearing, that such statement was made under oath, that it was accurately recorded and preserved, and that there was sufficient opportunity to cross-examine, or

(ii) after holding a separate hearing and, where practicable and where not inconsistent with the best interests of the child, meeting with the child, that such statement was made under circumstances inherently demonstrating a special guarantee of reliability.

For the purposes of finding circumstances demonstrating reliability pursuant to this subsection, a judge may consider whether the relator documented the child witness's statement and shall consider the following factors:

(a) the clarity of the statement, meaning the child's capacity to observe, remember, and give expression to that which such child has seen, heard, or experienced; provided, however, that a finding under this clause shall be supported by expert testimony from a treating psychiatrist, psychologist, or clinician;

(b) the time, content, and circumstances of the statement; and

(c) the child's sincerity and ability to appreciate the consequences of such statement.

(D) Corroborating Evidence. The out-of-court statement must be corroborated by other independently admitted evidence.

(E) Admissibility by Common Law or Statute. An out-of-court statement admissible by common law or by statute shall remain admissible notwithstanding the provisions of this section.

(9) Out-of-Court Statement of Child Describing Sexual Contact in Civil Proceeding, Including Termination of Parental Rights.

(A) Admissibility in General. The out-of-court statements of a child under the age of ten describing any act of sexual contact performed on or with the child, the circumstances under which it occurred, or which identifies the perpetrator shall be admissible as substantive evidence in any civil proceeding, except proceedings brought under G. L. c. 119, §§ 23(C) and 24; provided, however, that

(i) such statement is offered as evidence of a material fact and is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts,

(ii) the person to whom such statement was made or who heard the child make such statement testifies,

(iii) the judge finds pursuant to Subsection (b)(9)(B) that the child is unavailable as a witness,

(iv) the judge finds pursuant to Subsection (b)(9)(C) that such statement is reliable, and

(v) such statement is corroborated pursuant to Subsection (b)(9)(D).

(B) Unavailability of Child. The proponent of such statement shall demonstrate a diligent and good-faith effort to produce the child and shall bear the burden of showing unavailability. A finding of unavailability shall be supported by specific findings on the record, describing facts with particularity, demonstrating that

(i) the child is unable to be present or to testify because of death or existing physical or mental illness or infirmity;

(ii) by a ruling of the court, the child is exempt on the ground of privilege from testifying concerning the subject matter of such statement;

(iii) the child testifies to a lack of memory of the subject matter of such statement;

(iv) the child is absent from the hearing and the proponent of such statement has been unable to procure the attendance of the child by process or by other reasonable means;

(v) the court finds, based upon expert testimony from a treating psychiatrist, psychologist, or clinician, that testifying would be likely to cause severe psychological or emotional trauma to the child; or

(vi) the child is not competent to testify.

(C) Reliability of Statement. If a finding of unavailability is made, the out-of-court statement shall be admitted if the judge further finds,

(i) after holding a separate hearing, that such statement was made under oath, that it was accurately recorded and preserved, and that there was sufficient opportunity to cross-examine, or

(ii) after holding a separate hearing and, where practicable and where not inconsistent with the best interests of the child, meeting with the child, that such statement was made under circumstances inherently demonstrating a special guarantee of reliability.

For the purposes of finding circumstances demonstrating reliability pursuant to this subsection, a judge may consider whether the relator documented the child witness's statement and shall consider the following factors:

(a) the clarity of the statement, meaning the child's capacity to observe, remember, and give expression to that which such child has seen, heard, or experienced; provided, however, that a finding under this clause shall be supported by expert testimony from a treating psychiatrist, psychologist, or clinician;

(b) the time, content, and circumstances of the statement;

(c) the existence of corroborative evidence of the substance of the statement regarding the abuse, including either the act, the circumstances, or the identity of the perpetrator; and

(d) the child's sincerity and ability to appreciate the consequences of the statement.

(D) Corroborating Evidence. The out-of-court statement must be corroborated by other independently admitted evidence.

(E) Admissibility by Common Law or Statute. An out-of-court statement admissible by common law or by statute shall remain admissible notwithstanding the provisions of this section.

NOTE

Confrontation Clause. In a criminal case, a hearsay statement offered against the defendant must satisfy both the confrontation clause and one of the hearsay exceptions. For a discussion of the relationship between the confrontation clause and the hearsay exceptions stated in Section 804, refer to the Introductory Note to Article VIII, Hearsay.

Introduction. Section 804 defines hearsay exceptions that are conditioned upon a showing that the declarant is unavailable. Section 804(a) defines the requirement of unavailability that applies to all the hearsay exceptions in Section 804(b). The second paragraph of Section 804(a) is consistent with the doctrine of forfeiture by wrongdoing adopted by the Supreme Judicial Court in Commonwealth v. Edwards, 444 Mass. 526, 540 (2005).

The exceptions that apply when the declarant of the out-of-court statement is unavailable address only the evidentiary rule against hearsay, except in the context of forfeiture by wrongdoing. See Section 804(b)(6), Hearsay Exceptions; Declarant Unavailable: The Exceptions: Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability. In criminal cases, the admissibility at trial of an out-of-court statement against the defendant also requires consideration of the constitutional right to confrontation under the Sixth Amendment to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights. For a discussion of the relationship between the confrontation clause and the hearsay exceptions stated in Section 804, refer to the Introductory Note to Article VIII, Hearsay.

A defendant invoking the Fifth Amendment privilege against self-incrimination only makes himself or herself unavailable to another party, but the defendant is not unavailable as to himself or herself. See Commonwealth v. Labelle, 67 Mass. App. Ct. 698, 701 (2006). It should not be presumed that an absent witness may invoke his or her privilege against self-incrimination. See Commonwealth v. Lopera, 42 Mass. App. Ct. 133, 137 n.3 (1997). But where the declarant is a codefendant and joint venturer in the crimes charged against the defendant, and the declarant's out-of-court statements directly implicate the declarant in the criminal enterprise, the unavailability requirement is satisfied because the defendant undoubtedly would invoke the Fifth Amendment privilege. See Commonwealth v. Charles, 428 Mass. 672, 677–679 (1999).

Subsection (a)(1). This subsection is derived from Commonwealth v. Canon, 373 Mass. 494, 499–500 (1977), cert. denied, 435 U.S. 933 (1978) (valid invocation of privilege against self-incrimination rendered witness unavailable). Unavailability is not defined simply in terms of lack of physical presence, but stems from the inability of opposing counsel to cross-examine the witness. Commonwealth v. DiPietro, 373 Mass. 369, 382 (1977). Accord Commonwealth v. Negron, 441 Mass. 685, 688–691 (2004) (valid claim of

spousal privilege by defendant's wife rendered her unavailable). However, a claim of privilege will not be presumed simply because a witness might have a basis for asserting it if the witness had appeared and been called to testify. See Commonwealth v. Charros, 443 Mass. 752, 767–768 (2005).

Subsection (a)(2). The Supreme Judicial Court has not yet adopted Proposed Mass. R. Evid. 804(a)(2), which, like the Federal rule, provides that a witness who persists in refusing to testify concerning the subject matter of his or her statement may be deemed to be unavailable. See Commonwealth v. Fisher, 433 Mass. 340, 355–356 (2001) (explaining that absent the assertion of a privilege against self-incrimination, a witness's refusal to testify does not render the witness unavailable for purposes of the hearsay exception for prior recorded testimony).

Subsection (a)(3). Massachusetts law does not recognize lack of memory of the subject matter of the testimony as a basis for finding that the witness is unavailable. Commonwealth v. Bray, 19 Mass. App. Ct. 751, 758 (1985). Cf. A.T. Stearns Lumber Co. v. Howlett, 239 Mass. 59, 61 (1921) (declining to extend doctrine of past recollection recorded to permit introduction of prior recorded testimony that witness had no present memory of but recalled was the truth).

Subsection (a)(4). This subsection is derived from Commonwealth v. Bohannon, 385 Mass. 733, 742 (1982) ("death or other legally sufficient reason"), and cases cited. See Commonwealth v. Mustone, 353 Mass. 490, 491–492 (1968) (death of witness). In Ibanez v. Winston, 222 Mass. 129, 130 (1915), the Supreme Judicial Court observed that although the death or insanity of a witness would supply the basis for a finding of unavailability, the mere fact that a witness had returned to Spain, without more, did not demonstrate that he was unavailable. However, in Commonwealth v. Hunt, 38 Mass. App. Ct. 291, 295 (1995), the Appeals Court noted that

> "[w]hen a witness is outside of the borders of the United States and declines to honor a request to appear as a witness, the unavailability of that witness has been conceded because a State of the United States has no authority to compel a resident of a foreign country to attend a trial here."

In Commonwealth v. Housewright, 470 Mass. 665, 671–674 (2015), the Supreme Judicial Court provided a framework to analyze whether a witness is "unavailable because of illness or infirmity" in criminal cases where the Commonwealth is the proponent of the evidence. The Commonwealth must show that there is "an unacceptable risk that the witness's health would be significantly jeopardized if the witness were required to testify in court" by providing "reliable, up-to-date information sufficient to permit the judge to make an independent finding." Id. at 671. In assessing the probability that the witness's appearance will cause an adverse health consequence, the court should consider "the severity of the adverse health consequence, such as whether it would be life-threatening, the importance of the testimony in the context of the case, and the extent to which the live trial testimony would likely differ from the prior recorded testimony," id. at 672, and whether a continuance of the trial or a deposition of the witness is appropriate, considering both the witness's health and interest of justice. Id. at 672–673. The Commonwealth must make a good-faith effort to produce the witness at trial and must promptly inform the court and the defendant of the claimed unavailability. See Commonwealth v. Dorisca, 88 Mass. App. Ct. 776, 779–783 (2015) (trial judge erred in basing determination of witness's unavailability on prosecutor's statement that witness had recently gone into labor, without making inquiry into Housewright factors).

Subsection (a)(5). This subsection is derived from Commonwealth v. Charles, 428 Mass. 672, 678 (1999) ("We accept as a basis of unavailability the principles expressed in Rule 804[a][5] of the Federal Rules of Evidence [1985]"). In Commonwealth v. Sena, 441 Mass. 822, 832 (2004), the Supreme Judicial Court noted that

> "[b]efore allowing the Commonwealth to introduce prior recorded testimony, the judge must be satisfied that the Commonwealth has made a good faith effort to locate and produce the witness at trial. Whether the Commonwealth carries its burden on the question of sufficient diligence in attempting to obtain the attendance of the desired witness depends

> upon what is a reasonable effort in light of the peculiar facts of the case." (Citations and quotation omitted.)

See Commonwealth v. Roberio, 440 Mass. 245, 248 (2003) (where prosecutor established unavailability before trial of witness who is then located out of State during trial, court is not required to suspend trial to obtain presence of witness); Commonwealth v. Charles, 428 Mass. at 678 (evidence that declarant is a fugitive satisfies unavailability requirement); Commonwealth v. Pittman, 60 Mass. App. Ct. 161, 169–170 (2003) (witness who ignored defense counsel's subpoena and instead attended an out-of-State funeral was unavailable). Contrast Ruml v. Ruml, 50 Mass. App. Ct. 500, 508–509 (2000) (self-imposed exile from Massachusetts does not satisfy unavailability requirement); Commonwealth v. Hunt, 38 Mass. App. Ct. 291, 295–296 (1995) (fact that prospective witness is a foreign national outside United States does not excuse proponent of statement from making diligent effort to locate and secure attendance of witness). "When former testimony is sought to be offered against the accused, the degree of 'good faith' and due diligence is greater than that required in other situations." Commonwealth v. Bohannon, 385 Mass. 733, 745 (1982).

Subsection (b)(1). This subsection is derived from Commonwealth v. Meech, 380 Mass. 490, 494 (1980), and Commonwealth v. DiPietro, 373 Mass. 369, 380–385 (1977). See Mass. R. Civ. P. 32 and Mass. R. Crim. P. 35 (use of depositions in proceedings).

> "The prior recorded testimony exception to the hearsay rule applies 'where the prior testimony was given by a person, now unavailable, in a proceeding addressed to substantially the same issues as in the current proceeding, with reasonable opportunity and similar motivation on the prior occasion for cross-examination of the declarant by the party against whom the testimony is now being offered.'"

Commonwealth v. Fisher, 433 Mass. 340, 355 (2001), quoting Commonwealth v. Trigones, 397 Mass. 633, 638 (1986). The party against whom the testimony is being offered need not actually cross-examine the declarant; only an adequate opportunity to cross-examine the declarant is required. Commonwealth v. Canon, 373 Mass. 494, 499–501 (1977), cert. denied, 435 U.S. 933 (1978). See Commonwealth v. Hurley, 455 Mass. 53, 62–63 (2009) ("A defendant is not entitled under the confrontation clause to a cross-examination that is 'effective in whatever way, and to whatever extent the defense might wish.' Rather, what is essential is that the 'trier of fact [have] a satisfactory basis for evaluating the truth of the prior statement.'" [Citations omitted.]).

The Supreme Judicial Court has applied this hearsay exception when the prior recorded testimony was given at a probable cause hearing, see Commonwealth v. Mustone, 353 Mass. 490, 492–494 (1968), and at a pretrial dangerousness hearing under G. L. c. 276, § 58A. See Commonwealth v. Hurley, 455 Mass. at 63 & n.9 (noting that there is "no general rule that a witness's prior testimony at a pretrial detention hearing is always admissible at trial if that witness becomes unavailable."). See also id. at 66–67 (when an excited utterance is admitted at a pretrial hearing as an exception to the hearsay rule in circumstances in which the defendant is not given an opportunity to cross-examine the declarant about the facts described in the excited utterance, the admission of the evidence violates the confrontation clause). Cf. Commonwealth v. Arrington, 455 Mass. 437, 442–445 (2009) (upholding order that excluded from trial the alleged victim's testimony at a pretrial dangerousness hearing under G. L. c. 276, § 58, on grounds that due to her medical condition [late stage cancer], defense counsel was deprived of reasonable opportunity for cross-examination).

In Commonwealth v. Clemente, 452 Mass. 295, 313–315 (2008), the Supreme Judicial Court held that this hearsay exception is not generally applicable to prior recorded testimony before the grand jury because the testimony of such witnesses is usually far more limited than at trial and is often presented without an effort to corroborate or discredit it. "If, however, the party seeking the admission of the grand jury testimony can establish that the Commonwealth had an opportunity and similar motive to develop fully a (now unavailable) witness's testimony at the grand jury, that earlier testimony would be admissible." Id. at 315.

The declarant's prior testimony must be able to be "substantially reproduced in all material particulars." Commonwealth v. Martinez, 384 Mass. 377, 381 (1981). See G. L. c. 233, § 80 (official transcripts); Commonwealth v. DiPietro, 373 Mass. 369, 392–394 (1977) (unofficial transcripts); Commonwealth v. Vaden,

373 Mass. 397, 400 (1977) (tape recordings, whether official or unofficial); Commonwealth v. Janovich, 55 Mass. App. Ct. 42, 45 (2002) (witness present at prior proceeding).

Subsection (b)(2). This subsection is derived from Commonwealth v. Polian, 288 Mass. 494, 497 (1934), and Commonwealth v. Vona, 250 Mass. 509, 511 (1925). See Commonwealth v. Gonzalez, 469 Mass. 410, 419–420 (2014). This common-law exception is not subject to the defendant's right to confrontation. See Commonwealth v. Nesbitt, 452 Mass. 236, 251 (2008) ("Thus, in the unique instance of dying declarations, we ask *only* whether the statement is admissible as a common-law dying declaration, and not whether the statement is testimonial."). The "dying declaration" allows testimony as to the victim's statements concerning the circumstances of the killing and the identity of the perpetrator. Commonwealth v. Polian, 288 Mass. at 500. It may be in the form of oral testimony, gestures, or a writing made by the victim. See Commonwealth v. Casey, 65 Mass. 417, 422 (1853) (victim who was mortally wounded and unable to speak, but conscious, confirmed identity of perpetrator by squeezing the hand of her treating physician who asked her if it was "Mr. Casey, who worked for her husband"). The Supreme Judicial Court has left open the question whether a defendant's right to confrontation is applicable to the current, expanded concept of the dying declaration exception. See Commonwealth v. Nesbitt, 452 Mass. at 252 n.17, citing G. L. c. 233, § 64 (addressing admissibility of dying declarations of a female whose death results from an unlawful abortion in violation of G. L. c. 272, § 19), and Commonwealth v. Key, 381 Mass. 19, 26 (1980) (expanding the common-law exception by admitting a dying declaration to prove the homicides of other common victims).

The declarant's belief of impending death may be inferred from the surrounding circumstances, including the character of the injury sustained. See Commonwealth v. Moses, 436 Mass. 598, 602 (2002) ("Jenkins had been shot four times shortly before making the statement. Two bullets had pierced his chest, one of which had lodged in his spine. When police and emergency personnel arrived, he was 'very frightened,' grimacing in pain, bleeding, and asking for oxygen. He asked a treating emergency medical technician if he were going to die. She told him that 'it didn't look too good' for him. In the circumstances, it was not error for the judge to find that Jenkins believed at the time he made the statements that death was imminent."); Commonwealth v. Niemic, 427 Mass. 718, 724 (1998) ("The evidence showed that, when the officer found the victim, he had been stabbed in the heart and was bleeding profusely. There was also testimony that, at the hospital, he was 'breathing heavily' and 'appeared to be having a hard time' and that the officer questioning him 'had to work to get his attention to focus.' It was permissible to infer from this that the victim was aware that he was dying.").

Before admitting the dying declaration, the trial judge must first determine by a preponderance of the evidence that the requisite elements of a dying declaration are satisfied. Commonwealth v. Green, 420 Mass. 771, 781–782 (1995). If the statement is admitted, the judge must then instruct the jury that they must also find by a preponderance of the evidence that the same elements are satisfied before they may consider the substance of the statement. Id.

The broader statutory exception for declarations of a deceased person set forth in G. L. c. 233, § 65, applies only in civil cases. Commonwealth v. Dunker, 363 Mass. 792, 794 n.1 (1973).

Subsection (b)(3). This subsection is derived from Commonwealth v. Carr, 373 Mass. 617, 622–624 (1977), and Commonwealth v. Charles, 428 Mass. 672, 679 (1999). See also Williamson v. United States, 512 U.S. 594 (1994). This subsection is applicable only to "statements made by witnesses, not parties to the litigation or their privies or representatives." Commonwealth v. McLaughlin, 433 Mass. 558, 565 (2001), quoting P.J. Liacos, Massachusetts Evidence § 8.10 (7th ed. 1999). This exception against penal interest is applicable in civil and criminal cases. See Zinck v. Gateway Country Store, Inc., 72 Mass. App. Ct. 571, 575 (2008). The admission by a party-opponent need not be a statement against the declarant's penal or proprietary interest. See Section 801(d)(2), Definitions: Statements That Are Not Hearsay: An Opposing Party's Statement.

A declarant's narrative may include self-inculpatory and self-exculpatory elements.

> "[A]pplication of the evidentiary rule concerning declarations against penal interest to a full narrative requires breaking out which parts, if any, of the declaration are actually against the

> speaker's penal interest. Further, application of the hearsay exception requires determination whether the declaration has an evidentiary connection and linkage to the matters at hand in the trial."

Commonwealth v. Marrero, 60 Mass. App. Ct. 225, 229 (2003). When the self-inculpatory aspect of the narrative is very limited, the trial judge has discretion either to exclude it entirely or "to allow it in with some limited 'necessary surrounding context' to prevent its significance from being distorted" by opposing counsel. Commonwealth v. Dejarnette, 75 Mass. App. Ct. 88, 99 (2009).

The judge's role in determining the admissibility of a statement against interest is to determine "whether, in light of the other evidence already adduced or to be adduced, there is some reasonable likelihood that the statement could be true." Commonwealth v. Drew, 397 Mass. 65, 76 (1986). This means that in accordance with Section 104(b), Preliminary Questions: Relevance That Depends on a Fact, the question whether to believe the declarant's statement is ultimately for the jury. Id.

A statement may qualify for admission as a declaration against penal interest even though it supplies circumstantial, and not direct, evidence of the declarant's guilt. See Commonwealth v. Charles, 428 Mass. 672, 679 (1999). In Commonwealth v. Charles, the Supreme Judicial Court also indicated that even though the exception does not explicitly require corroboration when the statement is introduced against the defendant, it would follow the majority rule and require it in such cases. Id. at 679 n.2. See, e.g., Commonwealth v. Pope, 397 Mass. 275, 280 (1986) (reversing defendant's conviction based on erroneous admission of extrajudicial statement of a deceased witness; "[w]e do not believe that concern for penal consequence would inspire a suicide victim to truthfulness").

In criminal cases, "[i]n applying the corroboration requirement, judges are obliged to . . . consider as relevant factors the degree of disinterestedness of the witnesses giving corroborating testimony as well as the plausibility of that testimony in the light of the rest of the proof." Commonwealth v. Carr, 373 Mass. at 624. The Supreme Judicial Court has explained that

> "behind the corroboration requirement of [Fed. R. Evid.] 804(b)(3) lurks a suspicion that a reasonable man might sometimes admit to a crime he did not commit. A classic example is an inmate, serving time for multiple offenses, who has nothing to lose by a further conviction, but who can help out a friend by admitting to the friend's crime."

Commonwealth v. Drew, 397 Mass. at 74 n.8. The Supreme Judicial Court has stated that

> "[o]ther factors the judge may consider are: the timing of the declaration and the relationship between the declarant and the witness, the reliability and character of the declarant, whether the statement was made spontaneously, whether other people heard the out-of-court statement, whether there is any apparent motive for the declarant to misrepresent the matter, and whether and in what circumstances the statement was repeated" (citation omitted).

Id. at 76. However,

> "[i]n determining whether the declarant's statement has been sufficiently corroborated to merit its admission in evidence, the judge should not be stringent. A requirement that the defendant corroborate the declarant's entire statement, for example, may run afoul of the defendant's due process rights . . . . If the issue of sufficiency of the defendant's corroboration is close, the judge should favor admitting the statement. In most such instances, the good sense of the jury will correct any prejudicial impact." (Citation omitted.)

Id. at 75 n.10. See Commonwealth v. Nutbrown, 81 Mass. App. Ct. 773, 779–780 (2012) (in deciding whether statement is "trustworthy," trial judge must look only to credibility of declarant, leaving it to jury to determine credibility of witness who testifies to declaration). There is no requirement that when the statement is offered by the defendant, the exculpatory portion must also inculpate the declarant. See Commonwealth v. Keizer, 377 Mass. 264, 270 (1979).

Subsection (b)(4)(A). This subsection is derived from Haddock v. Boston & Maine R.R., 85 Mass. 298, 300–301 (1862), and Butrick v. Tilton, 155 Mass. 461, 466 (1892). In Haddock v. Boston & Maine R.R., 85 Mass. at 298–299, the court allowed a witness to testify that she came into ownership of the property through her mother and grandmother even though the only basis for her knowledge was what the person she alleged to be her mother said to her. In Butrick v. Tilton, 155 Mass. at 466, also a dispute over title to real property, the court permitted the alleged owner's granddaughter to testify as to how her grandfather came into ownership of the real estate, and that a cousin who owned the property before her grandfather died without children, based exclusively on what other family members told her and without any personal knowledge. See also Section 803(13), Hearsay Exceptions; Availability of Declarant Immaterial: Family Records; Section 803(19), Hearsay Exceptions; Availability of Declarant Immaterial: Reputation Concerning Personal or Family History.

Subsection (b)(4)(B). Massachusetts has not yet had occasion to consider Fed. R. Evid. 804(b)(4)(B), which extends the principle of Section 804(b)(4)(A) to others to whom the declarant is related by "blood, adoption or marriage," or to whom the declarant is so "intimately associated with . . . as to be likely to have accurate information concerning the matter declared."

Subsection (b)(5)(A). This subsection is taken verbatim from G. L. c. 233, § 65. This hearsay exception applies in "all civil cases." Harrison v. Loyal Protective Life Ins. Co., 379 Mass. 212, 219 (1979). It does not apply in criminal proceedings. Commonwealth v. Cyr, 425 Mass. 89, 94 n.9 (1997). Nor is it available to a party attempting to perpetuate the testimony of a person who is expected to die shortly. Anselmo v. Reback, 400 Mass. 865, 868–869 (1987). See G. L. c. 233, §§ 46, 47; Mass. R. Civ. P. 27(a) (requirements to perpetuate testimony). The proponent of the evidence has the burden of establishing the foundational requirements of good faith and personal knowledge for the admissibility of the evidence. Kelley v. Jordan Marsh Co., 278 Mass. 101, 106 (1932). Whether the proponent has met this burden, including proof that the statement was actually made, is a preliminary question of fact for the trial judge under Section 104(a), Preliminary Questions: In General. See Slotofski v. Boston Elevated Ry. Co., 215 Mass. 318, 321 (1913).

The only ground of unavailability is the death of the declarant. G. L. c. 233, § 65. In the absence of a finding of good faith, the statement is not admissible. See Barbosa v. Hopper Feeds, Inc., 404 Mass. 610, 620 (1989) (excluding declaration because it was made after the injury suffered by the plaintiff and at the time when the now-deceased person had an incentive to fabricate). "In general [the declarations] must be derived from the exercise of the declarant's own senses as distinguished from opinions based upon data observed by him or furnished by others." Little v. Massachusetts N.E. St. Ry. Co., 223 Mass. 501, 504 (1916). "The declarations of the deceased may be in writing and need not be reproduced in the exact words used by the declarant" (citations omitted). Bellamy v. Bellamy, 342 Mass. 534, 536 (1961). See id. (oral statements also admissible).

Subsection (b)(5)(B). This subsection is taken verbatim from G. L. c. 233, § 65A. See Thornton v. First Nat'l Stores, Inc., 340 Mass. 222, 225 (1960). See also Mass. R. Civ. P. 33 (interrogatories to parties).

Subsection (b)(5)(C). This subsection is taken nearly verbatim from G. L. c. 233, § 66. In Rothwell v. First Nat'l Bank, 286 Mass. 417, 421 (1934), the Supreme Judicial Court explained the difference between Section 65 and Section 66 of G. L. c. 233. "[Section 66] is narrower than the other, in that it relates to the declarations or conduct of one person in one sort of case. But it requires no preliminary finding of good faith or other conditions. These two statutes operate concurrently and independently." Id. See Greene v. Boston Safe Deposit & Trust Co., 255 Mass. 519, 524 (1926).

Subsection (b)(5)(D). This subsection is taken verbatim from G. L. c. 233, § 79H.

Subsection (b)(5)(E). This subsection is taken verbatim from G. L. c. 152, § 20B. The statutory exception, however, might not overcome the further objection that it contains hearsay-within-hearsay in the form of statements to the employee's physician about how an injury occurred. See Fiander's Case, 293 Mass. 157, 164 (1936).

Subsection (b)(6). This subsection is derived from Commonwealth v. Edwards, 444 Mass. 526, 540 (2005). See Giles v. California, 554 U.S. 353, 373 (2008) (holding that the Sixth Amendment right to confrontation is not forfeited by wrongdoing unless the defendant acted with the intent to render the witness unavailable); Crawford v. Washington, 541 U.S. 36, 62 (2004) ("[T]he rule of forfeiture by wrongdoing [which we accept] extinguishes confrontation claims on essentially equitable grounds."). The Massachusetts common-law doctrine expressed in this subsection is fully consistent with the Federal doctrine set forth in Fed. R. Evid. 804(b)(6):

> "By requiring that the defendant actively assist the witness in becoming unavailable with the intent to make her unavailable, our doctrine of forfeiture by wrongdoing is at least as demanding as Fed. R. Evid. 804(b)(6), which permits a finding of forfeiture where the defendant 'acquiesced' in conduct that was intended to, and did, make the witness unavailable to testify."

Commonwealth v. Szerlong, 457 Mass. 858, 862–863 (2010).

"A defendant's involvement in procuring a witness's unavailability need not consist of a criminal act, and may include a defendant's collusion with a witness to ensure that the witness will not be heard at trial." Commonwealth v. Edwards, 444 Mass. at 540. In Edwards, the Supreme Judicial Court elaborated on the scope of this exception.

> "A finding that a defendant somehow influenced a witness's decision not to testify is not required to trigger the application of the forfeiture by wrongdoing doctrine where there is collusion in implementing that decision or planning for its implementation. Certainly, a defendant must have contributed to the witness's unavailability in some significant manner. However, the causal link necessary between a defendant's actions and a witness's unavailability may be established where (1) a defendant puts forward to a witness the idea to avoid testifying, either by threats, coercion, persuasion, or pressure; (2) a defendant physically prevents a witness from testifying; or (3) a defendant actively facilitates the carrying out of the witness's independent intent not to testify. Therefore, in collusion cases (the third category above) a defendant's joint effort with a witness to secure the latter's unavailability, regardless of whether the witness already decided 'on his own' not to testify, may be sufficient to support a finding of forfeiture by wrongdoing." (Footnote omitted.)

Id. at 540–541. "[W]here the defendant has had a meaningful impact on the witness's unavailability, the defendant may have forfeited confrontation and hearsay objections to the witness's out-of-court statements, even where the witness modified the initial strategy to procure the witness's silence." Id. at 541. See also Commonwealth v. Szerlong, 457 Mass. at 865–866 (evidence that defendant married alleged victim of his assault with the intent to enable her to exercise her spousal privilege at trial supported application of the doctrine of forfeiture by wrongdoing and thus the use of his wife's hearsay statements made before the marriage, even though it may not have been defendant's sole or primary purpose).

The proponent of the statement must prove that the opposing party procured the witness's unavailability by a preponderance of the evidence. Commonwealth v. Edwards, 444 Mass. at 542. "[P]rior to a determination of forfeiture, the parties should be given an opportunity to present evidence, including live testimony [and the unavailable witness's out-of-court statements], at an evidentiary hearing outside the jury's presence." Id. at 545. The trial judge should make the findings required by Commonwealth v. Edwards either orally on the record or in writing. Commonwealth v. Szerlong, 457 Mass. at 864 n.9.

Subsection (b)(7). This subsection is derived from Kennedy v. Doyle, 92 Mass. 161, 168 (1865) (where the court admitted a baptismal record showing child's date of birth as evidence of the person's age when a contract had been made, in circumstances in which the entry was in the hand of the parish priest who had been the custodian of the book; Supreme Judicial Court observed that "[a]n entry made in the performance of a religious duty is certainly of no less value than one made by a clerk, messenger or notary, an attorney or solicitor or a physician, in the course of his secular occupation."). Contrast Derinza's Case, 229 Mass. 435, 443 (1918) (copies of what purported to be a marriage certificate from a town in Italy not admitted in evidence; Supreme Judicial Court observed that there was no "evidence respecting their character, the

circumstances under which the records were kept, or the source from which the certificates came. No one testified that they were copies of an official original. There was no authentication of them as genuine by a consular officer of the United States. There was absolutely nothing beyond the bare production of the copies of the certificates. In the absence of a statute making such certificates admissible by themselves, or something to show that they were entitled to a degree of credence, they were not competent."). See Section 803(6), Hearsay Exceptions; Availability of Declarant Immaterial: Business and Hospital Records.

Subsection (b)(8)(A). Subsections (b)(8)(A) through (b)(8)(A)(iv) are taken nearly verbatim from G. L. c. 233, § 81(a), and Subsection (b)(8)(A)(v) is derived from Commonwealth v. Colin C., 419 Mass. 54, 64–66 (1994). See generally Opinion of the Justices, 406 Mass. 1201 (1989) (concluding that bill on related topic would, if enacted, offend the Massachusetts Constitution). The prosecution must give prior notice to the criminal defendant that it will seek to admit hearsay statements under this statute. Commonwealth v. Colin C., 419 Mass. at 64. It must also show a compelling and necessary need to use this procedure by more than a preponderance of evidence. Id. at 64–65.

Subsection (b)(8)(B). This subsection is taken nearly verbatim from G. L. c. 233, § 81(b). See Section 804(a), Hearsay Exceptions; Declarant Unavailable: Criteria for Being Unavailable. A judge's reasons for finding a child incompetent to testify should not be the same reasons for doubting the reliability of the child's out-of-court statements. Commonwealth v. Colin C., 419 Mass. 54, 65 (1994).

Subsection (b)(8)(C). This subsection is taken nearly verbatim from G. L. c. 233, § 81(c). The separate hearing regarding the reliability of the out-of-court statement must be on the record, and the judge's determination of reliability must be supported by specific findings on the record. Commonwealth v. Colin C., 419 Mass. 54, 65 (1994). See Commonwealth v. Joubert, 38 Mass. App. Ct. 943, 945 (1995). The statement must be substantially reliable to be admissible. Commonwealth v. Joubert, 38 Mass. App. Ct. at 945. See Commonwealth v. Almeida, 433 Mass. 717, 719–720 (2001) (statements of sleeping child were not admissible because they lacked indicia of reliability). The defendant and his or her counsel should be given the opportunity to attend the hearing if it would not cause the child witness severe emotional trauma. Commonwealth v. Colin C., 419 Mass. at 65.

Subsection (b)(8)(D). This subsection is derived from Commonwealth v. Colin C., 419 Mass. 54, 66 (1994).

Subsection (b)(8)(E). This subsection is taken nearly verbatim from G. L. c. 233, § 81(d).

Subsection (b)(9)(A). Subsections (b)(9)(A)(i) through (iv) are taken nearly verbatim from G. L. c. 233, § 82, and Subsection (b)(9)(A)(v) is derived from Adoption of Quentin, 424 Mass. 882, 893 (1997). See Commonwealth v. Colin C., 419 Mass. 54, 64–66 (1994) (establishing additional procedural requirements for admitting hearsay statements of child under G. L. c. 233, § 81). The Department of Children and Families must give prior notice to the parents that it will seek to admit hearsay statements under this statute. Adoption of Quentin, 424 Mass. at 893. It must also show a compelling and necessary need to use this procedure by more than a preponderance of evidence. Id. See also Adoption of Arnold, 50 Mass. App. Ct. 743, 752 (2001); Adoption of Tina, 45 Mass. App. Ct. 727, 733–734 (1998) (recognizing additional procedural requirements). When a care and protection proceeding is joined with a petition to dispense with consent to adoption, admissibility of a child's hearsay statements should comply with the stricter requirements of G. L. c. 233, § 82, not § 83. Adoption of Tina, 45 Mass. App. Ct. at 733 n.10. The phrase "child under the age of ten" refers to the age of the child at the time the statement was made, not the child's age at the time of the proceeding. Adoption of Daisy, 460 Mass. 72, 78 (2011).

Subsection (b)(9)(B). This subsection is taken nearly verbatim from G. L. c. 233, § 82(b). See Adoption of Sean, 36 Mass. App. Ct. 261, 266 (1994). See also Section 804(a), Hearsay Exceptions; Declarant Unavailable: Criteria for Being Unavailable.

Subsection (b)(9)(C). This subsection is taken nearly verbatim from G. L. c. 233, § 82(c). Note that it appears that the Legislature inadvertently omitted from G. L. c. 233, § 82, the following: "finds: (1) after holding a separate hearing, that such . . . ." We have inserted that language in the subsection above. See Adoption of Quentin, 424 Mass. 882, 890 n.5 (1997) (noting omission). A judge must make sufficient findings of reliability to admit the statements. See Adoption of Tina, 45 Mass. App. Ct. 727, 733 (1998); Edward E. v. Department of Social Servs., 42 Mass. App. Ct. 478, 484–486 (1997). The separate hearing regarding the reliability of the out-of-court statement must be on the record, and the judge's determination of reliability must be supported by specific findings on the record. Adoption of Quentin, 424 Mass. at 893. See Commonwealth v. Colin C., 419 Mass. 54, 65 (1994). See also Adoption of Olivette, 79 Mass. App. Ct. 141, 149–150 (2011).

Subsection (b)(9)(D). This subsection is derived from Adoption of Quentin, 424 Mass. 882, 893 (1997). See Commonwealth v. Colin C., 419 Mass. 54, 66 (1994). See also Adoption of Arnold, 50 Mass. App. Ct. 743, 753 (2001) (examples of corroborating evidence).

Subsection (b)(9)(E). This subsection is taken verbatim from G. L. c. 233, § 82(d).

Section 805. Hearsay Within Hearsay

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule in accordance with the common law, a statute, or a rule of court.

NOTE

This section is derived from Commonwealth v. Gil, 393 Mass. 204, 218 (1984), and Bouchie v. Murray, 376 Mass. 524, 528–530 (1978). See Commonwealth v. McDonough, 400 Mass. 639, 643 n.8 (1987). This type of layered hearsay is commonly referred to as "multiple hearsay," see Commonwealth v. Gil, 393 Mass. at 218; "totem pole hearsay," see Commonwealth v. Santiago, 437 Mass. 620, 627 n.4 (2002); or "hearsay within hearsay," see Fed. R. Evid. 805. The decisions in Bouchie v. Murray, 376 Mass. at 528–530, and Custody of Tracy, 31 Mass. App. Ct. 481, 484–486 (1991), illustrate the principle that under the terms of certain exceptions to the hearsay rule, the statements of multiple out-of-court declarants appearing in a single report or writing may be admissible, provided that each such statement falls within the applicable hearsay exception. See also Commonwealth v. DePina, 476 Mass. 614, 623 (2017); Commonwealth v. Alcantara, 471 Mass. 550, 558–559 (2015).

Use of "totem pole hearsay" or "multiple hearsay" must conform to the principles of due process. The party against whom such evidence is to be used must have a meaningful opportunity to rebut the adverse evidence. Brantley v. Hampden Div. of the Probate & Family Ct. Dep't, 457 Mass. 172, 185–186 (2010) (documents "comprised of abbreviated oral summaries of voluminous records made by persons who may have no firsthand experience with the case" were unreliable and judge's consideration of such documents could run afoul of litigants' due process rights).

Section 806. Attacking and Supporting Credibility of Hearsay Declarant

When a hearsay statement has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity

to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

NOTE

This section is taken from Commonwealth v. Mahar, 430 Mass. 643, 649 (2000), in which the Supreme Judicial Court "accept[ed] the principles of proposed [Mass. R. Evid.] 806." See Commonwealth v. Gray, 463 Mass. 731, 748 & n.17 (2012) (quoting with approval Mass. G. Evid. § 806 and ruling that grand jury testimony of unavailable witness Jamison, who identified photograph of person other than defendant as perpetrator, was erroneously precluded to impeach witness's testimony at trial that Jamison had identified defendant). See also Commonwealth v. Pina, 430 Mass. 66, 76 (1999) ("We now adopt the rule in the circumstances of this case."); Commonwealth v. Sellon, 380 Mass. 220, 224 n.6 (1980).

Section 807. Residual Exception

[Exception not recognized]

NOTE

Unlike the Federal Rules of Evidence, Massachusetts does not recognize a "residual" exception to the hearsay rule. The Supreme Judicial Court, however, has recognized "a narrow, constitutionally based exception to the hearsay rule, which applies where otherwise inadmissible hearsay is critical to the defense and bears persuasive guarantees of trustworthiness." Commonwealth v. Drayton, 473 Mass. 23, 25 (2015) (the affidavit of a deceased witness). The court noted that it had previously recognized a criminal defendant's right to admit "otherwise inadmissible hearsay evidence to support the assertion that a third party is the true culprit, provided certain conditions are met," and that it identified "no persuasive reasons for confining [its] recognition of a constitutionally based hearsay exception to the context of third-party culprit evidence." Id. at 36. Nevertheless, the court emphasized that

> "[i]n the vast majority of cases, the established hearsay exceptions will continue to govern the admissibility of hearsay evidence at most criminal trials, with this constitutional hearsay exception operating only in the rarest of cases, where otherwise inadmissible evidence is both truly critical to the defense's case and bears persuasive guarantees of trustworthiness."

Id. at 40. See generally id. at 33–38 (discussing Chambers v. Mississippi, 410 U.S. 284 [1973]). See also Commonwealth v. Dame, 473 Mass. 524, 533 n.17 (2016) (defendant's sister's exculpatory hearsay statements to police were neither "critical to the defense" nor bearing "persuasive guarantees of trustworthiness").

Cross-Reference: Note to Section 1105, Third-Party Culprit Evidence.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

Section 901. Authenticating or Identifying Evidence

(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) Examples. The following are examples only—not a complete list—of evidence that satisfies the requirement:

(1) Testimony of a Witness with Knowledge. Testimony that an item is what it is claimed to be.

(2) Nonexpert Opinion About Handwriting. A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) Comparison by an Expert Witness or the Trier of Fact. A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) Distinctive Characteristics and the Like. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) Opinion About a Voice. An opinion identifying a person's voice—whether heard firsthand or through mechanical or electronic transmission or recording—based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) Evidence About a Telephone Conversation. For a telephone conversation, evidence that a call was made to the number assigned at the time to

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called, or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) Evidence About Public Records.

(A) Originals. Evidence that a document was recorded or filed in a public office as authorized by law, or that a purported public record or statement is from the office where items of this kind are kept.

(B) Copies. A copy of any of the items described in Subsection (7)(A), if authenticated by the attestation of the officer who has charge of the item, is admissible on the same terms as the original.

(8) Evidence About Ancient Documents. For a document, evidence that it

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least thirty years old when offered.

(9) Evidence About a Process or System. Evidence describing a process or system and showing that it produces an accurate result.

(10) Methods Provided by a Statute or Rule. Any method of authentication or identification allowed by a rule of the Supreme Judicial Court, by statute, or by the Massachusetts Constitution.

(11) Electronic or Digital Communication. Electronic or digital communication, by confirming circumstances that would allow a reasonable fact finder to conclude that this evidence is what its proponent claims it to be. Neither expert testimony nor exclusive access is necessary to authenticate the source.

NOTE

Subsection (a). This subsection is derived from Commonwealth v. LaCorte, 373 Mass. 700, 704 (1977), where the court acknowledged that a police witness at the trial properly authenticated a fingerprint card by his testimony that it was the same card he used to record the defendant's prints at the time of the defendant's arrest. "[P]roof of authenticity usually takes the form of testimony of a qualified witness either (1) that the thing is what its proponent represents it to be, or (2) that circumstances exist which imply that the thing is what its proponent represents it to be." Commonwealth v. LaCorte, 373 Mass. at 704, quoting W.B. Leach & P.J. Liacos, Massachusetts Evidence 265 (4th ed. 1967). Authentication is a preliminary question of fact under Section 104(b), Preliminary Questions: Relevance That Depends on a Fact. This requires the judge to determine whether sufficient evidence exists for a reasonable jury (or fact finder in a jury-waived case) to find by a preponderance of the evidence that the matter in question is what its proponent claims. Commonwealth v. Oppenheim, 86 Mass. App. Ct. 359, 366–367 (2014). See Commonwealth v. Duddie Ford Inc., 28 Mass. App. Ct. 426, 435 n.10 (1990), aff'd in part, rev'd in part, 409 Mass. 387 (1991), quoting Proposed Mass. R. Evid. 901(a). This principle is applicable to photographs as well as other forms of documentary evidence. Commonwealth v. Figueroa, 56 Mass. App. Ct. 641, 646 (2002) ("Photographs usually are authenticated directly through competent testimony that the scene they show is a fair and accurate representation of something the witness actually saw. But authenticity also can be established circumstantially by evidence sufficient to support a finding that the matter in question is what its proponent claims. Proposed Mass. R. Evid. 901[a]." [Quotation and citations omitted.]). See also Commonwealth v. Heang, 458 Mass. 827, 855–856 (2011) (store surveillance video properly authenticated by testimony of customer who had been there several hours before shootings, as well as by detective's description of process by which videotape was copied from store's system).

An item of evidence must be authenticated even if the item is presented only through testimony and is not itself admitted. See Commonwealth v. Connolly, 91 Mass. App. Ct. 580, 587–588 (2017) (foundational

requirements for video surveillance tape). Cross-Reference: Note "Identity" to Section 701, Opinion Testimony by Lay Witnesses.

Subsection (b)(1). This subsection is derived from Commonwealth v. LaCorte, 373 Mass. 700, 704 (1977), quoting W.B. Leach & P.J. Liacos, Massachusetts Evidence 265 (4th ed. 1967). See also Commonwealth v. Driscoll, 91 Mass. App. Ct. 474, 478–479 (2017) (testimony of insurance adjuster indicating that copied document was coverage selections page of defendant's insurance policy satisfied attestation requirement set forth in G. L. c. 233, § 79A); Commonwealth v. Wheeler, 42 Mass. App. Ct. 933, 935 (1997).

Subsection (b)(2). This subsection is derived from Commonwealth v. Ryan, 355 Mass. 768, 770–771 (1969). See also Commonwealth v. O'Connell, 438 Mass. 658, 667 (2003). Before the lay opinion evidence is admitted, the trial judge must determine that the witness has sufficient familiarity with the genuine handwriting of the person in question to express an opinion that the specimen was written by that person. Nunes v. Perry, 113 Mass. 274, 276 (1873). See Section 104(b), Preliminary Questions: Relevance That Depends on a Fact. However, when the evidence includes both authentic samples of the person's handwriting and samples of questionable origin, and where the witness has no prior familiarity, there is no necessity for lay opinion testimony and it should not be admitted. See Noyes v. Noyes, 224 Mass. 125, 130 (1916) ("The opinion of the jury under such circumstances is quite as good as that of the witness of ordinary experience who has no particular acquaintance with the genuine handwriting. There is, under such circumstances, no occasion for the opinion of the outsider of only ordinary intelligence.").

Subsection (b)(3). This subsection is derived from Commonwealth v. O'Connell, 438 Mass. 658, 662–663 (2003). Whether a specimen of handwriting is genuine, i.e., the handwriting of a named person, is a preliminary question of fact for the trial judge. See Davis v. Meenan, 270 Mass. 313, 314–315 (1930). See also Section 104(a), Preliminary Questions: In General. In a criminal case, if this issue is disputed, the trial judge also should submit the question to the jury. See Commonwealth v. Tucker, 189 Mass. 457, 473–474 (1905).

If a genuine specimen of handwriting is in evidence, the jury is capable of comparing a specimen of handwriting to it to determine whether the specimen is genuine. Commonwealth v. O'Laughlin, 446 Mass. 188, 209 (2006). In the discretion of the court, the testimony of an expert witness may be admissible. Moody v. Rowell, 34 Mass. 490, 496–497 (1835).

Subsection (b)(4). This subsection is derived from Irving v. Goodimate Co., 320 Mass. 454, 459–460 (1946) (contents of letter used to authenticate signature). For example, hospital records showing the name of a patient that was the same alias used by the defendant in the past, with the same date of birth and the same mother's name, where the patient was treated for a leg injury similar to that which the victim's friend described inflicting on the attacker, provided sufficient foundation to allow the jury to conclude that the defendant was the individual whose hospital records were admitted into evidence. Commonwealth v. Cole, 473 Mass. 317, 321–323 (2015). See also Connecticut v. Bradish, 14 Mass. 296, 300 (1817) (reply letter doctrine); Commonwealth v. Biesiot, 91 Mass. App. Ct. 820, 824–826 (2017) (graffiti tags); Commonwealth v. Figueroa, 56 Mass. App. Ct. 641, 645–647 (2002) (contents of photographs and authenticating circumstances).

Subsection (b)(5). This subsection is taken from Commonwealth v. Williams, 8 Mass. App. Ct. 283, 291 (1979), quoting Fed. R. Evid. 901(b)(5). See also Commonwealth v. Lykus, 367 Mass. 191, 201 n.4 (1975); Lord Elec. Co. v. Morrill, 178 Mass. 304, 306 (1901). On the other hand, "[a] caller's mere self-identification, without more, is insufficient authentication to admit the substance of a telephone conversation." Commonwealth v. Howard, 42 Mass. App. Ct. 322, 324 (1997). Cf. Commonwealth v. Hartford, 346 Mass. 482, 488 (1963) (identification of caller by witness is permitted when caller identifies himself and there is other circumstantial evidence pointing to his or her identity). Apart from whether a witness is sufficiently familiar with a voice to identify the speaker, an in-court voice identification may be excluded on grounds that it was the product of an unnecessarily suggestive identification procedure. See Commonwealth v. Saunders, 50 Mass. App. Ct. 865, 874 (2001).

Subsection (b)(6). This subsection is derived from Massachusetts Northeastern St. Ry. Co. v. Plum Island Beach Co., 255 Mass. 104, 114–115 (1926). See Commonwealth v. Anderson, 404 Mass. 767, 769–770 (1989); Bond Pharmacy, Inc. v. Cambridge, 338 Mass. 488, 490–491 (1959); Commonwealth v. Loach, 46 Mass. App. Ct. 313, 316 (1999).

Subsection (b)(7)(A). This subsection is derived from Kaufmann v. Kaitz, 325 Mass. 149, 151 (1949). See Bowes v. Inspector of Bldgs. of Brockton, 347 Mass. 295, 296 (1964) (authentication of city ordinance by city clerk). See also G. L. c. 233, § 73 (foreign oaths and affidavits, if taken or administered by a duly authorized notary public "within the jurisdiction for which he is commissioned, and certified under his official seal, shall be as effectual in this commonwealth as if administered or taken and certified by a justice of the peace therein"); G. L. c. 233, § 74 ("Acts of incorporation shall be held to be public acts and as such may be declared on and given in evidence."). Cf. G. L. c. 233, § 75 ("[P]rinted copies of any city ordinances . . . shall be admitted without certification or attestation, but, if their genuineness is questioned, the court shall require such certification or attestation thereof as it deems necessary.").

There are a number of statutory provisions dealing with authentication. See, e.g., G. L. c. 233, § 69 (admissibility of records and court proceedings of a court of another State or of the United States if authenticated "by the attestation of the clerk or other officer who has charge of the records of such court under its seal."); G. L. c. 233, § 73 (foreign oaths and affidavits); G. L. c. 233, § 74 (acts of incorporation); G. L. c. 233, § 75 (municipal ordinances); G. L. c. 233, § 76 (documents filed with governmental departments); G. L. c. 233, § 76A (documents filed with Securities and Exchange Commission); G. L. c. 233, § 76B (documents filed with Interstate Commerce Commission); G. L. c. 233, § 77 (copies of records, books, and accounts of banks and trust companies).

Subsection (b)(7)(B). This subsection is derived from G. L. c. 233, § 76; G. L. c. 90, § 30; Mass. R. Civ. P. 44(a)(1); Mass. R. Crim. P. 40(a)(1); and Commonwealth v. Deramo, 436 Mass. 40, 47–48 (2002).

> "[A]n attested copy of a document 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." (Citations and quotations omitted.)

Id. In Commonwealth v. Deramo, the Supreme Judicial Court held that "[m]erely making a copy of the original attestation along with a copy of the underlying record does not serve the purpose of the attestation requirement." Id. at 48. See id. (concluding that a copy of the defendant's driver history from the Registry of Motor Vehicles was improperly admitted into evidence because it was not supported by an original attestation, but only by a copy of the attestation). Unless a statute or regulation provides otherwise, an attestation does not have to take the form of an original signature; it need only be an original mark, such as a stamp or facsimile. See Commonwealth v. Martinez-Guzman, 76 Mass. App. Ct. 167, 170 (2010) (holding that documents bearing the original stamped signature of the Registrar of Motor Vehicles were properly authenticated).

Any error in admitting a copy of a public record may be cured by comparing it to a properly authenticated record. Commonwealth v. Deramo, 436 Mass. at 49. See also G. L. c. 233, § 68 (proof of the genuineness of a signature to an attested instrument may be by the same methods used for proof of any signature).

***Proof of Specific Types of Records*.** Records and court proceedings of a court of the United States or another State are admissible when relevant if authenticated "by the attestation of the clerk or other officer who has charge of the records of such court under its seal." G. L. c. 233, § 69. Printed copies of State statutes, acts, or resolves "which are published under its authority," and copies of city ordinances, town bylaws, and the rules and regulations of a board of alderman, "if attested by the clerk of such city or town, shall be admitted as sufficient evidence thereof in all courts of law and on all occasions." G. L. c. 233, § 75. Printed copies of rules and regulations of a State department, commission, board, or officer of the Com-

monwealth or any city or town authorized to adopt them, printed copies of city ordinances or town bylaws, or copies of the United States Code Annotated, the United States Code Service, and all Federal regulations, "shall be admitted without certification or attestation, but, if their genuineness is questioned, the court shall require such certification or attestation as it deems necessary." G. L. c. 233, § 75. Copies of books, papers, documents, and records in any department of State or local government, when attested by the officer in charge of the items, "shall be competent evidence in all cases equally with the originals . . . ." G. L. c. 233, § 76 (in most cases the genuineness of that officer's signature shall be attested by the Secretary of the Commonwealth or the clerk of a city or town, as the case may be). See also G. L. c. 233, § 76A (authentication of documents filed with the Securities and Exchange Commission); G. L. c. 233, § 76B (authentication of documents filed with the Interstate Commerce Commission). Copies of records of banks doing business in the Commonwealth are admissible in evidence on the same terms as originals if accompanied by an affidavit, taken before and under the seal of a clerk of a court of record or notary, "stating that the affiant is the officer having charge of the original records, books and accounts, and that the copy is correct and is full" insofar as it relates to the subject matter in question. G. L. c. 233, § 77. See also G. L. c. 233, § 77A (bank statement showing payment of a check or other item, if accompanied by a legible copy of the check or other item, "is competent evidence in all cases" and prima facie proof of payment of the amount of the check or other item).

Subsection (b)(8). This subsection is derived from Whitman v. Shaw, 166 Mass. 451, 456–461 (1896). See also Green v. Chelsea, 41 Mass. 71, 76–77 (1836). Compare Fed. R. Evid. 901(b)(8) and Proposed Mass. R. Evid. 901(b)(8), which shorten the period from thirty to twenty years.

Subsection (b)(9). This subsection is derived from Commonwealth v. Whynaught, 377 Mass. 14, 19 (1979) (radar), and De Forge v. New York, New Haven & Hartford R.R. Co., 178 Mass. 59, 62–63 (1901) (X-ray).

Subsection (b)(10). This subsection simply establishes that this section is not exclusive. For example, the authenticity of a writing which a party intends to offer at trial may be established prior to trial by a demand for an admission as to genuineness under G. L. c. 231, § 69. See Waldor Realty Corp. v. Planning Bd. of Westborough, 354 Mass. 639, 640 (1968). See also Mass. R. Crim. P. 11(a)(2)(A) ("Agreements reduced to writing in the conference report shall be binding on the parties and shall control the subsequent course of the proceeding."); Mass. R. Civ. P. 44(c) (authentication of official records or the lack thereof from the Commonwealth or a foreign jurisdiction may be accomplished "by any other method authorized by law"). Also, certain statutes provide that records may be authenticated as part of a hearsay exception by means of an affidavit. See, e.g., G. L. c. 233, §§ 79, 79G, 79J.

Subsection (b)(11). This subsection is derived from Commonwealth v. Purdy, 459 Mass. 442, 450 (2011), where the court held that the same basic principles of authentication apply to e-mails and other forms of electronic communication as apply to, for example, telephone calls and handwritten letters. Evidence that a person's name is written as the author of an e-mail or that the electronic communication originates from an e-mail or social-networking Web site that bears the person's name is not, standing alone, sufficient to authenticate the communication as having been authored, posted, or sent by the person. There must be some "confirming circumstances" sufficient for a reasonable jury to find by a preponderance of the evidence that the person authored, posted, or sent the communication. Id. at 450. In Purdy, the confirming circumstances were that the e-mails were found on the hard drive of the computer that the defendant acknowledged owning and to which he supplied all necessary passwords, and at least two e-mails contained either an attached photograph of the defendant or a self-characterization. Id. at 450–451. "The defendant's uncorroborated testimony that others used his computer regularly . . . was relevant to the weight, not the admissibility, of the[] messages." Id. at 451. The court stated that neither expert testimony nor exclusive access is necessary to authenticate the authorship of an e-mail. Id. at 451 n.7. See also Commonwealth v. Gilman, 89 Mass. App. Ct. 752, 758–759 (2016) (Facebook chat messages authenticated by location on laptops solely used by defendant, defendant's name and picture associated with account sending and receiving messages, initiation of chat sessions via text message, and references to personal details within messages); Commonwealth v. Oppenheim, 86 Mass. App. Ct. 359, 366–367 (2014); Commonwealth v.

Foster F., 86 Mass. App. Ct. 734, 737 (2014) (messages on social-networking Web site provided adequate confirming circumstances for reasonable jury to find defendant authored messages, as required for messages to be admissible, where defendant appeared at park to play dating game with victim and victim's friends exactly as person sending messages from the social-networking account had proposed); Commonwealth v. Salyer, 84 Mass. App. Ct. 346, 356 (2013) (Commonwealth had burden to demonstrate that communications contained in Myspace pages were authentic, "which in these circumstances meant that they were created by or at the direction of the defendant"); Commonwealth v. Amaral, 78 Mass. App. Ct. 671, 674–675 (2011) (e-mails authenticated by actions of defendant who, for example, appeared at time and place indicated in an e-mail and answered telephone number provided in another e-mail).

Section 902. Evidence That Is Self-Authenticating

Extrinsic evidence of authenticity, as a condition precedent to admissibility, is not required with respect to the following:

(a) Court Records Under Seal. The records and judicial proceedings of a court of another State or of the United States, if authenticated by the attestation of the clerk or other officer who has charge of the records of such court under its seal.

(b) Domestic Official Records Not Under Seal. An official record kept within the Commonwealth, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having legal custody of the record, or by that officer's deputy. If the record is kept in any other State, district, Commonwealth, territory, or insular possession of the United States, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, any such copy shall be accompanied by a certificate that such custodial officer has custody of the record. This certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the office.

(c) Foreign Official Records. A foreign official record, or an entry therein, when admissible for any purpose, attested by a person authorized to make the attestation and accompanied by a final certification as to the genuineness of the signature and official position (1) of the attesting person or (2) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (1) admit an attested copy without final certification or (2) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

(d) Certified Copies of Public Records. Copies of public records, of records described in Sections 5, 7, and 16 of G. L. c. 66, and of records of banks, trust companies, insurance companies, and hospitals, whether or not such records or copies are made by the photographic

or microphotographic process if there is annexed to such copies an affidavit, taken before a clerk of a court of record or notary public, under the seal of such court or notary, stating that the affiant is the officer having charge of the original records, books, and accounts, and that the copy is correct and is full so far as it relates to the subject matter therein mentioned.

(e) Official Publications.

(1) Printed copies of all statutes, acts, and resolves of the Commonwealth, public or private, which are published under its authority, and copies of the ordinances of a city, the bylaws of a town, or the rules and regulations of a board of aldermen, if attested by the clerk of such city or town.

(2) Printed copies of rules and regulations purporting to be issued by authority of any department, commission, board, or officer of the Commonwealth or of any city or town having authority to adopt them, or printed copies of any city ordinances or town bylaws or printed copies of the United States Code Annotated or the United States Code Service and all Federal regulations, without certification or attestation; provided, however, that if their genuineness is questioned, the court shall require such certification or attestation thereof as it deems necessary.

(3) Copies 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; provided that the genuineness of the signature of such officer shall be attested by the Secretary of the Commonwealth under its seal or by the clerk of such city or town except in the case of books, papers, documents, and records of the Department of Telecommunications and Energy in matters relating to common carriers, and of the Registry of Motor Vehicles.

(4) The Massachusetts Register.

(f) Certain Newspapers. Certified copies of any newspaper, or part thereof, made by the photographic or microphotographic process deposited in any public library or a library of any college or university located in the Commonwealth.

(g) Trade Inscriptions. A trademark or trade name affixed on a product indicating origin.

(h) Acknowledged Documents. All oaths and affidavits administered or taken by a notary public, duly commissioned and qualified by authority of any other State or government, within the jurisdiction for which the notary is commissioned, and certified under an official seal; such documents shall be as effectual in this Commonwealth as if administered or taken and certified by a justice of the peace therein.

(i) Commercial Paper and Related Documents. Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(j) Presumptions Created by Law. A signature, document, or anything else that a law of the United States or this Commonwealth declares to be presumptively or prima facie genuine or authentic.

(k) Certified Copies of Hospital and Other Records of Treatment and Medical History. Records or copies of records kept by any hospital, dispensary or clinic, or sanitarium, if certified by affidavit by the person in custody thereof to be true and complete.

(l) Copies of Hospital and Other Records of Itemized Bills and Reports. Itemized bills and reports, including hospital medical records and examination reports, relating to medical, dental, hospital services, prescriptions, or orthopedic appliances rendered to a person injured, if (1) it is subscribed and sworn to under the penalties of perjury by the physician, dentist, authorized agent of a hospital or health maintenance organization, pharmacist, or retailer of orthopedic appliances rendering such services; (2) the party offering the evidence gives the opposing party written notice of the intention to offer the evidence, along with a copy of the evidence, by mailing it by certified mail, return receipt requested, not less than ten days before the introduction of the evidence; and (3) the party offering the evidence files an affidavit of such notice and the return receipt is filed with the clerk of the court after said receipt has been returned.

(m) Copies of Bills for Genetic Marker Tests and for Prenatal and Postnatal Care. Copies of bills for genetic marker tests and for prenatal and postnatal health care of the mother and child, furnished to the adverse party at least ten days before trial, shall be admissible in evidence to prove the amount of the charges billed and that the charges were reasonable, necessary, and customary.

(n) Results of Genetic Marker Tests. In an action to establish the paternity of a child born out of wedlock, the report of the results of genetic marker tests, including a statistical probability of the putative father's paternity based upon such tests, unless a party objects in writing to the test results upon notice of the hearing date or within thirty days prior to the hearing, whichever is shorter.

NOTE

Subsection (a). This subsection is derived from G. L. c. 233, § 69. See also Mass. R. Crim. P. 39(a).

Subsection (b). This subsection is derived from Mass. R. Civ. P. 44(a)(1) and Mass. R. Crim. P. 40(a)(1).

Subsection (c). This subsection is derived from Mass. R. Civ. P. 44(a)(2) and Mass. R. Crim. P. 40(a)(2).

Subsection (d). This subsection is derived from G. L. c. 233, §§ 77 and 79A.

Subsection (e)(1). This subsection is derived from G. L. c. 233, § 75.

Subsection (e)(2). This subsection is derived from G. L. c. 233, § 75.

Subsection (e)(3). This subsection is derived from G. L. c. 233, § 76.

Subsection (e)(4). This subsection is derived from G. L. c. 30A, § 6 ("The publication in the Massachusetts Register of a document creates a rebuttable presumption [1] that it was duly issued, prescribed, or promulgated; [2] that all the requirements of this chapter and regulations prescribed under it relative to the document have been complied with; and [3] that the text of the regulations as published in the Massachusetts Register is a true copy of the attested regulation as filed by the agency.").

Subsection (f). This subsection is derived from G. L. c. 233, § 79D ("Copies of any newspaper, or part thereof made by photographic or microphotographic process deposited in any public library or a library of any college or university located in the commonwealth, shall, when duly certified by the person in charge thereof, be admitted in evidence equally with the originals."). See also Section 901(b)(1), Authenticating or Identifying Evidence: Examples: Testimony of a Witness with Knowledge.

Subsection (g). This subsection is derived from Smith v. Ariens Co., 375 Mass. 620, 621–623 (1978), and Doyle v. Continental Baking Co., 262 Mass. 516, 519 (1928). In Smith v. Ariens Co., 375 Mass. at 623, the presence of the defendant's name on the decal on a snowmobile was sufficient to identify the defendant as the manufacturer of the snowmobile. In Doyle v. Continental Baking Co., 262 Mass. at 519, the label on which the defendant's name appeared was sufficient to identify the defendant as the manufacturer of the defective bread. See also G. L. c. 156B, § 11(a) (a corporation is not permitted to use the corporate name or trademark of another corporation registered or doing business in this Commonwealth without their consent).

> "Several rationales underlie the acceptance of this rule. First, since trademarks and trade names are protected under statutes, the probability that a particular name will be used by another corporation is very low. Second, since the probability is very high that the corporation whose name appears on a product is the corporation which manufactured the product, judicial efficiency will be served by allowing the identity of the name on a product and the defendant's name to satisfy the plaintiff's burden of identifying the defendant as the manufacturer. Finally, the presence of trademarks or trade names on products is accepted and relied on in daily life as sufficient proof of the manufacturer of the product. This common acceptance, which has been reinforced by manufacturers' advertising, indicates that the identity of a corporation's name and the name on a product should be sufficient to identify that corporation as the manufacturer." (Citations omitted.)

Smith v. Ariens Co., 375 Mass. at 622.

Subsection (h). This subsection is derived from G. L. c. 233, § 73. See also Mass. R. Civ. P. 43(d).

Subsection (i). This subsection is derived from various statutes and commercial law. See, e.g., G. L. c. 106, § 1-202 (document authorized or required by a contract to be issued by a third party is prima facie evidence of its own authenticity); G. L. c. 233, § 76A (records of the Securities and Exchange Commission must be attested by an officer or person who has charge of the same and under a certificate of a member); G. L. c. 233, § 76B (printed copies of rate schedules filed with the Interstate Commerce Commission are admissible without certification); G. L. c. 233, § 77 (copies from the records, books, and accounts of banks and trust companies doing business in the Commonwealth must have an affidavit taken before a notary stating that the officer has charge of the original records); G. L. c. 233, § 78 (business records shall be admissible if the court finds the record was made in good faith, in the regular course of business, before the beginning of legal proceedings, and the person who made the entry has personal knowledge of the facts stated in the record).

Subsection (j). This subsection is derived from statutes which deal with authentication not covered in other areas of Article IX, Authentication and Identification. See, e.g., G. L. c. 9, § 11 (Great Seal); G. L. c. 111, § 195 (certified copy of reports of State laboratory for lead and lead poisoning); G. L. c. 209C, § 17 (in an action to establish paternity of a child born out of wedlock, the report of the results of genetic marker tests shall be admissible without proof of authenticity); G. L. c. 233, § 79B (published statements of fact of general interest to persons engaged in an occupation shall be admissible in the court's discretion in civil cases); G. L. c. 233, § 79C (published facts or opinions on a subject of science or art shall be admissible in actions of contract or malpractice, conditioned on the court finding that said statements are relevant and that the writer is recognized in his or her profession as an expert on the subject); G. L. c. 233, § 80 (stenographic transcripts).

Subsection (k). This subsection is derived from G. L. c. 233, § 79. "[Section 79] was enacted primarily to relieve the physicians and nurses of public hospitals from the hardship and inconvenience of attending court as witnesses to facts which ordinarily would be found recorded in the hospital books" (citation omitted). Bouchie v. Murray, 376 Mass. 524, 527 (1978).

Cross-Reference: Section 803(6)(B), Hearsay Exceptions; Availability of Declarant Immaterial: Business and Hospital Records: Hospital Records.

Subsection (l). This subsection is derived from G. L. c. 233, § 79G. Under Section 79G, in addition to those already noted are "chiropodists, chiropractors, optometrists, osteopaths, physical therapists, podiatrists, psychologists and other medical personnel licensed to practice under the laws of the jurisdiction within which such services were rendered." This subsection applies to both civil and criminal cases. See Commonwealth v. Schutte, 52 Mass. App. Ct. 796, 797–800 (2001).

Cross-Reference: Section 803(6)(C), Hearsay Exceptions; Availability of Declarant Immaterial: Business and Hospital Records: Medical and Hospital Services.

Subsection (m). This subsection is taken verbatim from G. L. c. 209C, § 16(f).

Subsection (n). This subsection is derived from G. L. c. 209C, § 17. Such reports shall not be admissible absent sufficient evidence of intercourse between the mother and the putative father during the period of probable conception and shall not be considered as evidence of the occurrence of intercourse between the mother and the putative father. Id. There is nothing in the statute that requires the test to be court ordered in order to be admissible. Department of Revenue v. Sorrentino, 408 Mass. 340, 344 (1990).

Section 903. Subscribing Witness's Testimony

A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

NOTE

This section is derived from G. L. c. 233, § 68, and Mass. R. Civ. P. 8(b) ("The signature to an instrument set forth in any pleading shall be taken as admitted unless a party specifically denies its genuineness.").

Authentication of wills in uncontested proceedings is governed by the Massachusetts Uniform Probate Code, G. L. c. 190B. Authentication of a will in a contested proceeding requires a greater level of support. See Goodwin v. Riordan, 333 Mass. 317, 318–319 (1955); Werber v. Werber, 62 Mass. App. Ct. 927, 927–928 (2004).

ARTICLE X. CONTENTS OF WRITINGS AND RECORDS

Section 1001. Definitions That Apply to This Article

The following definitions apply under this Article:

(a) Writings and Records. "Writings" and "records" are documents that consist of letters, words, numbers, or their equivalent. Photographs, composite pictures, tape recordings, videotapes, and digital images are not writings or records.

(b) Original. An "original" of a writing or record means the writing or record itself or any copy intended to have the same effect by the person who executed or issued it.

(c) Duplicate. A "duplicate" is a copy of a writing or record that is not intended to be an original, the copies being no more than secondary evidence of the original.

NOTE

Subsection (a). This subsection is derived from Commonwealth v. Duhamel, 391 Mass. 841, 844 (1984) (tape recording); Commonwealth v. Weichell, 390 Mass. 62, 77 (1983), cert. denied, 465 U.S. 1032 (1984) (photographs); Commonwealth v. Balukonis, 357 Mass. 721, 725 (1970) (composite pictures); Smith v. Palmer, 60 Mass. 513, 520–521 (1850) (best evidence); and Commonwealth v. Leneski, 66 Mass. App. Ct. 291, 294 (2006) (videotapes or digital images).

This section is not as extensive as Fed. R. Evid. 1001 and Proposed Mass. R. Evid. 1001(1), both of which cover recordings and photographs. "The best evidence rule is applicable to only those situations where the contents of a writing are sought to be proved" (citation omitted). Commonwealth v. Balukonis, 357 Mass. at 725. "[T]his rule is usually regarded . . . as not applicable to any objects but writings. . . . So far, then, as concerns objects not writings, a photographic representation could be used without accounting for the original." Id. at 725, quoting Wigmore, Evidence § 796 (3d ed. 1940). See also Commonwealth v. McKay, 67 Mass. App. Ct. 396, 402–403 (2006).

Subsection (b). This subsection is derived from Quinn v. Standard Oil Co., 249 Mass. 194, 201 (1924), and Peaks v. Cobb, 192 Mass. 196, 196–197 (1906).

Subsection (c). This subsection is derived from Augur Steel Axle & Gearing Co. v. Whittier, 117 Mass. 451, 455 (1875) (as to letter-press copy of an original letter in possession of adverse party, "[t]here was sufficient foundation for the admission of secondary evidence of the contents of the letter"). See also Meehan v. North Adams Sav. Bank, 302 Mass. 357, 363–364 (1939) (admissibility of copy of a letter upheld, not to prove its contents, but to prove the opponent had received the original letter).

Section 1002. Requirement of Original (Best Evidence Rule)

An original writing or record is required in order to prove its content unless these sections, a statute, or the common law provides otherwise.

NOTE

This section is derived from Commonwealth v. Ocasio, 434 Mass. 1, 6 (2001), where the court explained as follows:

> "The best evidence rule provides that, where the contents of a document are to be proved, the party must either produce the original or show a sufficient excuse for its nonproduction. The rule is a doctrine of evidentiary preference principally aimed, not at securing a writing at all hazards and in every instance, but at securing the best obtainable evidence of its contents. Thus, where the original has been lost, destroyed, or is otherwise unavailable, its production may be excused and other evidence of its contents will be admissible, provided that certain findings are made." (Quotation and citations omitted; emphasis omitted.)

See also Commonwealth v. Stevens, 155 Mass. 291, 292 (1892); Commonwealth v. Silva, 61 Mass. App. Ct. 28, 35–37 (2004) (written inventory search policy of police department is the best evidence of that policy and such documents should be offered in evidence to prove it exists).

The best evidence rule does not apply where the writing is so simple that the possibility of error is negligible. See Commonwealth v. Blood, 77 Mass. 74, 77 (1858).

"The best evidence rule [applies] to only those situations where the contents of a writing are sought to be proved." Commonwealth v. Balukonis, 357 Mass. 721, 725 (1970). See Commonwealth v. DeJesus, 87 Mass. App. Ct. 198, 201 (2015) (original currency not required where only question was whether photocopy of bills used in undercover operation matched bills found in defendant's pocket after drug transaction). The rule does not apply to photographs, Commonwealth v. Weichell, 390 Mass. 62, 77 (1983), cert. denied, 465 U.S. 1032 (1984); composite pictures, Commonwealth v. Balukonis, 357 Mass. at 725; tape recordings, Commonwealth v. Duhamel, 391 Mass. 841, 844 (1984); or videotapes or digital images, Commonwealth v. Leneski, 66 Mass. App. Ct. 291, 294 (2006). The introduction of such evidence is subject to other requirements, i.e., relevancy and authentication. Id.

The admission of photographs, composite drawings, tape recordings, or digital images is within the discretion of the trial judge, provided that the evidence is accurate, similar enough to circumstances at the time in dispute to be relevant and helpful to the jury in its deliberations, and its probative value outweighs any prejudice to the other party. See Renzi v. Paredes, 452 Mass. 38, 52 (2008); Commonwealth v. Duhamel, 391 Mass. at 844–845; Commonwealth v. Balukonis, 357 Mass. at 725–726; Commonwealth v. Leneski, 66 Mass. App. Ct. at 294; Henderson v. D'Annolfo, 15 Mass. App. Ct. 413, 428–429 (1983). A witness may testify that a photograph or digital image is substantially similar to the original as long as the witness is familiar with the details pictured even though the witness is not the photographer. Renzi v. Paredes, 452 Mass. at 52. "Concerns regarding the completeness or production of the image go to its weight and not its admissibility." Id.

"The best evidence rule does not forbid the use of 'copies' of electronic records (including e-mails and text messages and other computer data files), because there is no 'original' in the traditional sense" (citations omitted). Commonwealth v. Salyer, 84 Mass. App. Ct. 346, 356 n.10 (2013). Cf. G. L. c. 233, § 79K. "However, oral testimony designed to prove the contents of an electronic record is barred for the same reasons as those underlying the best evidence rule." Commonwealth v. Salyer, 84 Mass. App. Ct. at 356 n.10.

Section 1003. Admissibility of Duplicates

Where the original has been lost, destroyed, or otherwise made unavailable, its production may be excused and other evidence of its contents will be admissible, provided that certain findings are made as outlined in Section 1004.

NOTE

This section is taken nearly verbatim from Commonwealth v. Ocasio, 434 Mass. 1, 6 (2001).

> "As a threshold matter, the proponent must offer evidence sufficient to warrant a finding that the original once existed. If the evidence warrants such a finding, the judge must assume its existence, and then determine if the original had become unavailable, otherwise than through the serious fault of the proponent and that reasonable search had been made for it." (Citation, quotation, and ellipsis omitted.)

Id. at 6–7.

A number of statutes make duplicates admissible on the same terms as originals. See, e.g., G. L. c. 233, § 76 (attested-to records of governmental departments); G. L. c. 233, § 76A (properly authenticated copies of documents filed with the Securities and Exchange Commission); G. L. c. 233, § 77 (copies of books, etc., of trust companies and banks); G. L. c. 233, § 79A (duly certified copies of public, bank, insurance, and hospital records); G. L. c. 233, § 79D (duly certified copies of newspapers made by photographic process and deposited in certain public and college libraries); G. L. c. 233, § 79E (reproductions made in the regular course of business); G. L. c. 233, § 79K (duplicate of a computer data file or program file unless issue as to authenticity or unfair to admit). See also G. L. c. 233, § 78 (court "may" order originals).

Section 1004. Admissibility of Other Evidence of Content

An original is not required, and other evidence of the content of the writing or record is admissible, if

(a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;

(b) an original cannot be obtained by any available judicial process;

(c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or

(d) the writing or record is not closely related to a controlling issue.

NOTE

This section is taken from Fed. R. Evid. 1004 and Proposed Mass. R. Evid. 1004, both of which reflect Massachusetts practice.

Subsection (a). This subsection is derived from Commonwealth v. Ocasio, 434 Mass. 1, 7 (2001), quoting Proposed Mass. R. Evid. 1004(a). See also Old Colony Trust Co. v. Shaw, 348 Mass. 212, 219 (1964); Fauci v. Mulready, 337 Mass. 532, 540–542 (1958); Joannes v. Bennett, 87 Mass. 169, 172–173 (1862); Capitol Bank & Trust Co. v. Richman, 19 Mass. App. Ct. 515, 520–521 (1985).

"[I]n order to permit proof by secondary evidence of the contents of [a lost original], the trial judge must make preliminary findings that the original had become unavailable, otherwise than through the serious fault of the proponent . . . and that reasonable search had been made for it." Fauci v. Mulready, 337 Mass. at 540.

Subsection (b). This subsection is derived from Topping v. Bickford, 86 Mass. 120, 122 (1862), and Commonwealth v. Smith, 151 Mass. 491, 495 (1890).

Subsection (c). This subsection is derived from Fisher v. Swartz, 333 Mass. 265, 271 (1955) (defendant had an original in court and refused to produce it on plaintiff's request so secondary evidence was admitted), and Commonwealth v. Slocomb, 260 Mass. 288, 291 (1927) (when pleadings disclose proof of a document that will be necessary at trial, no further notice is necessary, and if the party fails to produce the document, secondary evidence is admissible). Cf. Cregg v. Puritan Trust Co., 237 Mass. 146, 149–150 (1921) ("The failure of the defendant to produce its books and accounts when summoned by a subpoena *duces tecum* conferred authority on the court to compel that production by proper process, and authorized the plaintiff to introduce parol evidence of the contents of such books and records. A like result follows upon the failure of a party at the trial to produce on reasonable demand writings which are material to the issue. The failure to produce documents on demand at a trial or on the subpoena *duces tecum*, is not in itself evidence of the alleged contents of such documents." [Citations omitted.]).

Subsection (d). This subsection is derived from Smith v. Abington Sav. Bank, 171 Mass. 178, 184 (1898). See also Commonwealth v. Borasky, 214 Mass. 313, 317 (1913) (defendant's objection to testimony of physician, who performed autopsy, on the ground that the record was the best evidence, was properly overruled as "[t]he testimony of the witness who was present and observed the condition revealed by the autopsy was admissible"); Beauregard v. Benjamin F. Smith Co., 213 Mass. 259, 264 (1913) (sheriff was permitted to testify as to where he served the defendant without producing the official return of service); Eagle Bank at New Haven v. Chapin, 20 Mass. 180, 182–183 (1825) (parol evidence of a notice to an endorser admissible without calling on the party to produce the written notice received by him).

Section 1005. Official Records

(a) Authentication.

(1) Domestic. An official record kept within the Commonwealth, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having legal custody of the record, or by that officer's deputy. If the record is kept in any other State, district, Commonwealth, territory, or insular possession of the United States, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, any such copy shall be accompanied by a certificate that such custodial officer has the custody. This certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the office.

(2) Foreign. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof, or a copy thereof, attested by a person authorized to make the attestation and accompanied by a final certification as to the genuineness of the signature and official position (A) of the attesting person or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (A) admit an attested

copy without final certification or (B) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

(b) Lack of Record. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in Subsection (a)(1) of this section in the case of a domestic record or complying with the requirements of Subsection (a)(2) of this section for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

(c) Other Proof. This section does not prevent the proof, by any other method authorized by law, of the existence of, or the lack of, an official record, or of entry, or lack of entry therein.

NOTE

This section is taken nearly verbatim from Mass. R. Civ. P. 44 and Mass. R. Crim. P. 40.

Section 1006. Summaries to Prove Content

The proponent may use a summary, chart, or the like to prove the content of voluminous writings or records that cannot be conveniently examined in court. The proponent may make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

NOTE

This section is derived from Commonwealth v. Greenberg, 339 Mass. 557, 581–582 (1959), and the cases cited in Section 611(a), Mode and Order of Examining Witnesses and Presenting Evidence: Control by the Court.

> "[I]n a trial embracing so many details and occupying so great a length of time . . . during which a great mass of books and documents were put in evidence, concise statements of their content verified by persons who had prepared them from the originals were the only means for presenting to the jury an intelligible view of the issues involved" (quotation and citations omitted).

Id. at 582.

"[C]are must be taken to insure that summaries accurately reflect the contents of the underlying documents and do not function as pedagogical devices that unfairly emphasize part of the proponent's proof" (quotations and citations omitted). Welch v. Keene Corp., 31 Mass. App. Ct. 157, 165–166 (1991). The witness presenting the summary is not permitted to state deductions or inferences, but may testify as to the results of his or her computations. Commonwealth v. Greenberg, 339 Mass. at 582. The court may order that the original be produced. Cf. Cornell-Andrews Smelting Co. v. Boston & P.R. Corp., 215 Mass. 381, 390–391 (1913).

For a thoughtful discussion of Section 1006, its relation to Fed. R. Evid. 1006, and its application to summaries of evidence, see Commonwealth v. Wood, 90 Mass. App. Ct. 271 (2016), which is instructive. There, the Commonwealth, as part of its case against a defendant on trial for assault with a deadly weapon, showed the jury a PowerPoint presentation that was a "compilation of various pages chosen from previously-admitted exhibits." Id. at 276. The presentation included cellular phone records; condensed versions of text messages between the defendant, the victim, and a third party; call logs; and maps showing the

victim's movement based on data from his GPS tracking bracelet. Id. The Appeals Court held that because the presentation selectively presented excerpts of other exhibits in evidence in such a way that it served to both bolster the Commonwealth's case and rebut the defendant's defense, it was "not merely a neutral summary. It was 'more akin to argument than evidence since [it] organizes the jury's examination of testimony and documents already admitted in evidence.'" Id. at 277, quoting United States v. Bray, 139 F.3d 1104, 1111 (6th Cir. 1998). However, the court found that although the presentation was erroneously admitted, its admission did not prejudice the defendant because "all of the material in [the presentation] was previously admitted in evidence and . . . added little to the Commonwealth's case and detracted little from the defendant's theory at trial." Id. at 282.

Section 1007. Testimony or Statement of Party to Prove Content

The proponent may prove the content of a written statement of the party against whom the evidence is offered without producing or accounting for the original.

NOTE

This section is taken from Smith v. Palmer, 60 Mass. 513, 521 (1850). See also Cooley v. Collins, 186 Mass. 507, 509–510 (1904); Clarke v. Warwick Cycle Mfg. Co., 174 Mass. 434, 435 (1899).

Section 1008. Functions of Judge and Fact Finder

Before secondary evidence of the contents of a writing or record may be admitted, the proponent must offer evidence sufficient to warrant a finding that an original once existed. If the evidence warrants such a finding, the judge must assume its existence and then determine if the original is unavailable, not through the serious fault of the proponent, and if reasonable search has been made for it. If the judge makes these findings in favor of the proponent, the judge must allow secondary evidence to establish the contents of the original writing or record. Once the secondary evidence is admitted, it is for the trier of fact to determine the weight, if any, to give the secondary evidence.

NOTE

This section is derived from Fauci v. Mulready, 337 Mass. 532, 540–542 (1958), and Dana v. Kemble, 36 Mass. 112, 114 (1837). See also Commonwealth v. Ocasio, 434 Mass. 1, 6–7 (2001); Old Colony Trust Co. v. Shaw, 348 Mass. 212, 219 (1964); Capitol Bank & Trust Co. v. Richman, 19 Mass. App. Ct. 515, 520–522 (1985); Buker v. Melanson, 8 Mass. App. Ct. 325, 330–331 (1979). If secondary evidence is admitted, it is then up to the trier of fact to decide, when it is an issue, whether the document ever existed. Fauci v. Mulready, 337 Mass. at 542.

"[T]here are no degrees in secondary evidence, so that a party authorized to resort to it is compelled to produce one class of such evidence rather than another." Commonwealth v. Smith, 151 Mass. 491, 495 (1890).

ARTICLE XI. MISCELLANEOUS SECTIONS

Section 1101. Applicability of Evidentiary Sections

(a) Proceedings to Which Applicable. Except as provided in Subsection (c), these sections apply to all actions and proceedings in the courts of the Commonwealth.

(b) Privileges. The provisions of Article V apply at all stages of all actions, cases, and proceedings.

(c) Where Inapplicable. These sections (other than those concerning privileges) do not apply in the following situations:

> **(1) Preliminary Determinations of Fact.** The determination of questions of fact preliminary to the admissibility of evidence when the determination is to be made by the judge under Section 104(a).
>
> **(2) Grand Jury Proceedings.** Proceedings before grand juries.
>
> **(3) Certain Other Proceedings.** Most administrative proceedings; bail proceedings; bar discipline proceedings; civil motor vehicle infraction hearings; issuance of process (warrant, complaint, capias, summons); precomplaint, show cause hearings; civil commitment proceedings for alcohol and substance abuse; pretrial dangerousness hearings; prison disciplinary hearings; probation violation hearings; restitution hearings; sentencing; sexual offender registry board hearings; small claims sessions; and summary contempt proceedings.

(d) Motions to Suppress. The law of evidence does not apply with full force at motion to suppress hearings. As to the determination of probable cause or the justification of government action, out-of-court statements are admissible.

NOTE

Subsection (a). This subsection summarizes the current practice in Massachusetts courts. "The rules of evidence stand guard to ensure that only relevant, reliable, noninflammatory considerations may shape fact finding. Without these rules, there would be nothing to prevent trials from being resolved on whim, personal affections, or prejudice." Adoption of Sherry, 435 Mass. 331, 338 (2001). In addition to trials, therefore, the law of evidence applies at hearings on motions. See Thorell v. ADAP, Inc., 58 Mass. App. Ct. 334, 340–341 (2003).

Subsection (b). Privileges are covered in Article V, Privileges and Disqualifications.

Subsection (c)(1). See Note to Section 104(a), Preliminary Questions: In General.

Subsection (c)(2). This subsection is derived from Commonwealth v. Gibson, 368 Mass. 518, 522–525 (1975), and Mass. R. Crim. P. 4(c). See Reporters' Notes to Mass. R. Crim. P. 4(c) ("evidence which is not legally competent at trial is sufficient upon which to base an indictment").

Subsection (c)(3). Evidence bearing directly on probable cause, such as what a witness, a police officer, or a probation officer tells a court in connection with a request for an arrest warrant, a probation violation warrant, a warrant of apprehension, a search warrant, a capias, or a summons, or in support of a criminal complaint or as justification for a search and seizure, is not objectionable on grounds of hearsay in a judicial proceeding to determine probable cause. Commonwealth v. Fletcher, 435 Mass. 558, 567 (2002); Commonwealth v. Weiss, 370 Mass. 416, 418 (1976); Commonwealth v. Rosenthal, 52 Mass. App. Ct. 707, 709 n.3 (2001). While the traditional rules of evidence may not apply in these situations, the evidence must still be reliable and trustworthy. See Abbott A. v. Commonwealth, 458 Mass. 24, 34–35 (2010); Brantley v. Hampden Div. of the Probate & Family Ct. Dep't, 457 Mass. 172, 184–185 (2010); Commonwealth v. Wilcox, 446 Mass. 61, 71 (2006).

This subsection identifies the various miscellaneous proceedings to which the rules of evidence are not applicable, including the following:

***209A Hearings*.** See Silvia v. Duarte, 421 Mass. 1007, 1008 (1995); Frizado v. Frizado, 420 Mass. 592, 597–598 (1995).

***Administrative Proceedings*.** See G. L. c. 30A, § 11(2); 452 Code Mass. Regs. § 1.11(5); Costa v. Fall River Hous. Auth., 453 Mass. 614, 627 (2009); Rate Setting Comm'n v. Baystate Med. Ctr., 422 Mass. 744, 752–755 (1996); Goodridge v. Director of Div. of Employment Sec., 375 Mass. 434, 436 n.1 (1978). See also Care & Protection of Rebecca, 419 Mass. 67, 83 (1994) (a witness at such a proceeding is not permitted to express an opinion about the credibility of another witness).

***Bail Proceedings*.** See Paquette v. Commonwealth, 440 Mass. 121, 133 (2003) (bail revocation proceedings); Querubin v. Commonwealth, 440 Mass. 108, 118 (2003) (G. L. c. 276, § 57, proceedings); Snow v. Commonwealth, 404 Mass. 1007, 1007 (1989).

***Bar Discipline Proceedings*.** See Matter of Abbott, 437 Mass. 384, 393 (2002).

***Civil Commitment Hearings for Alcohol and Substance Use Disorders*.** See G. L. c. 123, § 35; Matter of G.P., 473 Mass. 112, 128–129 (2015). See also Section 1118, Civil Commitment Hearings for Alcohol and Substance Use Disorders.

***Civil Motor Vehicle Infraction Hearings*.** See G. L. c. 90, § 20 (traffic citation). Under the Uniform Rules on Civil Motor Vehicle Infractions, the formal rules of evidence do not apply. See Commonwealth v. Curtin, 386 Mass. 587, 588 n.3 (1982). The same holds true for cases involving parking tickets under G. L. c. 90, § 20C. See Lemaine v. City of Boston, 27 Mass. App. Ct. 1173, 1175 (1989).

Issuance of Process (Warrant, Capias, Summons). See Commonwealth v. Weiss, 370 Mass. 416, 418 (1976); Commonwealth v. Young, 349 Mass. 175, 179 (1965); Commonwealth v. Lehan, 347 Mass. 197, 206 (1964); Commonwealth v. Rosenthal, 52 Mass. App. Ct. 707, 709 n.3 (2001).

***Precomplaint Hearings*.** See G. L. c. 218, § 35A. The formal rules of evidence do not apply at a hearing conducted pursuant to G. L. c. 218, § 35A. Commonwealth v. Clerk-Magistrate of the W. Roxbury Div. of the Dist. Ct. Dep't, 439 Mass. 352, 357–358 (2003); Commonwealth v. DiBennadetto, 436 Mass. 310, 314–315 (2002) (no right to cross-examine witness).

***Pretrial Dangerousness Hearings*.** See G. L. c. 276, § 58A(4); Abbott A. v. Commonwealth, 458 Mass. 24, 30–33 (2010); Mendonza v. Commonwealth, 423 Mass. 771, 785–786 (1996). By statute, a judge must consider hearsay contained either in a police report or a statement of a victim or witness at a dangerousness hearing. G. L. c. 276, § 58A(4). Before being able to summons the victim or the victim's family to the hearing, a defendant must make a motion to the court prior to the issuance of the summons. The defendant must demonstrate a good-faith basis that there is a reasonable belief that the testimony of the witness will support a conclusion for conditions of release. G. L. c. 276, § 58A(4).

***Prison Disciplinary Hearings*.** See Murphy v. Superintendent, Mass. Correctional Inst., 396 Mass. 830, 834 (1986).

***Probation Violation Hearings*.** See Commonwealth v. Bukin, 467 Mass. 516, 522 (2014) (hearsay admissible in probation violation hearings as long as it is determined to be substantially reliable); Com-

monwealth v. Durling, 407 Mass. 108, 117–118 (1990) (hearsay evidence must still bear substantial indicia of reliability and trustworthiness). See also Rule 7 of the District Court Rules for Probation Violation Proceedings.

***Restitution Hearings*.** See Section 1114, Restitution.

***Sentencing*.** See Commonwealth v. Goodwin, 414 Mass. 88, 92 (1993) (a judge may consider many factors, including hearsay). See also G. L. c. 276, § 85; Mass. R. Crim. P. 28(d); Commonwealth v. Stuckich, 450 Mass. 449, 461–462 (2008) (evidence of uncharged conduct is admissible and relevant to the character of the offender, but may not be used to increase the punishment).

***Sexual Offender Registry Board Hearings*.** See G. L. c. 6, § 178L(2); 803 Code Mass. Regs. § 1.19(1).

***Small Claims*.** See generally G. L. c. 218, §§ 21, 22.

***Summary Contempt Proceedings*.** See Mass. R. Crim. P. 43.

Subsection (d). This subsection is derived from United States v. Matlock, 415 U.S. 164, 172–175 (1974), and Commonwealth v. Young, 349 Mass. 175, 179 (1965). While out-of-court statements are admissible as to the determination of probable cause or the justification of government action, other evidence that would be incompetent under the rules of evidence is not admissible at suppression hearings or other proceedings in which probable cause is challenged. If a defendant testifies at a motion to suppress hearing and subsequently testifies at trial, his or her testimony from the motion to suppress hearing may be used to impeach his or her credibility at the later trial. Commonwealth v. Rivera, 425 Mass. 633, 637–638 (1997).

Cross-Reference: Section 1112, Eyewitness Identification.

Section 1102. Spoliation or Destruction of Evidence

A judge has the discretion to impose sanctions for the spoliation or destruction of evidence, whether negligent or intentional, in the underlying action in which the evidence would have been offered.

NOTE

This section is derived from Keene v. Brigham & Women's Hosp., Inc., 439 Mass. 223, 235–236 (2003), and Commonwealth v. Henderson, 411 Mass. 309, 311–312 (1991). See also Mass. R. Civ. P. 37(b); Kippenhan v. Chaulk Servs., Inc., 428 Mass. 124, 126–129 (1998); Nally v. Volkswagen of Am., Inc., 405 Mass. 191, 197 (1989). The mere fact that evidence is missing and was in the possession of a party, without more, is insufficient to establish spoliation. Sullivan v. Connolly, 91 Mass. App. Ct. 56, 58–59 (2017). There is no tort cause of action for spoliation or destruction of evidence. See Fletcher v. Dorchester Mut. Ins. Co., 437 Mass. 544, 547 (2002).

> "Sanctions may be appropriate for the spoliation of evidence that occurs even before an action has been commenced, if a litigant or its expert knows or reasonably should know that the evidence might be relevant to a possible action. The threat of a lawsuit must be sufficiently apparent, however, that a reasonable person in the spoliator's position would realize, at the time of spoliation, the possible importance of the evidence to the resolution of the potential dispute." (Citations omitted.)

Kippenhan v. Chaulk Servs., Inc., 428 Mass. at 127. "While a duty to preserve evidence does not arise automatically from a nonparty's mere knowledge, there are ways that that duty may be imposed on a nonparty." Fletcher v. Dorchester Mut. Ins. Co., 437 Mass. at 548. For example, a witness served with a

subpoena duces tecum must preserve evidence in his or her control when the subpoena is received, or a third-party witness may enter into an agreement to preserve evidence. Id. at 549.

Civil Cases. "[S]anctions for spoliation are carefully tailored to remedy the precise unfairness occasioned by that spoliation. A party's claim of prejudice stemming from spoliation is addressed within the context of the action that was allegedly affected by that spoliation." Fletcher v. Dorchester Mut. Ins. Co., 437 Mass. 544, 551 (2002). "As a general rule, a judge should impose the least severe sanction necessary to remedy the prejudice to the nonspoliating party." Keene v. Brigham & Women's Hosp., Inc., 439 Mass. 223, 235 (2003).

> "[I]n a civil case, where an expert has removed an item of physical evidence and the item has disappeared, or the expert has caused a change in the substance or appearance of such an item in such circumstances that the expert knows or reasonably should know that that item in its original form may be material to litigation, the judge, at the request of a potentially prejudiced litigant, should preclude the expert from testifying as to his or her observations of such items before he or she altered them and as to any opinion based thereon. The rule should be applied without regard for whether the expert's conduct occurred before or after the expert was retained by a party to the litigation."

Nally v. Volkswagen of Am., Inc., 405 Mass. 191, 197–198 (1989). See also Bolton v. MBTA, 32 Mass. App. Ct. 654, 655–657 (1992) (extending rule to cover spoliation of evidence by a party after expert inspection).

"The spectrum of remedies [also] includes allowing the party who has been aggrieved by the spoliation to present evidence about the preaccident condition of the lost evidence and the circumstances surrounding the spoliation, as well as instructing the jury on the inferences that may be drawn from spoliation" (citations omitted). Gath v. M/A-Com, Inc., 440 Mass. 482, 488 (2003). A judge may preclude testimony that is dispositive of the ultimate merits of the case. Fletcher v. Dorchester Mut. Ins. Co., 437 Mass. at 550. Once the moving party produces evidence sufficient to establish that another party lost or destroyed evidence that the litigant or its expert knew or reasonably should have known might be relevant to a pending or potential case, the burden shifts to the nonmoving party to prove that it was not at fault. Scott v. Garfield, 454 Mass. 790, 799 (2009). See also Nally v. Volkswagen of Am., Inc., 405 Mass. at 195, 199 (defendant entitled to summary judgment if excluded testimony prevents plaintiff from making prima facie case). For the extreme sanction of dismissal or entering a default judgment, ordinarily a finding of wilfulness or bad faith is necessary. Keene v. Brigham & Women's Hosp., Inc., 439 Mass. at 235–236.

Criminal Cases. In Commonwealth v. DiBenedetto, 427 Mass. 414, 419 (1998), the court addressed the appropriate remedial action in criminal cases:

> "[W]hen potentially exculpatory evidence is lost or destroyed, a balancing test is employed to determine the appropriateness and extent of remedial action. The courts must weigh the culpability of the Commonwealth, the materiality of the evidence and the potential prejudice to the defendant. To establish prejudice, the defendant must show a reasonable possibility, based on concrete evidence rather than a fertile imagination, that access to the [material] would have produced evidence favorable to [the defendant's] cause." (Quotations and citation omitted.)

See also Mass. R. Crim. P. 14(c); Commonwealth v. Olszewski, 416 Mass. 707, 714 (1993), cert. denied, 513 U.S. 835 (1994); Commonwealth v. Willie, 400 Mass. 427, 432–433 (1987); Commonwealth v. Heath, 89 Mass. App. Ct. 328, 335–337 (2016) (conviction reversed for improper calibration of factors of culpability and potential prejudice relating to destroyed evidence, and for insufficiency of remedial action). Remedial action in the form of sanctions or a "missing evidence" instruction is not appropriate unless the defendant meets "his initial burden of showing a reasonable possibility that the lost evidence was exculpatory." Commonwealth v. Kee, 449 Mass. 550, 554 (2007). If remedial action is required, the judge has the discretion to fashion a remedy that will protect the defendant's rights. See, e.g., Commonwealth v. Kee, 449 Mass. at 557–558 (missing evidence instruction); Commonwealth v. Harwood, 432 Mass. 290, 303 (2000) (suppression of evidence). Cf. Commonwealth v. Sasville, 35 Mass. App. Ct. 15, 28 (1993) (dismissal ap-

propriate only where the harm is irremediable). With reference to the Commonwealth's duty to preserve evidence, see Commonwealth v. Williams, 475 Mass. 705, 722–723 (2016).

Section 1103. Sexually Dangerous Person Proceedings

(a) In General. A person who has been convicted of a sex offense may be confined indefinitely for treatment after the termination of the person's criminal sentence if the person is found to be a sexually dangerous person (SDP) in accordance with statutory procedures and based on the testimony of a qualified examiner.

(b) Proceedings. In proceedings for the commitment or discharge of a person alleged to be a sexually dangerous person, hearsay evidence is not admissible, except as provided in Subsections (b)(1) and (b)(2) of this section.

> **(1) Hearsay That Is Admissible.** Hearsay consisting of reports or records relating to a person's criminal conviction, adjudication of juvenile delinquency or as a youthful offender, the person's psychiatric and psychological records, and a variety of records created or maintained by the courts and other government agencies, as more particularly defined by statute, is admissible in SDP proceedings.
>
> **(2) Hearsay That May Be Admissible.** In addition to hearsay admissible under Subsection (b)(1), other hearsay may be admissible if it concerns uncharged conduct of the person and is closely related in time and circumstance to a sexual offense for which the person was convicted or adjudicated a juvenile delinquent or youthful offender.

NOTE

Subsection (a). This subsection is derived from Johnstone, petitioner, 453 Mass. 544, 547 (2009) (discussing G. L. c. 123A, §§ 12–14), and Green, petitioner, 475 Mass. 624 (2016). Expert witness testimony by a credible qualified examiner is required for a judge or a jury to make the determination that a person is sexually dangerous, and the jury must be instructed to that effect. Green, petitioner, 475 Mass. at 625–626.

The current Massachusetts law, G. L. c. 123A, was adopted in 1999, St. 1999, c. 74, §§ 3–8, and is the successor to an earlier statutory scheme for the civil commitment of sexually dangerous persons (St. 1958, c. 646) that was repealed by St. 1990, c. 150, § 304. As a result, the population of the Massachusetts Treatment Center includes persons who are confined under commitment orders made prior to 1990 and subsequent to 1999. Each population has a right to file a petition in the Superior Court each year that requires a redetermination of whether they remain sexually dangerous. See G. L. c. 123A, § 9. The law provides for trial by jury and affords the individual the right to counsel, the right to present evidence, and the right to cross-examine adverse witnesses. Unless the Commonwealth proves that the person remains sexually dangerous beyond a reasonable doubt, the person must be released. See Commonwealth v. Nieves, 446 Mass. 583, 587, 593–594 (2006) (explaining the statutory procedures governing commitment and discharge under G. L. c. 123A). The criteria for commitment are set forth in the definition of a "sexually dangerous person" found in G. L. c. 123A, § 1. See Commonwealth v. Boucher, 438 Mass. 274, 275–281 (2002).

Subsection (b). "It is settled that hearsay not otherwise admissible under the rules of evidence is inadmissible at the trial of a sexually dangerous person petition unless specifically made admissible by statute" (citations omitted). Commonwealth v. Markvart, 437 Mass. 331, 335 (2002). Thus, the catch-all provision found in G. L. c. 123A, § 14(c) ("Any other evidence" tending to show that the person is sexually dangerous),

is not interpreted to make any and all hearsay evidence admissible in SDP proceedings. McHoul, petitioner, 445 Mass. 143, 147 n.2 (2005). See also id. at 151 n.6 ("For example, there is no hearsay exception that would allow a party to introduce his own prior statements in the various reports and records; if offered by the petitioner, his own statements would not be the admission of a party opponent."). It is equally settled that documents made admissible by statute in SDP proceedings such as police reports, psychological assessments, notes about treatment, and the like, are not subject to redaction simply because they contain hearsay statements. See id. at 147–148, 151 n.6.

> "When the Legislature identified the specific records and reports that were to be admissible in sexually dangerous person proceedings, it did so with full knowledge that they routinely contain information derived from hearsay sources. Having made such records and reports 'admissible,' the Legislature did not intend that the documents be reduced to isolated shreds of partial information that would result from the application of hearsay rules to each individual entry in the documents."

Id. at 150. See also Commonwealth v. Reese, 438 Mass. 519, 527 (2003) (G. L. c. 123A, § 14[c], does not supersede the requirements of the learned treatise exception to the hearsay rule).

***Miscellaneous Evidentiary Rulings*.** The Supreme Judicial Court and Appeals Court have addressed several other evidentiary questions that relate to these specialized proceedings. See Johnstone, petitioner, 453 Mass. 544, 550 (2009) (although the annual report of the Community Access Board as to a civilly committed person's sexual dangerousness is admissible in discharge proceedings under G. L. c. 123A, § 9, the Commonwealth cannot proceed to trial unless at least one of the two qualified examiners opines that the petitioner is a sexually dangerous person); Commonwealth v. Connors, 447 Mass. 313, 317–319 (2006) (although the allegedly sexually dangerous person has a right to refuse to speak to the qualified examiners, he or she may not offer his or her own expert testimony, based on his or her statements made to his or her own experts, while refusing to answer the questions of the qualified examiners); Commonwealth v. Nieves, 446 Mass. 583, 587, 593–594 (2006) (civil commitment of an incompetent person under G. L. c. 123A is not unconstitutional even though no effective treatment is available); Commonwealth v. Callahan, 440 Mass. 436, 439–442 (2004) (G. L. c. 123A, § 13[b], which requires that certain material about a person alleged to be a sexually dangerous person be given to the qualified examiners, does not supersede the patient-psychotherapist privilege); Wyatt, petitioner, 428 Mass. 347, 355–359 (1998) (questions concerning the relevancy and probative value of evidence offered in proceedings under G. L. c. 123A are within the discretion of the trial judge in accordance with Sections 401–403 of this Guide); Gammel, petitioner, 86 Mass. App. Ct. 8, 9 (2014) (qualified examiner was permitted to testify at trial as to his opinion regarding the credibility of statements made by petitioner during evaluation of sexual dangerousness); Kenney, petitioner, 66 Mass. App. Ct. 709, 714–715 (2006) (admissibility of juvenile court records in SDP cases); Commonwealth v. Bradway, 62 Mass. App. Ct. 280, 287 (2004) (if reports of qualified examiners are admitted pursuant to G. L. c. 123A, § 14[c], the author of report must be made available for cross-examination).

***Hearsay Evidence Excluded*.** Police reports and out-of-court statements of witnesses from cases in which the charges have been dismissed or nolle prossed or in which the defendant was found not guilty are not statements of "prior sexual offenses," as set forth in G. L. c. 123A, § 14(c), and thus are inadmissible as hearsay. See Commonwealth v. Markvart, 437 Mass. 331, 335–336 (2002). However, this does not mean that the testimony of witnesses with personal knowledge of the facts in cases that were dismissed or nolle prossed cases would be inadmissible in SDP cases. See id. at 337.

Subsection (b)(1). This subsection is derived from G. L. c. 123A, §§ 6A, 9, and 14(c). In proceedings for the initial commitment of a person under Section 12 (including the preliminary, probable cause hearing) and the discharge of committed persons under Section 9, the Legislature has removed many of the barriers against the admissibility of hearsay evidence. See G. L. c. 123A, §§ 6A, 9, 14(c). The case law has harmonized these sections so that the general rule is that hearsay admissible in a proceeding under G. L. c. 123A, § 12, is also admissible in a proceeding under Section 9. These statutory provisions permit psychiatrists or psychologists who are qualified examiners, see G. L. c. 123A, § 1, to testify as experts without an independent determination by the court that they are qualified and that their testimony meets standards of reliability under Section 702, Testimony by Expert Witnesses. See Commonwealth v. Bradway, 62 Mass. App.

Ct. 280, 285–289 (2004) (admission of testimony and reports of qualified examiners as to a person's sexual dangerousness does not require the court to assess reliability under the standards established in Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 [1993], and Commonwealth v. Lanigan, 419 Mass. 15 [1994]). Cf. Ready, petitioner, 63 Mass. App. Ct. 171, 172–179 (2005) (in a Section 9 proceeding, the trial judge was correct in excluding the results of the Abel Assessment for Sexual Interest test administered by an independent expert witness for the petitioner on grounds that it was not generally accepted by the relevant scientific community and thus not reliable under the Daubert-Lanigan standard).

Hearsay Evidence Expressly Made Admissible by Statute. Under G. L. c. 123A, § 6A, reports by the community access board of evaluations of residents of the Massachusetts Treatment Center are admissible in proceedings for discharge under G. L. c. 123A, § 9. Under G. L. c. 123A, §§ 9 and 14(c), reports prepared by qualified examiners are admissible. The phrase "psychiatric and psychological records" in G. L. c. 123A, § 9, includes the reports prepared by psychiatrists and psychologists who have been retained as expert witnesses by the petitioner in connection with a Section 9 petition for examination and discharge. Santos, petitioner, 461 Mass. 565, 573 (2012). The cognate phrase in G. L. c. 123A, § 14(c), will be interpreted in the same manner. Id. at 573 n.10. There also is a broad exemption from the hearsay rule found in G. L. c. 123A, § 14(c), which states that the following records are admissible in proceedings under G. L. c. 123A, § 12, for the initial commitment of an offender as a sexually dangerous person:

> "Juvenile and adult court probation records, psychiatric and psychological records and reports of the person named in the petition, including the report of any qualified examiner, as defined in section 1, and filed under this chapter, police reports relating to such person's prior sexual offenses, incident reports arising out of such person's incarceration or custody, oral or written statements prepared for and to be offered at the trial by the victims of the person who is the subject of the petition and any other evidence tending to show that such person is or is not a sexually dangerous person shall be admissible at the trial if such written information has been provided to opposing counsel reasonably in advance of trial."

See also Commonwealth v. Morales, 60 Mass. App. Ct. 728, 730 (2004) ("[Department of Social Services] reports and grand jury minutes containing information about victims of sexual offenses committed against them by a defendant convicted of those offenses are directly admissible in evidence at trials on petitions brought under G. L. c. 123A, § 14[a]"). Under G. L. c. 123A, § 9, either side may introduce in evidence the report of a qualified examiner, the petitioner's "juvenile and adult court and probation records," the petitioner's "psychiatric and psychological records," and the Department of Correction's updated annual progress report pertaining to the petitioner. Constitutional challenges to the Legislature's relaxation of the rule against the admissibility of hearsay in SDP cases were considered and rejected by the Supreme Judicial Court in Commonwealth v. Given, 441 Mass. 741, 746–748 (2004).

When Hearsay Evidence Is the Basis of Expert Testimony. In Commonwealth v. Markvart, 437 Mass. 331, 336–339 (2002), the Supreme Judicial Court applied Department of Youth Servs. v. A Juvenile, 398 Mass. 516, 531 (1986), see Section 703(c), Bases of Opinion Testimony by Experts, and harmonized the demands of the more general law of evidence and the special statutory exemptions from the hearsay rule found in G. L. c. 123A, §§ 9 and 14(c). The Supreme Judicial Court held that in an SDP proceeding, a qualified examiner could base an expert opinion on police reports and witness statements pertaining to the sex offender even though the information is not in evidence, as long as the information could be admitted if the witnesses were called to testify. Commonwealth v. Markvart, 437 Mass. at 337–338. Because the statutes, G. L. c. 123A, §§ 9 and 14(c), make the reports of these qualified examiners admissible, any independently admissible hearsay contained in such reports that is not admitted during the trial must be redacted from the reports before it is presented to the jury. Id. at 339. The reason why redaction is required in such cases is not because the qualified examiner's report contains hearsay within hearsay, but rather because the report is the equivalent of an expert witness's direct testimony which cannot be used as a vehicle for putting before the jury facts not in evidence. See McHoul, petitioner, 445 Mass. 143, 148 n.4 (2005).

Subsection (b)(2). This subsection is derived from Commonwealth v. Given, 441 Mass. 741, 745 (2004). The Supreme Judicial Court explained that in proceedings under G. L. c. 123A, § 9 or § 12, G. L. c. 123A, § 14(c), makes admissible evidence of uncharged conduct when it is closely related in time and circum-

stance to the underlying sexual offense. Id. Cf. id. at 746 n.6 ("We do not consider or decide whether statements in a police report that include information concerning uncharged misconduct completely unrelated in time and circumstance to the underlying sexual offense must be redacted.").

Section 1104. Witness Cooperation Agreements

In a criminal case in which there is a written agreement between the Commonwealth and a witness in which the Commonwealth makes a promise to the witness in relation to the charges or the sentence in exchange for the testimony of the witness at trial, the use and admission of the agreement by the Commonwealth at trial is within the discretion of the trial judge subject to the following guidelines:

(a) On direct examination, the prosecution may properly bring out the fact that the witness has entered into a plea agreement and that the witness generally understands his or her obligations under it.

(b) The agreement itself is admissible. The timing of the admission of the agreement is within the judge's discretion. The judge may defer admission of the agreement until redirect examination, after the defendant has undertaken to impeach the witness's credibility by showing that the witness had struck a deal with the prosecution in order to obtain favorable treatment.

(c) References to a witness's obligation to tell the truth, any certification or acknowledgment by his or her attorney, and any provision that suggests that the Commonwealth has special knowledge as to the veracity of the witness's testimony should be redacted from the agreement, on request.

(d) Ordinarily, questions by the prosecutor about the duty of the witness to tell the truth and the reading of the agreement are not permitted until redirect examination and after the witness has been cross-examined on the matter.

(e) Care must be taken by the Commonwealth not to suggest, by questions or argument, that it has knowledge of the credibility of the witness independent of the evidence.

(f) The trial judge must instruct the jury by focusing their attention on the particular care they should give in evaluating testimony given pursuant to a plea agreement that is contingent on the witness's telling the truth.

NOTE

Subsections (a) and (b). These subsections are taken nearly verbatim from Commonwealth v. Ciampa, 406 Mass. 257, 264 (1989). See also Commonwealth v. Rivera, 430 Mass. 91, 96 (1999).

Subsection (c). This subsection is derived from Commonwealth v. Conkey, 430 Mass. 139, 147 (1999), and Commonwealth v. Ciampa, 406 Mass. 257, 261–262 (1989).

Subsections (d) and (e). These subsections are derived from Commonwealth v. Rivera, 430 Mass. 91, 96–97 (1999), and Commonwealth v. Ciampa, 406 Mass. 257, 264–265 (1989). See also Commonwealth v. Webb, 468 Mass. 26, 32–34 (2014) (no error in permitting prosecutor to inquire on direct examination into

witness's agreement to provide truthful testimony after defense counsel had attacked witness's credibility during opening statement).

Subsection (f). This subsection is derived from Commonwealth v. Ciampa, 406 Mass. 257, 266 (1989), and Commonwealth v. Asmeron, 70 Mass. App. Ct. 667, 675 (2007). See Commonwealth v. Meuse, 423 Mass. 831, 832 (1996) (reversible error where prosecutor vouched for witness testifying pursuant to plea agreement and judge failed to give Ciampa-type instruction); Commonwealth v. Daye, 411 Mass. 719, 739–740 (1992) (no special instruction necessary as it did not appear that evidence presented realistic possibility that jury would believe witness's testimony based on her agreement to tell truth); Commonwealth v. Colon, 408 Mass. 419, 445 (1990) (no special instructions necessary where plea agreement does not condition immunization on truthfulness).

General Application. The above guidelines also apply to nonbinding pretrial "agreements." See Commonwealth v. Davis, 52 Mass. App. Ct. 75, 78–79 & n.7 (2001) (holding that Ciampa's prophylactic measures are applicable in circumstances in which Commonwealth witness testified that, after he was charged with distribution of marijuana, he agreed to help police arrest others involved in illegal sale of drugs in exchange for nonspecific "consideration" from prosecution). A defendant has the right to bring to the attention of the jury any "quid pro quo" agreement between the prosecution and a testifying witness, whether formal or informal, written or unwritten. See id. at 78 n.7; Commonwealth v. O'Neil, 51 Mass. App. Ct. 170, 179 (2001).

In Commonwealth v. Prater, 431 Mass. 86, 98 (2000), the Supreme Judicial Court indicated that the "better practice" is for the trial judge to include in the cautionary instruction a warning that the jury should not consider an accomplice's guilty plea as evidence against the defendant.

An agreement that obligates a witness to testify to some particular version of the facts in exchange for a charge or sentence concession would be grounds for a motion to preclude the testimony or to strike it. See Commonwealth v. Ciampa, 406 Mass. 257, 261 n.5 (1989) ("Testimony pursuant to a plea agreement made contingent on obtaining . . . a conviction, as a result of the witness's testimony, would presumably present too great an inducement to lie, [and] would not meet the test of fundamental fairness."). See also Commonwealth v. Colon-Cruz, 408 Mass. 533, 553 (1990) ("[W]e do not condone the use of agreements which do not require a witness to tell the truth. Such agreements are antithetical to the fair administration of justice. . . . [F]uture plea agreements [should] be drafted so as to make the obligation to testify truthfully clear to the witness[.]").

Cross-Reference: Section 611(b)(2), Mode and Order of Examining Witnesses and Presenting Evidence: Scope of Cross-Examination: Bias and Prejudice.

Section 1105. Third-Party Culprit Evidence

Evidence that a third party committed the crimes charged against the defendant, or had the motive, intent, and opportunity to commit the crimes, is admissible provided that the evidence has substantial probative value. In making this determination, the court must make a preliminary finding (a) that the evidence is relevant, (b) that the evidence will not tend to prejudice or confuse the jury, and (c) that there are other substantial connecting links between the crime charged and a third party or between the crime charged and another crime that could not have been committed by the defendant.

NOTE

This section is derived from Commonwealth v. Silva-Santiago, 453 Mass. 782, 800–801 (2009); Commonwealth v. Jewett, 392 Mass. 558, 562 (1984); Commonwealth v. Murphy, 282 Mass. 593, 597–598

(1933); and Commonwealth v. Abbott, 130 Mass. 472, 475 (1881). See Commonwealth v. Buckman, 461 Mass. 24, 29–30 (2011) (trial judge had discretion to rule in advance of trial that defendant had not made adequate showing that three potential culprits were connected to the crime, and that defendant should provide advance warning to court before offering evidence or argument at trial of third-party culprit). The admission of evidence under this section does not require the trial judge to give a specific instruction on third-party culprit evidence so long as the jury instructions adequately convey the Commonwealth's burden to prove beyond a reasonable doubt that the defendant committed the crime charged. Commonwealth v. Hoose, 467 Mass. 395, 412–413 (2014).

In Commonwealth v. Rosa, 422 Mass. 18, 22 (1996), the Supreme Judicial Court observed that

> "[i]f the defense offers its own theory of the case (beyond merely putting the government to its proof), its evidence must have a rational tendency to prove the issue the defense raises, and the evidence cannot be too remote or speculative. Evidence that another person committed the crime charged also poses a real threat of prejudice, especially the risk of confusing jurors by diverting their attention to wholly collateral matters involving persons not on trial."

For example, in Commonwealth v. Rosa, the Supreme Judicial Court upheld the trial judge's exclusion of so-called third-party culprit evidence consisting of the fact that there was another person awaiting trial with a record for crimes of violence and who was held in the same jail as the defendant. Id. at 24–25. Even though this other person had been mistaken for the defendant by his lawyer and had lived in the same neighborhood as the defendant at the time of the murder, the court upheld the trial judge's decision to exclude the evidence. The court concluded that "[w]ithout more, these are fairly common similarities that do not require the admission of evidence of similar crimes." Id. at 23. The court contrasted Commonwealth v. Keizer, 377 Mass. 264, 267 (1979), where it held that the trial judge should have admitted evidence "because there were substantial connecting links between the robbery charged and another robbery in which the defendant could not have participated." Commonwealth v. Rosa, 422 Mass. at 23. The court noted that in Keizer,

> "[n]ot only did the two crimes share an identical modus operandi with several distinctive features, but the two robberies also had one common perpetrator (each robbery was by a team of three perpetrators). We also found distinctive a specific link between the identification testimony against the defendant and the identity of the perpetrators of the similar crime (only one witness could identify defendant, and same witness also identified common perpetrator of two crimes)."

Id. at 23, citing Commonwealth v. Keizer, 377 Mass. at 268 n.2.

The mere fact that a third party had the motive, intent, and opportunity to commit the crime, however, does not make evidence about that person and his or her possible culpability admissible. Commonwealth v. O'Brien, 432 Mass. 578, 588–589 (2000) (explaining that evidence that the victim had expressed fear of the third party in circumstances in which there were no substantial links between the third party and the crime was not admissible because it amounted to nothing more than the witness's opinion that the third party committed the crime). Accord Commonwealth v. Buckman, 461 Mass. 24, 29–30 (2011); Commonwealth v. Rice, 441 Mass. 291, 305–306 (2004); Commonwealth v. DiBenedetto, 427 Mass. 414, 420–421 (1998). See also Commonwealth v. Wood, 469 Mass. 266, 278 (2014) (affirming exclusion of statements offered in furtherance of a Bowden defense where there was no evidence suggesting that the third party was in any way involved in the victim's death); Commonwealth v. Smith, 461 Mass. 438, 446–448 (2012) (affirming exclusion of statements suggesting murder victim feared unknown persons because statements failed to establish connection between the unknown persons and the murder).

Where the Commonwealth seeks to obtain a DNA buccal swab from a third party in order to foreclose a possible third-party culprit defense, it bears the burden of establishing probable cause that a crime has been committed and that the sample probably will provide evidence relevant to the question of the defendant's guilt. Commonwealth v. Kostka, 471 Mass. 656, 659 (2015) (DNA buccal swab of defendant's twin brother).

Constitutional Considerations. "The defendant has a constitutional right to present evidence that another may have committed the crime." Commonwealth v. Keohane, 444 Mass. 563, 570 (2005). State evidence rules which effectively bar the introduction of third-party culprit evidence deprive a defendant of his or her right to present a meaningful defense and violate the due process clause of the Fourteenth Amendment. See Holmes v. South Carolina, 547 U.S. 319 (2006); Chambers v. Mississippi, 410 U.S. 284 (1973). Hearsay evidence is admissible as third-party culprit evidence even though it does not fall within a hearsay exception, but "only if, in the judge's discretion, the evidence is otherwise relevant, will not tend to prejudice or confuse the jury, and there are other substantial connecting links to the crime." Commonwealth v. Silva-Santiago, 453 Mass. 782, 801 (2009), and cases cited; Commonwealth v. Alcantara, 471 Mass. 550, 559–561 (2015). See Commonwealth v. Drew, 397 Mass. 65, 72 (1986) (noting that in "rare circumstances," the defendant's constitutional right to present a defense may require the admission of third-party culprit evidence). However, "[a] defendant has no 'constitutional right to the admission of unreliable hearsay.'" Commonwealth v. Burnham, 451 Mass. 517, 526 (2008), quoting Commonwealth v. Evans, 438 Mass. 142, 156 (2002), cert. denied, 538 U.S. 966 (2003). Accord Commonwealth v. Morgan, 449 Mass. 343, 358 (2007) (explaining that an absent witness's statement that a third party told her that he had shot the victim was not admissible as a statement against penal interest or as third-party culprit evidence in circumstances in which the third party denied making the statement when interviewed by the police and where there was no corroboration). Hearsay evidence which does not qualify as third-party culprit evidence may nonetheless be admissible for a different but related purpose of establishing the inadequacy of the police investigation. See Commonwealth v. Silva-Santiago, 453 Mass. at 802 (explaining that based on the reasoning in Commonwealth v. Bowden, 379 Mass. 472, 486 (1980), "information regarding a third-party culprit, whose existence was known to the police but whose potential involvement was never investigated, may be admissible under a Bowden defense even though it may not otherwise be admissible under a third-party culprit defense"). Before such evidence is admitted, the judge should conduct a voir dire to determine whether the third-party culprit evidence was provided to the police and whether its admission would be more prejudicial than probative. Id. at 802–803.

Cross-Reference: Section 1107, Inadequate Police Investigation Evidence.

Section 1106. Abuse Prevention and Harassment Prevention Proceedings

In all civil proceedings under G. L. c. 209A (abuse prevention) and G. L. c. 258E (harassment prevention), the rules of evidence should be applied flexibly by taking into consideration the personal and emotional nature of the issues involved, whether one or both of the parties is self-represented, and the need for fairness to all parties.

NOTE

Introduction. This section is derived from G. L. c. 209A; Frizado v. Frizado, 420 Mass. 592, 597–598 (1995); S.T. v. E.M., 80 Mass. App. Ct. 423, 429–430 (2011); and O'Brien v. Borowski, 461 Mass. 415 (2012). Civil proceedings under G. L. c. 209A are commenced by filing a civil complaint. G. L. c. 209A, § 3A. Violations of orders issued under G. L. c. 209A are punishable as crimes. G. L. c. 209A, §§ 3B, 7. The remedies that may be ordered by the court are set forth in G. L. c. 209A, §§ 3 and 3B. Initially, a temporary order may be issued, ex parte, if the plaintiff demonstrates abuse. Abuse is defined as "the occurrence of one or more of the following acts between family or household members: (a) attempting to cause or causing physical harm; (b) placing another in fear of imminent serious physical harm; [or] (c) causing another to engage involuntarily in sexual relations by force, threat or duress." G. L. c. 209A, § 1. When courts are closed, emergency relief is available to any person who "demonstrates a substantial likelihood of immediate danger of abuse." G. L. c. 209A, § 5. Whenever a court issues a temporary order, the defendant has a right to be heard no later than ten business days after such order. This hearing constitutes a civil, jury-waived trial. At the temporary hearing and at any subsequent trial or hearing, the Supreme Judicial Court has observed that "the rules of evidence need not be followed, provided that there is fairness in what evidence is admitted

and relied on." Frizado v. Frizado, 420 Mass. at 597–598. For additional information, see Guidelines for Judicial Practice, Abuse Prevention Proceedings, at http://perma.cc/LN2Q-8672.

Evidentiary Principles Applicable in G. L. c. 209A Proceedings. In determining whether and how to apply the law of evidence, the Supreme Judicial Court in Frizado v. Frizado, 420 Mass. 592 (1995), offered the following guidelines.

> "[First, t]he burden is on the complainant to establish facts justifying the issuance and continuance of an abuse prevention order. The court must on request grant a defendant an opportunity to be heard on the question of continuing the temporary order and of granting other relief. That opportunity, however, places no burden on a defendant to testify or to present evidence. The defendant need only appear at the hearing." (Quotation omitted.)

Frizado v. Frizado, 420 Mass. at 596, quoting G. L. c. 209A, § 4.

Second, the plaintiff's burden of proof is preponderance of the evidence. Frizado v. Frizado, 420 Mass. at 597.

Third, an adverse inference can be drawn by the court from the defendant's failure to testify in a G. L. c. 209A proceeding. The fact that the defendant may refuse to testify on the ground of self-incrimination does not bar the taking of an adverse inference. However, the adverse inference alone is not sufficient to justify the issuance of an abuse prevention order. Frizado v. Frizado, 420 Mass. at 596. See also Smith v. Joyce, 421 Mass. 520, 523 n.1 (1995) (a judge may not issue a restraining order "simply because it seems to be a good idea or because it will not cause the defendant any real inconvenience"). The plaintiff is still permitted to call the defendant as a witness even though the defendant is able to assert the privilege against self-incrimination. S.T. v. E.M., 80 Mass. App. Ct. 423, 429 (2011).

Fourth, "[b]ecause a G. L. c. 209A proceeding is a civil, and not a criminal, proceeding, the constitutional right to confront witnesses and to cross-examine them set forth in art. 12 of the Declaration of Rights has no application." Frizado v. Frizado, 420 Mass. at 596 n.3.

Fifth, "[t]he right of the defendant to be heard includes his right to testify and to present evidence." Frizado v. Frizado, 420 Mass. at 597. It is not sufficient to hear from the defendant's attorney and to deny the defendant the opportunity to present evidence. C.O. v. M.M., 442 Mass. 648, 657 (2004). The plaintiff has a corresponding right to present evidence prior to the judge vacating any part of an abuse prevention order. Singh v. Capuano, 468 Mass. 328, 331 (2014); S.T. v. E.M., 80 Mass. App. Ct. at 429–430.

Sixth, with respect to cross-examination, "[t]he judge's discretion in restricting cross-examination may not be unlimited in particular situations." Frizado v. Frizado, 420 Mass. at 598 n.5. The Supreme Judicial Court cautioned against "the use of cross examination for harassment or discovery purposes. However, each side must be given a meaningful opportunity to challenge the other's evidence." Id. See C.O. v. M.M., 442 Mass. at 656–658 (defendant's due process rights were violated when the court refused to permit him to cross-examine witnesses or to present evidence).

Termination of an Order. A defendant who seeks to terminate a permanent G. L. c. 209A order must prove by clear and convincing evidence that there has been a significant change in circumstances such that the protected party no longer has a reasonable fear of imminent serious physical harm from the defendant, and that continuation of the order would therefore not be equitable. The mere passage of time, during which the defendant has complied with the order, is not alone sufficient to justify termination. MacDonald v. Caruso, 467 Mass. 382, 388–389 (2014).

Harassment Prevention Proceedings (G. L. c. 258E). There are many parallels between proceedings brought under G. L. c. 209A and those brought under G. L. c. 258E. See F.A.P. v. J.E.S., 87 Mass. App. Ct. 595, 602 (2015). The considerations set forth above regarding the conduct of a G. L. c. 209A proceeding also apply to proceedings conducted pursuant to G. L. c. 258E. See O'Brien v. Borowski, 461 Mass. 415 (2012).

In order to obtain a harassment prevention order pursuant to G. L. c. 258E, a plaintiff must demonstrate that the act or acts of the defendant fit within the statutory definition of harassment set forth in G. L. c. 258E, § 1. Harassment is defined in various ways under the statute. Harassment is first defined as "3 or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property and that does in fact cause fear, intimidation, abuse or damage to property." G. L. c. 258E, § 1. Additionally, "an act that . . . by force, threat or duress causes another to involuntarily engage in sexual relations" constitutes harassment under the statute. Id. Finally, harassment includes a violation of the stalking statute, the criminal harassment statute, or any of the ten sex-crime statutes listed in G. L. c. 258E, § 1. Id. See A.S.R. v. A.K.A., 92 Mass. App. Ct. 270, 274–275 (2017) (discussing various definitions of harassment under G. L. c. 258E); F.A.P. v. J.E.S., 87 Mass. App. Ct. at 598–599 (same).

An adverse inference may be drawn against a defendant, including a juvenile, who fails to testify at a 258E hearing. See A.P. v. M.T., 92 Mass. App. Ct. 156, 166 (2017).

Section 1107. Inadequate Police Investigation Evidence

(a) Admissibility. Evidence that certain tests were not conducted, that certain police procedures were not followed, or that certain information known to the police about another suspect was not investigated, in circumstances in which it was reasonable to expect that the police should have conducted such tests, followed such procedures, or investigated such information, is admissible.

(b) Jury Instruction. If evidence under Subsection (a) is admitted, it is within the judge's discretion whether to give a specific instruction to the jury. In the absence of an instruction, counsel may argue the issue, provided the argument is based on the evidence in the record and any permissible inferences taken from that evidence.

NOTE

Subsection (a). This subsection is derived from Commonwealth v. Bowden, 379 Mass. 472, 486 (1980), and cases cited. See Commonwealth v. Silva-Santiago, 453 Mass. 782, 801 (2009) ("[T]he inference that may be drawn from an inadequate police investigation is that the evidence at trial may be inadequate or unreliable because the police failed to conduct the scientific tests or to pursue leads that a reasonable police investigation would have conducted or investigated, and these tests or investigation reasonably may have led to significant evidence of the defendant's guilt or innocence."); Commonwealth v. Phinney, 446 Mass. 155, 165 (2006) ("Defendants have the right to base their defense on the failure of police adequately to investigate a murder in order to raise the issue of reasonable doubt as to the defendant's guilt . . . ."). Compare Commonwealth v. Mattei, 455 Mass. 840, 857–860 (2010) (In a prosecution for attempted rape in which the defendant, a convict on work release, sought to demonstrate misidentification based on an inadequate police investigation because the police did not investigate three other Housing Authority employees who were on duty at the time who had criminal histories, it was error to refuse to permit the defense to question the police about their knowledge of the criminal histories of these employees.) with Commonwealth v. Alcantara, 471 Mass. 550, 561–563 (2015) (judge did not abuse her discretion in excluding proposed Bowden evidence as not probative of police thoroughness and likely to confuse jury).

The Bowden defense "is a two-edged sword for the defendant, because it opens the door for the Commonwealth to offer evidence explaining why the police did not follow the line of investigation suggested by the defense" (citations omitted). Commonwealth v. Silva-Santiago, 453 Mass. at 803 n.25. "[T]he more wide-ranging the defendant's attack on the police investigation, the broader the Commonwealth's response may be." Commonwealth v. Avila, 454 Mass. 744, 754–755 (2009) ("Here, the Bowden claim was an expansive one, calling into question police competence and judgment about both the leads that were not pursued and those that were. In response, the Commonwealth was entitled to elicit testimony about why the

investigators chose the particular investigative path they did . . . ."). See Commonwealth v. Wiggins, 477 Mass. 732, 743–744 (2017) (testimony that evidence collected during defendants' booking was removed from police custody by someone who was not a member of law enforcement properly admitted where defendants "attempted to raise a Bowden defense" and challenged the competence of investigators at trial).

Under a Bowden defense, information regarding a third-party culprit whose existence was known to the police but whose potential involvement was never investigated may be admissible to prove that the police knew of the possible suspect and failed to take reasonable steps to investigate the suspect. This information is not hearsay because it is not offered to show the truth of the matter asserted, but simply to show that the information was provided to the police. Therefore, it need not meet the standard set to admit hearsay evidence regarding a third-party culprit, including the substantial connecting links. See Commonwealth v. Reynolds, 429 Mass. 388, 391–392 (1999) (police detective could testify to what confidential informants had told him about suspect's motive and opportunity to kill the victim, despite the confidential informants' potential lack of firsthand knowledge). There is a lessened risk of prejudice to the Commonwealth from the admission of evidence of a Bowden defense because the police are able to explain what they did to determine that the suspect was not guilty of the crime. See Id. at 391 n.1. In contrast to the third-party culprit defense, where evidence may be admitted regardless of whether the police knew of the suspect, third-party culprit information is admissible under a Bowden defense only if the police had learned of it during the investigation and failed to reasonably act on the information. Commonwealth v. Silva-Santiago, 453 Mass. at 802–803. The judge would first need to conduct a voir dire hearing to determine whether the third-party culprit information had been furnished to the police, and whether the probative weight of the Bowden evidence exceeded the risk of unfair prejudice to the Commonwealth from diverting the jury's attention to collateral matters. Id. at 803.

Cross-Reference: Section 1105, Third-Party Culprit Evidence.

Subsection (b). This subsection is derived from Commonwealth v. Bowden, 379 Mass. 472, 486 (1980). The admission of Bowden evidence does not require the trial judge to give a special instruction to the jury. Instead, the judge is simply required not to take the issue of the adequacy of the police investigation away from the jury. See Commonwealth v. Williams, 439 Mass. 678, 687 (2003). 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 (1990).

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 (1988) (while police have no constitutional duty to perform any particular test, defense may argue to 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 (1987); 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 (1985).

Section 1108. Access to Third-Party Records Prior to Trial in Criminal Cases (Lampron-Dwyer Protocol)

(a) Filing and Service of the Motion.

(1) Whenever in a criminal case a party seeks to summons books, papers, documents, or other objects (records) from any nonparty individual or entity prior to trial, the party shall file a motion pursuant to Mass. R. Crim. P. 17(a)(2), stating the name and address of the custodian of the records (record holder) and the name, if any, of the person who is the subject of the

records (third-party subject), for example, a complainant, and describing, as precisely as possible, the records sought. The motion shall be accompanied by an affidavit as required by Mass. R. Crim. P. 13(a)(2) and Commonwealth v. Lampron, 441 Mass. 265 (2004) (Lampron).

(2) The moving party shall serve the motion and affidavit on all parties.

(3) The Commonwealth shall forward copies of the motion and affidavit to the record holder and (where applicable) to the third-party subject, and notify them of the date and place of the hearing on the motion. The Commonwealth shall also inform the record holder and third-party subject that (i) the Lampron hearing shall proceed even if either of them is absent; (ii) the hearing shall be the third-party subject's only opportunity to address the court; (iii) any statutory privilege applicable to the records sought shall remain in effect unless and until the third-party subject affirmatively waives any such privilege, and that failure to attend the hearing shall not constitute a waiver of any such privilege; and (iv) if the third-party subject is the victim in the case, he or she has the opportunity to confer with the prosecutor prior to the hearing.

(b) The Lampron Hearing and Findings.

(1) A party moving to summons documents pursuant to Mass. R. Crim. P. 17(a)(2) prior to trial must establish good cause by showing (i) that the documents are evidentiary and relevant; (ii) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (iii) that the party cannot properly prepare for trial without such production and inspection in advance of trial, and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (iv) that the application is made in good faith and is not intended as a general fishing expedition.

(2) At the Lampron hearing, the judge shall hear from all parties, the record holder, and the third-party subject, if present. The record holder and third-party subject shall be heard on whether the records sought are relevant or statutorily privileged.

(3) Following the Lampron hearing, and in the absence of having reviewed the records, the judge shall make oral or written findings with respect to the records sought from each record holder indicating (i) that the party seeking the records has or has not satisfied the requirements of Mass. R. Crim. P. 17(a)(2), and (ii) that the records sought are or are not presumptively privileged. A judge's determination that any records sought are presumptively privileged shall not be appealable as an interlocutory matter and shall carry no weight in any subsequent challenge that a record is in fact not privileged.

(c) Summons and Notice to Record Holder.

(1) If all Mass. R. Crim. P. 17(a)(2) requirements have been met and there has been a finding that the records sought are not presumptively privileged or the third-party subject has waived all applicable statutory privileges, the judge shall order a summons to issue directing the record holder to produce all responsive records to the applicable clerk of the court on the return date stated in the summons. The clerk shall maintain the records in a location separate from the court file, and the records shall be made available for inspection by counsel, as pro-

vided in Subsection (d)(1) below. The records shall not be made available for public inspection unless and until any record is filed in connection with a proceeding in the case or introduced in evidence at the trial.

(2) Where a judge has determined that some or all of the requested records are presumptively privileged, the summons shall so inform the record holder and shall order the record holder to produce such records to the clerk of the court in a sealed envelope or box marked "PRIVILEGED," with the name of the record holder, the case name and docket number, and the return date specified on the summons. The clerk shall maintain the records in a location separate from the court file, clearly designated "presumptively privileged records," and the records shall not be available for inspection except by counsel as provided in Subsection (d)(2). The records shall not be made available for public inspection unless and until any record is introduced in evidence at trial.

(d) Inspection of Records.

(1) Nonpresumptively Privileged Records. The clerk of court shall permit counsel who obtained the summons to inspect and copy all records that are not presumptively privileged. When the defendant is the moving party, the Commonwealth's ability to inspect or copy the records is within a judge's discretion.

(2) Presumptively Privileged Records.

(A) The clerk of court shall permit only defense counsel who obtained the summons to inspect the records, and only on counsel's signing and filing a protective order in a form approved by the court. The protective order shall provide that any violation of its terms and conditions shall be reported to the Board of Bar Overseers by anyone aware of such violation.

(B) [The Supreme Judicial Court has not reached the issue of whether the procedures governing defense counsel's review of presumptively privileged records also apply to the Commonwealth.]

(e) Challenge to Privilege Designation.

(1) If, on inspection of the records, defense counsel believes that any record or portion thereof is in fact not privileged, then in lieu of or in addition to a motion to disclose or introduce at trial (see Subsections (f) and (g) below), counsel may file a motion to release specified records or portions thereof from the terms of the protective order.

(2) Defense counsel shall provide notice of the motion to all parties. Prior to the hearing, counsel for the Commonwealth shall be permitted to review such records in order to respond to the motion, subject to signing and filing a protective order as provided in Subsection (d)(2) above.

(3) If a judge determines that any record or portion thereof is not privileged, the record shall be released from the terms of the protective order and may be inspected and copied as provided in Subsection (d)(1) above.

(f) Disclosure of Presumptively Privileged Records.

(1) If defense counsel who obtained the summons believes that the copying or disclosure of some or all of any presumptively privileged record to other persons (for example, the defendant, an investigator, an expert) is necessary to prepare the case for trial, counsel shall file a motion to modify the protective order to permit copying or disclosure of particular records to specifically named individuals. The motion shall be accompanied by an affidavit explaining with specificity the reason why copying or disclosure is necessary; the motion and the affidavit shall not disclose the content of any presumptively privileged record. Counsel shall provide notice of the motion to all parties.

(2) Following a hearing, and in camera inspection of the records by the judge where necessary, a judge may allow the motion only on making oral or written findings that the copying or disclosure is necessary for the defendant to prepare adequately for trial. The judge shall consider alternatives to full disclosure, including agreed to stipulations or disclosure of redacted portions of the records. Before disclosure is made to any person specifically authorized by the judge, that person shall sign a copy of the court order authorizing disclosure. This court order shall clearly state that a violation of its terms shall be punishable as criminal contempt.

(3) All copies of any documents covered by a protective order shall be returned to the court on resolution of the case, i.e., on a change of plea or at the conclusion of any direct appeal following a trial or dismissal of the case.

(g) Use of Presumptively Privileged Records at Trial.

(1) A defendant seeking to introduce at trial some or all of any presumptively privileged record shall file a motion in limine at or before any final pretrial conference.

(2) Counsel for the Commonwealth shall be permitted to review enough of the presumptively privileged records to be able to respond adequately to the motion in limine, subject to signing and filing a protective order as provided in Subsection (d)(2) above.

(3) The judge may allow the motion only on making oral or written findings that introduction at trial of a presumptively privileged record is necessary for the moving defendant to obtain a fair trial. Before permitting the introduction in evidence of such records, the judge shall consider alternatives to introduction, including an agreed to stipulation or introduction of redacted portions of the records.

(h) Preservation of Records for Appeal. Records produced in response to a Mass. R. Crim. P. 17(a)(2) summons shall be retained by the clerk of court until the conclusion of any direct appeal following a trial or dismissal of a case.

NOTE

Introduction. In criminal cases, pretrial discovery is limited to information and objects in the possession or control of the parties and is governed principally by Mass. R. Crim. P. 14. When a party seeks access in advance of trial to books, papers, documents, or objects (records, privileged or nonprivileged) that are in the hands of a third party, such requests are governed by Mass. R. Crim. P. 17(a)(2). Commonwealth v.

Odgren, 455 Mass. 171, 186–187 (2009) (both prosecutor and defense counsel must follow the procedures contained in Mass. R. Crim. P. 17 and obtain prior judicial approval to obtain access before trial to any records in the hands of a third party, whether privileged or not). See Commonwealth v. Lampron, 441 Mass. 265, 268 (2004). See also Commonwealth v. Hart, 455 Mass. 230, 243 (2009) (Mass. R. Crim. P. 17[a][2] is the exclusive method to obtain records from a third party prior to trial); Commonwealth v. Hunt, 86 Mass. App. Ct. 494, 495 (2014) (affidavit accompanying motion for records must meet the specificity requirements of Mass. R. Crim. P. 17[a][2]). When Mass. R. Crim. P. 17(a)(2) has been satisfied and a nonparty has produced records to the court, the protocol set forth in Commonwealth v. Dwyer, 448 Mass. 122, 139–147 (2006), governs review or disclosure of presumptively privileged records by defense counsel. To reference the forms promulgated by the Supreme Judicial Court, see http://perma.cc/45WM-J4NE.

At trial, a defendant seeking records must proceed under Mass. R. Crim. P. 17(a)(2). The Commonwealth may proceed under either Mass. R. Crim. P. 17(a)(2) or G. L. c. 277, § 68. See Commonwealth v. Hart, 455 Mass. at 243 (a subpoena issued under G. L. c. 277, § 68, may only request a third party to produce records to a court on the day of the trial).

Subsection (a). This subsection is derived from Commonwealth v. Lampron, 441 Mass. 265, 268 (2004). See also Commonwealth v. Odgren, 455 Mass. 171, 187 (2009) (Lampron procedures apply to both prosecution and defense).

Subsection (b). This subsection is derived generally from Commonwealth v. Lampron, 441 Mass. 265, 268 (2004), and Commonwealth v. Dwyer, 448 Mass. 122, 148 (2006). "The Commonwealth's inability to locate either the record holder or the third-party subject shall not delay the Lampron hearing." Id. at 148 n.2.

In Commonwealth v. Lampron, 441 Mass. 265 (2004), the Supreme Judicial Court followed Federal law as enunciated in United States v. Nixon, 418 U.S. 683, 699–700 (1974), and held that a party moving to summons documents pursuant to Mass. R. Crim. P. 17(a)(2) prior to trial must establish good cause by showing the following:

> "(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general 'fishing expedition.'"

Commonwealth v. Lampron, 441 Mass. at 269. Accord Commonwealth v. Mitchell, 444 Mass. 786, 792 (2005) (summarizing these requirements as "relevance, admissibility, necessity, and specificity"). See Commonwealth v. Jones, 478 Mass. 65, 68–72 (2017) (in sexual abuse prosecution, trial judge did not abuse discretion in refusing to issue summonses for privileged records where defendant's showing of relevance was "too speculative"); Commonwealth v. Olivier, 89 Mass. App. Ct. 836, 844–846 (2016) (trial judge correctly denied motion for release of privileged records where defendant failed to present evidence of connection between diagnosis in records and victim's actions); Commonwealth v. Rivera, 83 Mass. App. Ct. 581, 588–589 (2013) (judge properly denied defendant's pretrial motion seeking access to complainant's preabuse mental health records based only on belief that they might yield evidence concerning her credibility).

> "Presumptively privileged records are those prepared in circumstances suggesting that some or all of the records sought are likely protected by a statutory privilege, for example, a record prepared by one who holds himself or herself out as a psychotherapist, see G. L. c. 233, § 20B; a social worker, see G. L. c. 112, § 135B; a sexual assault counsellor, see G. L. c. 233, § 20J; or a domestic violence victims' counsellor, see G. L. c. 233, § 20K."

Commonwealth v. Dwyer, 448 Mass. at 148. Because the judge will not have viewed any of the records sought by the defendant, "the judge shall make such determination based on the identity of the record holder

or record preparer (if known) and any additional information adduced at the Lampron hearing. The defendant shall have the burden of showing that records are not presumptively privileged." Id. at 148 n.3.

Subsection (c). This subsection is derived generally from Commonwealth v. Lampron, 441 Mass. 265 (2004), and Commonwealth v. Dwyer, 448 Mass. 122 (2006).

"Some records, although not presumptively privileged, may contain information of a personal or confidential nature, such as medical or school records. See, e.g., G. L. c. 71B, § 3 (special education records); G. L. c. 111, §§ 70, 70E (hospital records). The judge may, in his or her discretion, order such records produced subject to an appropriate protective order." Commonwealth v. Dwyer, 448 Mass. at 149 n.5.

Subsection (d). This subsection is derived generally from Commonwealth v. Dwyer, 448 Mass. 122, 149 (2006). A judge may order that even nonpresumptively privileged records be subject to an appropriate protective order. Id. at 149 n.5 (Appendix).

"The Commonwealth may inspect or copy any records if prior consent is given by the record holder and third-party subject (where applicable)." Id. at 149 n.7. With respect to nonpresumptively privileged records, Subsection (d)(1), a party may have production obligations pursuant to Mass. R. Crim. P. 14 or other pretrial agreements. See Commonwealth v. Mitchell, 444 Mass. 786, 800 (2005).

Subsection (e). This subsection is taken nearly verbatim from Commonwealth v. Dwyer, 448 Mass. 122, 149–150 (2006).

Subsection (f). This subsection is taken nearly verbatim from Commonwealth v. Dwyer, 448 Mass. 122, 150 (2006).

Subsection (g). This subsection is taken nearly verbatim from Commonwealth v. Dwyer, 448 Mass. 122, 150 (2006).

Subsection (h). This subsection is taken nearly verbatim from Commonwealth v. Dwyer, 448 Mass. 122, 150 (2006).

Section 1109. View

(a) Availability.

(1) Upon motion in civil and criminal cases, the court has discretion to allow the jury, accompanied by the judge, or, in a matter tried without a jury, the judge to take a view of the premises or place in question or any property matter or thing relative to the case.

(2) In a limited class of civil cases, a party has the right, upon request, to a view.

(b) Conduct. Counsel may point out the essential features of the place or thing that is the subject of the view, but no comment or discussion is permitted. No witnesses are heard. Jurors are not permitted to ask questions. The presence of the defendant in a criminal case is left to the judge's discretion.

(c) Status. Observations made by the jury or by the judge on a view may be used by the finder of fact in making a decision.

(d) Costs. In a civil case, the expenses of taking a view shall be paid by the party who makes the motion or in accordance with an agreement between or among some or all of the parties, and may

be taxed as costs if the party or parties who advanced them prevails. In a criminal case, the expenses of taking a view shall be paid by the Commonwealth.

NOTE

Subsection (a)(1). This subsection is derived from Commonwealth v. Gedzium, 259 Mass. 453, 462 (1927); Madden v. Boston Elevated Ry. Co., 284 Mass. 490, 493–494 (1933); Commonwealth v. Gomes, 459 Mass. 194, 201–202 (2011); and G. L. c. 234, § 35. In the administrative context, the judge or fact finder also may have the right to conduct a view. See, e.g., G. L. c. 152, § 2 (Authority of the Division of Industrial Accidents to "make all necessary inspections and investigations relating to causes of injuries for which compensation may be claimed . . . .").

The court has the discretion to take a view any time after the jury is sworn. See Yore v. City of Newton, 194 Mass. 250, 253 (1907) (court permitted jury to take a view after deliberations had begun).

The court may exercise its discretion to deny a motion for a view when visiting a particular location would not fairly represent the way it appeared or the conditions that existed at the time of the events that are the subject of the trial. See Commonwealth v. Cataldo, 423 Mass. 318, 327 n.8 (1996). However, even though the appearance of premises or a thing has changed, if the premises or thing in its altered condition would be helpful to the jury in understanding the evidence the court has discretion to permit a view. See Commonwealth v. Welansky, 316 Mass. 383, 401–402 (1944) (there was no error in permitting the jury to take a view of a nightclub after a fire had severely damaged it and caused the death of numerous persons who were trapped inside). The court may deny a motion for a view because it will not contribute to the jury's understanding of the evidence at trial. See Commonwealth v. Cambell, 378 Mass. 680, 704–705, cert. denied, 488 U.S. 847 (1979).

Subsection (a)(2). This subsection is derived from G. L. c. 80, § 9 (betterment assessments); G. L. c. 79, § 22 (eminent domain); and G. L. c. 253, § 7 (mill flowage).

Subsection (b). This subsection is derived from Commonwealth v. Dascalakis, 246 Mass. 12, 29–30 (1923). "Generally, an impropriety occurring on a view may be cured by cautionary instructions." Commonwealth v. Cresta, 3 Mass. App. Ct. 560, 562 (1975), citing Commonwealth v. Madeiros, 255 Mass. 304, 313 (1926).

The defendant has no right to be present at a view; the judge has discretion to impose reasonable restrictions on the defendant's presence and conduct. Commonwealth v. Corliss, 470 Mass. 443, 448 (2015). "A defendant is not entitled of right to confer with his counsel during a view." Commonwealth v. Gagliardi, 29 Mass. App. Ct. 225, 237 (1990).

Subsection (c). This subsection is derived from Commonwealth v. Curry, 368 Mass. 195 (1975), where the Supreme Judicial Court stated that

> "[t]he chief purpose (of a view) is to enable the jury to understand better the testimony which has or may be introduced. The function of the jury . . . is simply to observe. Although what is seen on the view may be used by the jury in reaching their verdict, in a strict and narrow sense a view may be thought not to be evidence." (Citations omitted.)

Id. at 197–198. See also Berlandi v. Commonwealth, 314 Mass. 424, 451 (1943) ("A view is not technically evidence and subject to all the principles applicable to evidence . . . [but] it inevitably has the effect of evidence" [citations and quotation omitted].); Commonwealth v. Perryman, 55 Mass. App. Ct. 187, 193–194 n.1 (2002) (a view is analogous to a courtroom demonstration or the use of a chalk; observations made on a view can be used "to illustrate testimony and assist the jury in weighing the evidence they hear" so long as the conditions are similar to the circumstances of the matter to be proved).

Subsection (d). This subsection is derived from G. L. c. 234, § 35.

Section 1110. Consciousness of Guilt or Liability

(a) Criminal Cases. In a criminal case, the Commonwealth may offer evidence of a defendant's conduct that occurred subsequent to the commission of the crime if

(1) the evidence reflects a state of consciousness of guilt;

(2) the evidence supports the inference that the defendant committed the act charged;

(3) the evidence is, with other evidence, together with reasonable inferences, sufficient to prove guilt; and

(4) the inflammatory nature of the conduct does not substantially outweigh its probative value.

Evidence of consciousness of guilt alone is not sufficient to support a verdict or finding of guilt. The judge should instruct the jury accordingly.

(b) Civil Cases. Subject to Sections 407–411, in a civil case, a party may offer evidence of another party's conduct that occurred subsequent to the commission of the alleged act or acts that give rise to the cause of action if the evidence

(1) reflects a state of consciousness of liability of that party;

(2) supports the inference that the party against whom the evidence is offered is liable; and

(3) is, with other evidence, together with reasonable inferences, sufficient to prove liability.

Evidence of consciousness of liability alone cannot sustain the burden to establish liability. The judge should instruct the jury accordingly.

(c) Rebuttal. The party against whom the evidence is offered has the right to offer evidence explaining the reason or reasons for the conduct to negate any adverse inference.

NOTE

Subsection (a). This subsection is derived from Commonwealth v. Vick, 454 Mass. 418, 423 (2009), and Commonwealth v. Toney, 385 Mass. 575, 584–585 & n.4 (1982). Where self-defense is an issue and the defendant objects to an instruction on consciousness of guilt, the trial judge should first consider whether to instruct on flight as evidence of consciousness of guilt. If the instruction is given, the judge should focus first on possible innocent reasons for flight, and that the conduct does not necessarily reflect feelings of guilt, but may be consistent with self-defense. Commonwealth v. Morris, 465 Mass. 733, 738–739 (2013). The Commonwealth may properly argue consciousness of guilt even if a jury instruction is not requested or not given. Commonwealth v. Franklin, 465 Mass. 895, 915 (2013). Compare Section 1111, Missing Witness.

***Illustrations*.** The following conduct may be offered as evidence of consciousness of guilt:

- flight itself, regardless of whether the police were actively searching for the defendant, Commonwealth v. Figueroa, 451 Mass. 566, 579 (2008);
- flight after discovery by the party that he or she was about to be arrested or charged with an offense, Commonwealth v. Jackson, 391 Mass. 749, 758 (1984);

- attempted escape while awaiting trial, Commonwealth v. Fritz, 472 Mass. 341, 350 (2015);
- flight from a defendant's "usual environs," Commonwealth v. Siny Van Tran, 460 Mass. 535, 553 (2011);
- an intentionally false statement made to police or another person before or after arrest, Commonwealth v. Martinez, 476 Mass. 186, 197 (2017);
- use of a false name to conceal his or her identity, Commonwealth v. Vick, 454 Mass. 418, 424 (2009); Commonwealth v. Carrion, 407 Mass. 263, 276 (1990);
- intentional attempts to intimidate, coerce, threaten, or bribe a witness, Commonwealth v. Vick, 454 Mass. at 423; Commonwealth v. Toney, 385 Mass. 575, 584 n.4 (1982);
- alteration of a defendant's appearance after a crime to conceal physical characteristics, Commonwealth v. Carrion, 407 Mass. at 277; or
- an intentional attempt to conceal, destroy, or falsify evidence, Commonwealth v. Stuckich, 450 Mass. 449, 453 (2008).

The following conduct should not be admitted as evidence of consciousness of guilt:

- flight, where the issue is misidentification and there is no dispute that the person who fled the scene committed the offense, Commonwealth v. Bastaldo, 472 Mass. 16, 33–36 (2015); cf. Commonwealth v. Lopez, 87 Mass. App. Ct. 642, 647 (2015) (flight may be admitted as evidence of consciousness of guilt even when identification is an issue so long as it is not certain person fleeing committed the crime);
- evidence that the defendant lied during trial testimony, Commonwealth v. Edgerly, 390 Mass. 103, 110 (1983) (disfavoring such evidence; "[c]omment to a jury on the consequences of a criminal defendant's lying in the course of his testimony must be made with care, and customarily should be avoided because it places undue emphasis on only one aspect of the evidence");
- a defendant's failure to appear at trial, except where the Commonwealth can show the defendant had knowledge of the scheduled date, Commonwealth v. Hightower, 400 Mass. 267, 269 (1987); Commonwealth v. Addy, 79 Mass. App. Ct. 835, 841 (2011); see also Commonwealth v. Zammuto, 89 Mass. App. Ct. 80, 82–83 (2016); cf. Commonwealth v. Muckle, 59 Mass. App. Ct. 631, 639–640 (2003) (where defendant is defaulted midtrial, judge should conduct voir dire to determine if Commonwealth can show requisite foundation); or
- the denial or failure to deny guilt during a police interrogation, Commonwealth v. Diaz, 453 Mass. 266, 273–274 (2009); Commonwealth v. Haas, 373 Mass. 545, 558–562 (1977).

In a charge of murder, consciousness of guilt "is rarely relevant to the issue of premeditation," Commonwealth v. Dagenais, 437 Mass. 832, 843–844 (2002), and it should not be used as proof that a homicide was murder rather than manslaughter. See Commonwealth v. Clemente, 452 Mass. 295, 334 (2008); Commonwealth v. Lowe, 391 Mass. 97, 108 n.6 (1984); Commonwealth v. Niland, 45 Mass. App. Ct. 526, 529 (1998). However, in a homicide case, consciousness-of-guilt evidence may be "relevant to an assessment of the defendant's mental state and whether he was criminally responsible." Commonwealth v. Chappell, 473 Mass. 191, 207 (2015).

***Jury Instruction on Evidence of Consciousness of Guilt*.** If evidence of consciousness of guilt is admitted, the court should instruct the jury (1) that they are not to convict the defendant on the basis of the offered evidence alone, and (2) that they may, but need not, consider such evidence as one of the factors tending to prove the guilt of the defendant. Upon request, the jury must be further instructed (1) that the conduct does not necessarily reflect feelings of guilt, since there are numerous reasons why an innocent person might engage in the conduct alleged, and (2) that even if the conduct demonstrates feelings of guilt, it does not necessarily mean that the defendant is guilty in fact, because guilty feelings are sometimes present in innocent people. See Commonwealth v. Toney, 385 Mass. 575, 584–585 (1982); Commonwealth v. Estrada, 25 Mass. App. Ct. 907, 908 (1987). See also Commonwealth v. Vick, 454 Mass. 418, 424 (2009).

Evidence of Consciousness of Innocence. "Consciousness of innocence is a subject properly left to the give and take of argument, without jury instructions." Commonwealth v. Lam, 420 Mass. 615, 619–620 (1995). In some instances, however, such evidence is not admissible. See Commonwealth v. Cassidy, 470 Mass. 201, 218–219 (2014) (judge properly excluded evidence of a telephone call and note to explain reason for fleeing); Commonwealth v. Martinez, 437 Mass. 84, 88 (2002) (offer to submit to polygraph inadmissible).

Cross-Reference: Section 410, Pleas, Offers of Pleas, and Related Statements; Section 1102, Spoliation or Destruction of Evidence.

Subsection (b). This subsection is derived from Sheehan v. Goriansky, 317 Mass. 10, 16–17 (1944), and City of Boston v. Santosuosso, 307 Mass. 302, 349 (1940). Evidence of consciousness of liability alone cannot sustain the burden to establish liability. Olofson v. Kilgallon, 362 Mass. 803, 806 (1973); Miles v. Caples, 362 Mass. 107, 114 (1972).

Illustrations. The following conduct may be offered as evidence of consciousness of liability:

- providing false or inconsistent statements, McNamara v. Honeyman, 406 Mass. 43, 54 n.10 (1989);
- leaving the scene of an accident without identifying himself or herself, Olofson v. Kilgallon, 362 Mass. 803, 806 (1973);
- providing a false name or statement to police, Parsons v. Ryan, 340 Mass. 245, 248 (1960);
- providing intentionally false testimony, Sheehan v. Goriansky, 317 Mass. 10, 16–17 (1944);
- transferring property immediately prior to the beginning of litigation, Credit Serv. Corp. v. Barker, 308 Mass. 476, 481 (1941);
- suborning a witness to provide false testimony, bribing a juror, or suppressing evidence, Bennett v. Susser, 191 Mass. 329, 331 (1906); or
- destroying potential evidence, Gath v. M/A-Com, Inc., 440 Mass. 482, 489–491 (2003).

Cross-Reference: Section 407, Subsequent Remedial Measures; Section 408, Compromise Offers and Negotiations in Civil Case; Section 409, Expressions of Sympathy in Civil Cases; Offers to Pay Medical and Similar Expenses; Section 410, Pleas, Offers of Pleas, and Related Statements; Section 411, Insurance; Section 1102, Spoliation or Destruction of Evidence.

Jury Instruction on Evidence of Consciousness of Liability. Upon request, the judge should instruct the jury that they may, but are not required to, draw an inference; that any such inference must be reasonable in light of all the circumstances; that the weight of the evidence is for the jury to decide; that there may be innocent explanations for the conduct; and that the conduct does not necessarily reflect feelings of liability or responsibility. See Commonwealth v. Toney, 385 Mass. 575, 584–585 (1982) (it was for jury to decide which explanation for defendant's departure from scene was most credible). See also Sheehan v. Goriansky, 317 Mass. 10, 16–17 (1944) (whether evidence of defendant's conduct indicated consciousness of liability was for jury to decide); Hall v. Shain, 291 Mass. 506, 512 (1935) (jury to decide whether driver's failure to contact police after accident was because of consciousness of liability).

Subsection (c). This subsection is derived from Commonwealth v. Chase, 26 Mass. App. Ct. 578, 580–581 (1988), and Commonwealth v. Kerrigan, 345 Mass. 508, 513 (1963).

Section 1111. Missing Witness

(a) Argument by Counsel. Counsel is not permitted to make a missing-witness argument without first obtaining judicial approval; if approval is granted, the court must give a missing witness instruction.

(b) Jury Instruction. The court may instruct the jury that an adverse inference may be drawn from a party's failure to call a witness when

(1) the witness is shown to be available;

(2) the witness is friendly, or at least not hostile, to the party;

(3) the witness is expected to give noncumulative testimony of distinct importance to the case; and

(4) there is no logical or tactical explanation for the failure to call the witness.

NOTE

Subsection (a). This subsection is derived from Commonwealth v. Pena, 455 Mass. 1, 16–17 (2009); Commonwealth v. Saletino, 449 Mass. 657, 670 (2007); and Commonwealth v. Ortiz, 61 Mass. App. Ct. 468, 471 (2004). See Hoffman v. Houghton Chem. Corp., 434 Mass. 624, 640 (2001) (same principles apply in civil cases). The missing witness argument and the missing witness instruction are interrelated. The preferred practice is for counsel and the court to discuss the matter of a missing witness argument before the closing arguments. See Commonwealth v. Williams, 450 Mass. 894, 907 (2008). If the trial judge decides not to give the instruction, counsel is not permitted to make the argument. Commonwealth v. Saletino, 449 Mass. at 670–672.

In Commonwealth v. Saletino, 449 Mass. 657 (2007), the Supreme Judicial Court explained the critical distinction between argument by counsel that the evidence is insufficient, and the missing witness argument:

> "A defendant has wide latitude in every case to argue that the Commonwealth has failed to present sufficient evidence and, in this sense, that there is an 'absence' of proof or that evidence is 'missing.' That is distinctly different from a missing witness argument, however. In the former, the defendant argues 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 the defendant does not argue or ask the jury to draw any conclusions as to the substance of the evidence that has not been produced. In the latter, the defendant points an accusatory finger at the Commonwealth for not producing the missing witness and urges the jury to conclude affirmatively that the missing evidence would have been unfavorable to the Commonwealth. That is the essence of the adverse inference."

Id. at 672. Accord Commonwealth v. Pena, 455 Mass. at 17; Sullivan v. Connolly, 91 Mass. App. Ct. 56, 57–58 (2017).

Subsection (b). This subsection is derived from Commonwealth v. Saletino, 449 Mass. 657, 668 (2007), and Commonwealth v. Anderson, 411 Mass. 279, 280 n.1 (1991). See also Commonwealth v. Franklin, 366 Mass. 284, 292–295 (1974). The instruction permits the jury, "if they think reasonable in the circumstances, [to] infer that the person, had he been called, would have given testimony unfavorable to the party." Id.

Whether to allow argument and give a missing witness instruction is within the discretion of the trial judge, even when the foundation requirements are met. Commonwealth v. Thomas, 429 Mass. 146, 151 (1999). It is a highly fact-specific decision, and it cannot be insisted on as a matter of right. Id. "Because the inference, when it is made, can have a seriously adverse effect on the noncalling party—suggesting, as it does, that the party has willfully attempted to withhold or conceal significant evidence—it should be invited only in clear cases, and with caution." Commonwealth v. Williams, 450 Mass. 894, 900–901 (2008), quoting Commonwealth v. Schatvet, 23 Mass. App. Ct. 130, 134 (1986). If the instruction is given, the court must

take care not to negate its effect by instructing the jury not to consider anything beyond the evidence actually introduced at trial. See Commonwealth v. Remedor, 52 Mass. App. Ct. 694, 701 (2001).

***Foundation for the Instruction*.** In Commonwealth v. Broomhead, 67 Mass. App. Ct. 547 (2006), the court stated as follows:

> "In order to determine whether there has been a sufficient foundation for a missing witness instruction, we look at (1) whether the case against the defendant is [so strong that,] 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."

Id. at 552, quoting Commonwealth v. Alves, 50 Mass. App. Ct. 796, 802 (2001). Even where the foundational requirements are met, the judge has discretion to decline to give the instruction and refuse to permit the argument if the judge finds that an adverse inference is not warranted. Commonwealth v. Pena, 455 Mass. 1, 17 n.15 (2009).

Is the "Missing Witness" Available? Availability is "the likelihood that the party against whom the inference is to be drawn would be able to procure the missing witness'[s] physical presence in court." Commonwealth v. Happnie, 3 Mass. App. Ct. 193, 197 (1975). Availability does not necessarily require proof of "actual physical whereabouts," but the court will look at whether the party made reasonable efforts to produce the witness under the circumstances. Commonwealth v. Luna, 46 Mass. App. Ct. 90, 95–96 nn.3 & 6 (1998). Compare Commonwealth v. Smith, 49 Mass. App. Ct. 827, 830–831 (2000) (basis to conclude that witnesses lived in area and no showing of impediment to obtaining their testimony), with Commonwealth v. Ortiz, 67 Mass. App. Ct. 349, 350 (2006) (defendant not entitled to missing witness instruction where he failed to show that prosecutor had knowledge of witness's whereabouts).

A missing witness instruction is not warranted where a witness is equally available to both sides. Commonwealth v. Cobb, 397 Mass. 105, 108 (1986). For example, in Commonwealth v. Hoilett, 430 Mass. 369, 376 (1999), the court ruled the instruction was not warranted because both sides had the same contact information for a witness who was not aligned with either side. The instruction may properly be given where the missing witness is more friendly to one side than the other, even if the witness was available to the party requesting the instruction. See Commonwealth v. Thomas, 429 Mass. 146, 151–152 (1999). See also Hoffman v. Houghton Chem. Corp., 434 Mass. 624, 641 (2001) (defendant corporation's vice president not absent where plaintiff could have subpoenaed him to testify).

***Is the "Missing Witness" Friendly, or at Least Not Hostile, to the Party?* "**The jury should ordinarily be instructed not to draw inferences from the neglect of a defendant to call witnesses, unless it appears to be within his power to call others than himself, and unless the evidence against him is so strong that, if innocent, he would be expected to call them." Commonwealth v. Finnerty, 148 Mass. 162, 167 (1889). See Commonwealth v. Rollins, 441 Mass. 114, 118–119 (2004); Commonwealth v. Thomas, 429 Mass. 146, 152 (1999). See also Grady v. Collins Transp. Co., 341 Mass. 502, 509 (1960) ("The plaintiff's testimony was uncorroborated and was opposed by that of three witnesses, which, if accepted, showed his admitted fault to be the cause of the accident. The names of the plaintiff's companions had been given to his counsel. There was very substantial likelihood that, notwithstanding the nine year interval, one or more of them lived in Worcester or near by [sic].").

Would the "Missing Witness" Give Noncumulative Testimony of Importance? A missing witness instruction is warranted where the witness would be expected to give testimony "of distinct importance to the case." Commonwealth v. Schatvet, 23 Mass. App. Ct. 130, 134 (1986). In determining the potential importance of the missing witness's testimony, the court may consider whether the case against the party is so strong that the party would be likely to call the missing witness to rebut it. Commonwealth v. Broomhead, 67 Mass. App. Ct. 547, 552 (2006). See Commonwealth v. Rollins, 441 Mass. at 119 (proper to give missing witness instruction where defendant failed to call "good friend" who was with him at time of his arrest for OUI); Commonwealth v. Caldwell, 36 Mass. App. Ct. 570, 581–582 (1994) (defendant failed to call as alibi

witness a cousin who supposedly let him into apartment at time of charged attack). Compare Commonwealth v. Graves, 35 Mass. App. Ct. 76, 81 (1993) (failure to call alibi witness who was "central" to defense), with Commonwealth v. Thomas, 439 Mass. 362, 370 (2003) (absent witness's testimony would have been "merely corroborative").

Is There an Explanation for Failure to Call a "Missing Witness"? "If the circumstances, considered by ordinary logic and experience, suggest a plausible reason for nonproduction of the witness, the jury should not be advised of the inference." Commonwealth v. Anderson, 411 Mass. 279, 282–283 (1991). Thus, it is not error to refuse the instruction where it appears the witness may have been withheld because of his or her prior criminal record. Commonwealth v. Saletino, 449 Mass. 657, 668–669 (2007). See Commonwealth v. Figueroa, 413 Mass. 193, 197 (1992) (witnesses of limited mental capacity); Commonwealth v. Ortiz, 61 Mass. App. Ct. 468, 472–473 (2004) (defense counsel believed, albeit mistakenly, that witness had been subpoenaed and had failed to appear such that further efforts to compel his presence would be futile); Commonwealth v. Gagliardi, 29 Mass. App. Ct. 225, 244 (1990) (witness was reluctant to testify because of fear of intimidation by persons related to defendant). Contrast Brownlie v. Kanzaki Specialty Papers, Inc., 44 Mass. App. Ct. 408, 420 (1998) (affidavit of company official stating only that "compelling business reasons" mandated his return to Japan did not provide judge with plausible explanation for his absence).

***Criminal Cases*.** The judge must inform the jury in a criminal case that they may not draw an adverse inference from the defendant's failure to call a witness unless and until they find beyond a reasonable doubt that if the witness had been called he or she would have given testimony unfavorable to the defendant. Commonwealth v. Niziolek, 380 Mass. 513, 522 (1980). The inference may also be applied to a situation where evidence is "missing." See Commonwealth v. Kee, 449 Mass. 550, 558 (2007).

Cross-Reference: Section 1102, Spoliation or Destruction of Evidence.

Section 1112. Eyewitness Identification

(a) Eyewitness Identification Generally. The admissibility of eyewitness identification evidence is governed both by Article 12 of the Massachusetts Declaration of Rights and common-law principles of fairness.

(b) Out-of-Court Identification.

(1) Photographic Array.

(A) Suppression of Identification. Identification based on a pretrial photographic procedure is not subject to suppression unless the procedures employed in showing the photographic array were unnecessarily suggestive and conducive to mistaken identification. In making this ruling, the trial judge should consider

(i) whether the police properly informed the party making the identification that (1) the wrongdoer may or may not be in the depicted photographs, (2) it is just as important to clear a person from suspicion as to identify a person as the wrongdoer, (3) the depicted individuals may not appear exactly as they did on the date of the incident because features such as weight and head and facial hair may change, and (4) the investigation will continue regardless of whether an identification is made;

(ii) whether the party making the identification was asked to state how certain he or she is of any identification;

(iii) whether the array was composed of persons who possess reasonably similar features and characteristics; and

(iv) whether the array contained at least five fillers for every photograph of the suspect.

(B) Suggestive Police Procedures. If the trial judge finds that the police procedures employed in the showing of the photographic array were so unnecessarily suggestive and conducive to mistaken identity as to deny the defendant due process of law, the Commonwealth may offer evidence of the identification only if it establishes by clear and convincing evidence that the proffered identification has a source independent of the suggestive photographic array.

(C) Admissibility of Photographs. Police photographs used in an out-of-court identification may be admitted if (i) the prosecution demonstrates some need for their introduction, (ii) the photographs are offered in a form that does not imply a prior criminal record, and (iii) the manner of their introduction does not call attention to their source.

(2) Lineup. The considerations present with photographic arrays also apply to identifications resulting from lineups.

(3) Showup. Showup identifications are generally disfavored. However, for good cause shown, the trial judge may admit evidence of such an identification if the showup was not unnecessarily or impermissibly suggestive. This determination involves an inquiry of whether the Commonwealth has shown that police had good cause to use a one-on-one identification procedure and whether police avoided any special elements of unfairness.

(c) In-Court Identification.

(1) Where There Has Been an Out-of-Court Identification.

(A) Generally, an in-court identification of the defendant by an eyewitness who was present during commission of the crime is admissible if the eyewitness (i) participated before trial in an identification procedure and (ii) has made an unequivocal, positive identification of the defendant.

(B) If the out-of-court identification is determined to have been the result of unnecessarily suggestive police procedures, an in-court identification is not admissible unless the Commonwealth establishes, by clear and convincing evidence, that it has a source independent of and unrelated to the unnecessarily suggestive out-of-court identification.

(C) If the suggestiveness did not arise from police conduct, and the out-of-court identification was suppressed under common-law principles of fairness, a subsequent in-court identification cannot be admitted.

(2) Where There Has Been No Out-of-Court Identification.

(A) If an eyewitness who was present during the commission of a crime did not participate before trial in an identification procedure or has made something less than an un-

equivocal, positive identification, an in-court identification is not admissible unless there is good reason for its admission.

(B) In cases subject to Subsection (c)(2)(A), the Commonwealth must move in limine to admit the in-court identification. The Commonwealth has the burden of production on whether there is good reason for admitting the in-court identification. The defendant has the burden of persuasion to establish that an in-court identification would be unnecessarily suggestive and that there is not good reason for it.

(d) Testimony of Third-Party Observer. If the eyewitness testifies at trial and is subject to cross-examination, a third party who observed the eyewitness's out-of-court identification may testify about that identification (1) where the eyewitness cannot identify a defendant at trial but acknowledges having made an out-of-court identification of the defendant, or (2) where the eyewitness denies or fails to remember having made an identification. The third party's testimony about the identification may not be admitted until after the Commonwealth has questioned the eyewitness about the identification. The third party's testimony about the out-of-court identification is admissible as substantive evidence.

(e) Expert Testimony. Expert testimony on the issue of eyewitness identification is admissible at the discretion of the trial judge.

(f) Jury Instruction.

(1) Positive Eyewitness Identification. Where the jury heard eyewitness evidence that positively identified the defendant and the identification of the defendant as the person who committed or participated in the alleged crime is contested, the judge should give the Model Eyewitness Identification Instruction.

(2) Partial Eyewitness Identification. Upon request, where an eyewitness partially identified the defendant, the judge should give some variation of the Model Eyewitness Identification Instruction that includes information about the risk of an honest but mistaken observation.

(3) Cross-Racial Identification. The judge should omit the cross-racial component of the Model Eyewitness Identification Instruction only if all parties agree that there was no cross-racial identification. Where the instruction is given, the judge has discretion to add references to ethnicity.

(4) Failure to Identify or Inconsistent Identification. The judge should instruct the jury to 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.

(5) Preliminary/Contemporaneous Instruction. Upon request, before opening statements or immediately before or after the testimony of an identifying witness, the judge must give the Preliminary/Contemporaneous Instruction.

NOTE

Subsection (a). This subsection is derived from Commonwealth v. Crayton, 470 Mass. 228 (2014). See also Commonwealth v. Walker, 460 Mass. 590 (2011); Commonwealth v. Jones, 423 Mass. 99 (1996).

In both Crayton and Walker, the Supreme Judicial Court explained that Massachusetts law follows a per se rule of exclusion for unnecessarily suggestive identifications and, as a result, is more favorable to the defendant than Federal law, which permits the admission of such identifications so long as the judge finds that they are reliable under the totality of the circumstances. In Crayton, the court added that, in Massachusetts, an identification made under "'especially suggestive circumstances' even where the circumstances did not result from improper police activity is also in contrast with the United States Supreme Court jurisprudence" (quotation and citations omitted). Commonwealth v. Crayton, 470 Mass. at 235. Because Massachusetts constitutional and common law is more favorable to the defendant, there is no need to separately consider Federal law on questions relating to the admission of eyewitness identification.

In Walker, the court added that

> "[b]ecause eyewitness identification is the greatest source of wrongful convictions but also an invaluable law enforcement tool in obtaining accurate convictions, and because the research regarding eyewitness identification procedures is complex and evolving, we shall convene a study committee to consider how we can best deter unnecessarily suggestive procedures and whether existing model jury instructions provide adequate guidance to juries in evaluating eyewitness testimony."

Commonwealth v. Walker, 460 Mass. at 604 n.16. The study committee filed its report on July 25, 2013. See Supreme Judicial Court Study Group on Eyewitness Evidence, Report and Recommendations to the Justices, at http://perma.cc/52L8-C6SQ. See also Identifying the Culprit: Assessing Eyewitness Identification (2014) (report of the National Research Council of the National Academies of Science; prepublication copy available at http://perma.cc/6SRE-8UHR).

***Inanimate Objects*.** Under some circumstances, due process principles may apply to the identification of an inanimate object:

> "Due process may be denied by admitting in evidence an identification of an inanimate object where, first, the police knew or reasonably should have known that identification of the object effectively identifies the defendant as the perpetrator of the crime and where, second, the police needlessly and strongly suggested to the witness that the object is the object at issue."

Commonwealth v. Thomas, 476 Mass. 451, 466–467 (2017). The Supreme Judicial Court has urged police departments to devise a protocol for identification of inanimate objects and suggested elements of such a protocol for police departments to consider. Id. at 467–468. See also Commonwealth v. Bresilla, 470 Mass. 422, 429 (2015).

Subsection (b)(1)(A)(i). This subsection is derived from Commonwealth v. Walker, 460 Mass. 590, 600 (2011), making mandatory the protocol adopted in Commonwealth v. Silva-Santiago, 453 Mass. 782, 797–798 (2009). While the Supreme Judicial Court has not yet required a double-blind procedure where the identification procedure is conducted by a law enforcement officer who does not know the identity of the suspect, it has recognized that such a process is the better practice to eliminate the risk of conscious or unconscious suggestion. Id. at 797.

Subsection (b)(1)(A)(ii). This subsection is derived from Commonwealth v. Silva-Santiago, 453 Mass. 782, 797–798 (2009).

Subsection (b)(1)(A)(iii). This subsection is derived from Commonwealth v. Silva-Santiago, 453 Mass. 782, 795 (2009). See, e.g., Commonwealth v. Arzola, 470 Mass. 809, 813 (2015) (after victim had given description of assailant that included a gray shirt, identification was not unnecessarily suggestive where

victim explicitly stated that his identification was based on defendant's facial features, hair, complexion, and eyes, even though defendant was the only subject wearing gray shirt).

Subsection (b)(1)(A)(iv). This subsection is derived from Commonwealth v. Walker, 460 Mass. 590, 602–603 (2011). Unless there are exigent circumstances, the police should not show a witness a photographic array that contains fewer than five fillers for every suspect photograph. Id. at 603–604.

Subsection (b)(1)(B). This subsection is derived from Commonwealth v. Johnson, 473 Mass. 594 (2016), and Commonwealth v. Warren, 403 Mass. 137, 139 (1988). Cf. Commonwealth v. Forte, 469 Mass. 469, 477 (2014).

In Johnson, the Supreme Judicial Court indicated that it will, in an appropriate case, determine whether the reasoning in Commonwealth v. Crayton, 470 Mass. 228 (2014), and Commonwealth v. Collins, 470 Mass. 255 (2014), dictates elimination or revision of the independent-source doctrine. Commonwealth v. Johnson, 473 Mass. at 602–603.

Subsection (b)(1)(C). This subsection is derived from Commonwealth v. Cruz, 445 Mass. 589, 592 (2005).

Subsection (b)(3). This subsection is derived from Commonwealth v. Martin, 447 Mass. 274, 279 (2006). See also Commonwealth v. Crayton, 470 Mass. 228, 235 (2014); Commonwealth v. Amaral, 81 Mass. App. Ct. 143, 148–149 (2012). Good cause may be based on (1) the nature of the crime and concerns for public safety, (2) the need for efficient investigation in the aftermath of a crime, and (3) the usefulness of prompt confirmation of the accuracy of information. Commonwealth v. Rivera, 91 Mass. App. Ct. 796, 801 (2017). The availability of an alternative identification procedure does not necessarily make an identification unduly suggestive. Commonwealth v. Martinez, 67 Mass. App. Ct. 788, 793 (2006). A delay in time between the crime and the showup is one factor in determining whether the identification is inherently or unnecessarily suggestive, but such a delay does not make it per se inadmissible. Commonwealth v. Levasseur, 32 Mass. App. Ct. 629, 636 (1990). E.g., Commonwealth v. Pearson, 87 Mass. App. Ct. 720, 724–725 (2015) (showup procedure following victim's spontaneous encounter with perpetrator fifty-three days after assault not unnecessarily suggestive). The defendant may argue to the jury that as an alternative to a one-on-one showup, it would have been fairer to ask the witness to pick the defendant out of a group of similar individuals. Commonwealth v. Gonzalez, 28 Mass. App. Ct. 906, 908 (1989).

Subsection (c). This subsection is derived from Commonwealth v. Crayton, 470 Mass. 228, 233–245 (2014), and Commonwealth v. Collins, 470 Mass. 255, 259–267 (2014), which apply prospectively to trials that commence after December 17, 2014. In both Crayton and Collins, the Supreme Judicial Court explained that the new rule was not mandated by the State constitution, but rather was a rule of the common law.

In Crayton, the court noted that the usual "good reasons" for conducting an out-of-court showup—"concerns for public safety," "efficient police investigation[s]," and the value of rapid confirmation of investigatory details—"will never justify an in-court showup." Commonwealth v. Crayton, 470 Mass. at 242. In Crayton, the court recognized two circumstances that may qualify as "good reasons" for not conducting an out-of-court identification procedure: the first is "where the eyewitness was familiar with the defendant before the commission of the crime, such as where a victim testifies to a crime of domestic violence," and the second is "where the witness is an arresting officer who was also an eyewitness to the commission of the crime, and the identification merely confirms that the defendant is merely the person who was arrested for the charged crime." Id. In Collins, the court added that

> "'good reason' will not often exist where a witness has earlier failed to make a positive identification. In these circumstances, for an in-court showup to be admissible, it would need to be justified by some other 'good reason' for permitting a suggestive identification procedure, which usually would require a showing that the in-court identification is more reliable than the witness's earlier failure to make a positive identification and that it poses little risk of misidentification despite its suggestiveness."

Commonwealth v. Collins, 470 Mass. at 265.

The court specifically left open whether this new rule should apply to in-court identifications of the defendant by eyewitnesses who were not present during the commission of the crime but who may have observed the defendant before or after the crime. Commonwealth v. Crayton, 470 Mass. at 242 n.17; Commonwealth v. Collins, 470 Mass. at 265 n.15.

Subsection (c)(1)(A). The requirement that the out-of-court identification must have been "unequivocal" stems from Commonwealth v. Collins, 470 Mass. 255, 266 (2014), where the Supreme Judicial Court stated that

> "[i]n the future, where an eyewitness to a crime has not made an unequivocal positive identification of the defendant before trial but the prosecutor nonetheless intends to ask the eyewitness to make an in-court identification of the defendant, we impose the same burden on the prosecutor as we did in [Commonwealth v.] Crayton[, 470 Mass. 228, 242 (2014),] to move in limine to admit the in-court identification, preferably before trial."

An unequivocal positive identification exists where the witness "identifies the defendant as the perpetrator, such that the statement of identification is clear and free from doubt." Commonwealth v. Dew, 478 Mass. 304, 315 (2017).

Subsection (c)(1)(B). This subsection is derived from Commonwealth v. Johnson, 420 Mass. 458, 463 (1995), as further elaborated by Commonwealth v. Johnson, 473 Mass. 594 (2016). The prosecution may introduce only an identification that is not the product of the suggestive identification. If the out-of-court identification was the result of unnecessarily suggestive police procedures, such an identification must have an independent source, as demonstrated by clear and convincing evidence. In the 2016 Johnson case, the Supreme Judicial Court indicated that it will, in an appropriate case, determine whether the reasoning in Commonwealth v. Crayton, 470 Mass. 228 (2014), and Commonwealth v. Collins, 470 Mass. 255 (2014), dictates elimination or revision of this independent-source doctrine. Commonwealth v. Johnson, 473 Mass. at 602–603. An in-court identification will be suppressed where either the physical presence of the witness in court or the witness's basis of knowledge for the identification was procured in violation of the Fourth Amendment to the United States Constitution. Commonwealth v. Greenwood, 78 Mass. App. Ct. 611, 621 (2011). An in-court identification will be suppressed even in the absence of constitutional concerns or police action if admitting the identification would violate common-law principles of fairness. Commonwealth v. Jones, 423 Mass. 99, 108–109 (1996).

Subsection (c)(1)(C). This subsection is derived from Commonwealth v. Johnson, 473 Mass. 594 (2016). If an out-of-court identification was declared inadmissible under common-law principles of fairness, a subsequent in-court identification by the same person cannot be admitted. The independent-source doctrine does not apply. Id. at 603.

Subsection (d). This subsection is derived from Commonwealth v. Cong Duc Le, 444 Mass. 431, 441–442 (2005). Identification testimony must be accompanied by an accusation relevant to the issue before the court or some form of exclusionary statement.

> "[A]n eyewitness's out-of-court statement identifying a defendant as the person shooting at the eyewitness's friend is part of the context of the identification, but a statement regarding the number of shots fired, the color of the firearm, and the defendant's behavior after the shooting goes beyond the context of the identification of the shooter" (citation omitted).

Commonwealth v. Walker, 460 Mass. 590, 608 (2011). The Commonwealth is required to question the alleged eyewitness about the prior identification before it seeks to introduce substantive evidence of that identification through a third party. This procedure is necessary to provide the defendant with adequate notice about the identification and to permit the defendant to cross-examine the alleged eyewitness. Commonwealth v. Herndon, 475 Mass. 324, 334 (2016). The opportunity to recall the declarant witness after the statement has been introduced through a third party does not satisfy the requirement of meaningful

cross-examination, as it is too limited and inappropriately places a "strategic burden on the non-offering party." Id., quoting Smith v. State, 669 A.2d 1, 8 (Del. 1995). The third-party testimony of the declarant is admissible for probative purposes even if that third party was not a percipient observer of the entire identification process, including observing the declarant in the act of identifying the particular person. Commonwealth v. Raedy, 68 Mass. App. Ct. 440, 448–449 (2007). The testimony of the third-party witness who observed the out-of-court identification is governed by Section 801(d)(1)(C), Definitions: Statements Which Are Not Hearsay: Prior Statement by Witness.

Subsection (e). This subsection is derived from Commonwealth v. Bly, 448 Mass. 473, 495 (2007). The judge must conclude the subject of the expert opinion is one on which the jurors need assistance, and that they will not be confused or misled by the testimony. The tests and circumstances on which the opinion rests must provide a basis for determining it is reliable. The testimony must be sufficiently tied to the facts of the case so that it will aid the jury. Commonwealth v. Santoli, 424 Mass. 837, 844 (1997).

Subsection (f). This subsection is derived from the Model Jury Instructions on Eyewitness Identification set forth at 473 Mass. 1051 (2015). The instructions include the Model Eyewitness Identification Instruction and the Preliminary/Contemporaneous Instruction. The Model Eyewitness Identification Instruction should be given "unless a judge determines that different language would more accurately or clearly provide comparable guidance to a jury or better promote the fairness of the trial." Model Jury Instructions on Eyewitness Identification, 473 Mass. at 1051. For the entire statement of the justices, see https://perma.cc/KH5B-J9YQ.

Section 1113. Opening Statement and Closing Argument; Applicable to Criminal and Civil Cases

(a) Opening Statement.

(1) Purpose. The proper function of an opening statement is to outline in a general way the nature of the case that a party expects to be able to prove or support by admissible evidence. The expectation must be reasonable and grounded in good faith. Except for a prosecutor in a criminal case, a party may discuss evidence expected to be offered by an opponent. Argument for or against either party is not permitted.

(2) Directed Verdict, Finding of Not Guilty, or Mistrial. If the evidence outlined in an opening statement is insufficient as a matter of law to sustain that party's burden of proof, or to establish a cause of action, the court has discretion to direct a verdict against that party.

(b) Closing Argument.

(1) Critical Stage. Closing argument is not evidence but is a critical stage of a trial that requires advance preparation and knowledge of the principles expressed in this section.

(2) Permissible Argument. Closing argument must be based on the evidence and the fair inferences from the evidence. It may contain enthusiastic rhetoric, strong advocacy, and excusable hyperbole. It is permissible to argue from the evidence that a witness, document, or other evidence is or is not credible, as well as to suggest the conclusions, if any, that should be drawn from the evidence. A party may urge jurors to rely on common sense and life experience as long as the subject matter at issue does not require expert knowledge. In civil actions in the Superior Court, parties, through their counsel, may suggest a specific monetary amount for damages at trial.

(3) Improper Argument. The following are not permissible in a closing argument:

(A) to misstate the evidence, to refer to facts not in evidence (including excluded matters), to use evidence for a purpose other than the limited purpose for which it was admitted, or to suggest inferences not fairly based on the evidence;

(B) to state a personal opinion about the credibility of a witness, the evidence, or the ultimate issue of guilt or liability;

(C) to appeal to the jurors' emotions, passions, prejudices, or sympathies;

(D) to ask the jurors to put themselves in the position of any person involved in the case;

(E) to misstate principles of law, to make any statement that shifts the burden of proof, or to ask the finder of fact to infer guilt based on the defendant's exercise of a constitutional right; and

(F) to ask the jury to disregard the court's instructions.

(c) Objections. An objection to a statement in an opening or closing, to be timely, must be made no later than the conclusion of the opponent's opening or closing. If counsel is dissatisfied with a judge's curative or supplemental instruction, an additional objection must be made.

(d) Duty of the Court. A trial judge has a duty to take appropriate action to prevent and remedy error in opening statements and closing arguments.

NOTE

Subsection (a). An opening statement is generally limited to fifteen minutes. See Mass. R. Crim. P. 24(a)(2); Rule 7 of the Rules of the Superior Court. The defendant may present an opening statement immediately after the plaintiff's opening or may choose to defer his or her opening until after the close of the plaintiff's case. See Commonwealth v. Dupree, 16 Mass. App. Ct. 600, 603 (1983) (discussing tactical considerations that may affect decision whether to defer opening until after conclusion of Commonwealth's case).

Subsection (a)(1). This subsection is derived from Commonwealth v. Croken, 432 Mass. 266, 268 (2000); Commonwealth v. Fazio, 375 Mass. 451, 454 (1978); and Posell v. Herscovitz, 237 Mass. 513, 514 (1921). There is no place for inflammatory rhetoric in an opening statement. See Commonwealth v. Siny Van Tran, 460 Mass. 535, 554 (2011); Commonwealth v. Silva, 455 Mass. 503, 514 (2009) ("The prosecutor's opening remark, describing the killing as cold blooded, was improper argument for an opening."). But see Commonwealth v. Johnson, 429 Mass. 745, 748 (1999). Simply because a statement made in a reasonable, good-faith belief that the evidence would materialize at trial turns out not to be true does not mean the statement constitutes error. See Commonwealth v. Fazio, 375 Mass. at 457. Accord Commonwealth v. Qualls, 440 Mass. 576, 586 (2003) (holding that absent a showing of bad faith or prejudice, the fact that certain evidence cited in an opening statement fails to materialize is not a ground for reversal). Neither unreasonableness or bad faith is to be presumed. Commonwealth v. Errington, 390 Mass. 875, 883 (1984). Just because statements of a coconspirator the prosecutor believes to be admissible against the defendant are ruled inadmissible when offered at trial does not establish that the prosecutor acted in bad faith in referring to the statements in his or her opening statement. See Commonwealth v. Morgan, 449 Mass. 343, 361 (2007).

"[A] judge, acting within his discretion, may limit the scope of the prosecutor's and defense counsel's opening statements to evidence counsel expects to introduce." Commonwealth v. Truong, 34 Mass. App. Ct. 668, 671 (1993). See also Commonwealth v. Medeiros, 15 Mass. App. Ct. 913, 913–914 (1983) (no abuse of discretion in refusing to permit an opening statement when defense counsel "announced no more than a hope to puncture the Commonwealth's case somehow through cross-examination"; but, "[i]f defense counsel reasonably expects on cross-examination to elicit specific evidence, . . . a defense opening stating such [evidence] would be proper"); Commonwealth v. Dupree, 16 Mass. App. Ct. 600, 602–603 (1983) ("To deny the defendant the right to open at the commencement of the trial without inquiry into the [content] of the proposed statement was error. To attempt to evaluate the extent of the prejudice which ensued would be an exercise in speculation, and, therefore, we reverse."). There may be special circumstances where a statement may be so "irretrievably and fatally prejudicial to the defendant" that a prosecutor should have "no doubt" as to its admissibility before including it in the opening. See Commonwealth v. Fazio, 375 Mass. at 455, discussing Commonwealth v. Bearse, 358 Mass. 481, 487 (1987). If there is a question asked as to the existence or admissibility of evidence, the matter may be brought to the judge by way of a motion in limine. See Commonwealth v. Spencer, 465 Mass. 32, 42 (2013). Cross-Reference: Section 103(f), Rulings on Evidence, Objections, and Offers of Proof: Motions in Limine.

***Disciplinary Authority*.** See Mass. R. Prof. C. 3.4(e), 8.4(d) (2015); Admonition No. 00-51, 16 Mass. Att'y Discipline Rep. 528 (2000), available at http://perma.cc/NB7Y-7BES (in opening statement, prosecutor described evidence that he was not in a position to produce).

Subsection (a)(2). This subsection is derived from Douglas v. Whittaker, 324 Mass. 398, 399 (1949), and Commonwealth v. Lowder, 432 Mass. 92, 102 (2000). The power to direct a verdict should be exercised with "great caution" because the outline of the evidence in the opening may not always fully describe the evidence at trial. See Hubert v. Melrose-Wakefield Hosp. Ass'n, 40 Mass. App. Ct. 172, 176 (1996), quoting from Upham v. Chateau de Ville Dinner Theatre, Inc., 380 Mass. 350, 351 n.2 (1980). Thus, in close cases, the motion should be denied. Douglas v. Whittaker, 324 Mass. at 400. However, where the facts stated do not constitute a cause of action, a verdict is properly directed because "the court and jury's time, the public purse, and the defendant's time and purse ought not to be wasted." Sereni v. Star Sportswear Mfg. Corp., 24 Mass. App. Ct. 428, 431 (1987). In a criminal case, the judge should not allow a motion for a required finding of not guilty after the opening unless the prosecutor is made aware of the problem and given an opportunity to correct it, and it is clear that the defendant cannot be lawfully convicted. Commonwealth v. Lowder, 432 Mass. at 100–101. See Island Transp. Co. v. Cavanaugh, 54 Mass. App. Ct. 650, 654 (2002) (preference for civil cases to be decided upon "sworn evidence rather than an anticipatory statement of counsel" unless opening statement fails to describe the elements of a cause of action).

Cross-Reference: Section 611(f), Mode and Order of Examining Witnesses and Presenting Evidence: Reopening.

Subsection (b). A party is generally allowed thirty minutes for closing argument in a civil case. Mass. R. Civ. P. 51(a). "The defendant shall present his closing argument first." Mass. R. Crim. P. 24(a)(1). "A trial judge has broad discretion in limiting the time for closing argument." Commonwealth v. Mahar, 6 Mass. App. Ct. 875, 875–876 (1978). See also Commonwealth v. Rocheteau, 74 Mass. App. Ct. 17, 22 (2009). "[J]udges who intend to enforce a time limit [on closing argument should] make clear to counsel before closing argument the limit to be imposed and the possibility that the judge will warn them of the time remaining." Commonwealth v. Brown, 462 Mass. 620, 633 n.11 (2012).

The defendant in a criminal case has a right under the Sixth Amendment to the United States Constitution to make a closing argument at trial. Commonwealth v. Marvin, 417 Mass. 291, 292 (1994). This right applies in cases in which the defendant represents himself or herself as well. Herring v. New York, 422 U.S. 853, 864 n.18 (1975). See also Commonwealth v. Martelli, 38 Mass. App. Ct. 669, 669–672 (1995) (failure to allow defense to present closing argument is structural error and requires reversal even absent objection).

Subsection (b)(1). This subsection is derived from Herring v. New York, 422 U.S. 853, 862 (1975), and Commonwealth v. Farley, 432 Mass. 153, 157 (2000).

Subsection (b)(2). The first sentence of this subsection is taken nearly verbatim from Commonwealth v. Pettie, 363 Mass. 836, 840 (1973), and Mason v. General Motors Corp., 397 Mass. 183, 192 (1986). See also Commonwealth v. Haas, 398 Mass. 806, 812 (1986); Teller v. Schepens, 25 Mass. App. Ct. 346, 352–353 (1988). The second sentence is derived from Commonwealth v. Costa, 414 Mass. 618, 629 (1993). See also Commonwealth v. Brown, 46 Mass. App. Ct. 279, 283 (1999) (prosecutor's comment fell into category of enthusiastic rhetoric, strong advocacy, and excusable hyperbole). The third sentence is derived from Commonwealth v. Kee, 449 Mass. 550, 560 (2007). See also Commonwealth v. Grimshaw, 412 Mass. 505, 510 (1992); Commonwealth v. Ferreira, 381 Mass. 306, 316 (1980) ("Counsel may also attempt to assist the jury in their task of analyzing, evaluating, and applying evidence. Such assistance includes suggestions by counsel as to what conclusion the jury should draw from the evidence."); Commonwealth v. Haas, 373 Mass. 545, 557 n.11 (1977) ("Counsel may 'fit all the pieces of evidence together so that they form a comprehensive and comprehensible picture for the jury.'"). The fourth sentence is derived from Commonwealth v. Oliveira, 431 Mass. 609, 613 (2000). Counsel may argue that a witness is mistaken or lying when the argument is expressed as a conclusion to be drawn from the evidence and not as a personal opinion. See Commonwealth v. Murchison, 418 Mass. 58, 60 (1994) (defense counsel was entitled to argue from the evidence that police officers had lied). The last sentence of this subsection is derived from G. L. c. 231, § 13B. The Supreme Judicial Court has noted its concern with unfair tactics where, "[a]lthough the prosecutor's comment d[oes] not violate the letter of the judge's order, it undoubtedly undermine[s] the spirit of the ruling." Commonwealth v. Durand, 475 Mass. 657, 672 (2016). In Durand, the court, while concluding there was no prejudicial error, noted that the prosecutor's comment "unfairly suggested that the defendant withheld . . . information, and that this act reflected consciousness of guilt." Id.

***References to the View*.** Counsel may ask the jury in a closing to consider things they saw on a view. Commonwealth v. Fitzgerald, 376 Mass. 402, 420 (1978). Cross-Reference: Section 1109, View.

***Common Sense; Common Experience*.** Counsel may ask the jury to use their common sense and to apply their common experience to the evidence. See Commonwealth v. Jefferson, 461 Mass. 821, 836 (2012); Commonwealth v. Santiago, 425 Mass. 491, 498 (1997), cert. denied, 525 U.S. 1003 (1998). Contrast Commonwealth v. Hrabak, 57 Mass. App. Ct. 648, 654 (2003) (improper for prosecutor to urge jurors to infer from their own knowledge and experience that six-year-old child's rectum could accommodate a penis without showing any injury, as this is beyond knowledge of ordinary layperson).

***Stipulation or Transcript*.** Counsel may read from or quote any transcript or stipulation that has been admitted in evidence "so long as [counsel] furnishes opposing counsel with a copy of the transcript [or stipulation] from which he or she expects to read." Commonwealth v. Delacruz, 443 Mass. 692, 694–696 (2005).

***Special Role of the Prosecutor*.** The prosecutor performs a special function in representing the Commonwealth. The interest of the prosecutor is "not that [he] shall win a case, but that justice shall be done. . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Commonwealth v. Keo, 467 Mass. 25, 35–36 (2014), quoting Berger v. United States, 295 U.S. 78, 88 (1935). See also Commonwealth v. Shelley, 374 Mass. 466, 472 (1978) ("The prosecuting attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.").

> "We have never criticized a prosecutor for arguing forcefully for a conviction based on the evidence and on inferences that may reasonably be drawn from the evidence. On the other hand, a prosecutor should not refer to the defendant's failure to testify, misstate the evidence or refer to facts not in evidence, interject personal belief in the defendant's guilt, play on racial, ethnic, or religious prejudice or on the jury's sympathy or emotions, or comment on the consequences of a verdict. . . . [P]rosecutors are held to a stricter standard of

> conduct than are errant defense counsel and their clients . . . ." (Citations and footnotes omitted.)

Commonwealth v. Kozec, 399 Mass. 514, 516–519 (1987). See also Commonwealth v. Mahdi, 388 Mass. 679, 693 (1983).

Within reason, prosecutors may comment on the tactics and strategy of the defense. Compare Commonwealth v. Felder, 455 Mass. 359, 369 (2009), citing Commonwealth v. Jackson, 428 Mass. 455, 463 (1998) ("When read in context, there was no error in the prosecutor's limited references to the attempts by defense counsel to create 'smoke screen[s].'"); Commonwealth v. Espada, 450 Mass. 687, 699 (2008) (not improper for prosecutor to refer to defendant's "story as 'ridiculous'"); Commonwealth v. Raposa, 440 Mass. 684, 697 (2004) ("[T]he prosecutor stated, 'I mean, thank goodness you folks have notes, if I was sitting there listening to [defense counsel] tell you what the evidence was. Thank goodness you have the notes, because it's not what [defense counsel] tells you the evidence is.' The prosecutor went on to characterize defense counsel as an attorney able to 'spin gold from straw.' Our cases have upheld the use of language of this nature."); and Commonwealth v. MacDonald (No. 1), 368 Mass. 395, 401 (1975) ("Comment by the prosecutor on the tactics of the defense, based on the evidence and what the jury could observe in the court room, is permissible"), with Commonwealth v. Gentile, 437 Mass. 569, 580–581 (2002) ("Characterizing the defense tactic as 'despicable' goes beyond labeling it as unworthy of belief or lacking in merit and smacks more of an ad hominem attack."); Commonwealth v. Fernandes, 436 Mass. 671, 674 (2002) (improper to characterize defense counsel as "obscuring the truth or intentionally misleading the jury"); and Commonwealth v. McCravy, 430 Mass. 758, 764 (2000) (prosecutor may address a particular point in defense counsel's closing argument as a sham, but he or she may not characterize the entire defense as such). See also Commonwealth v. Silanskas, 433 Mass. 678, 702–703 (2001) (improper to comment on length of defense closing).

A prosecutor must be careful in making comments about defense counsel. See Commonwealth v. Lewis, 465 Mass. 119, 132 (2013) (Prosecutor's closing argument improperly disparaged defense counsel.); Commonwealth v. Scott, 463 Mass. 561, 574 (2012) ("[S]ome of the prosecutor's personal comments about defense counsel went beyond the bounds of proper argument."); Commonwealth v. Hawley, 380 Mass. 70, 84–85 (1980) (concluding that "impropriety lay in the prosecutor's suggestion that defense counsel was an active participant, if not the leader or mastermind, in the commission of the crimes of perjury"); Commonwealth v. Burts, 68 Mass. App. Ct. 684, 687–688 (2007) ("Criticisms of the defendant's attorney, including the prosecutor's urging of the jurors to be angry with the attorney, were improper and, among other things, impugned two basic constitutional rights, that of counsel, as well as the right of a defendant to make his defense."); Commonwealth v. Awad, 47 Mass. App. Ct. 139, 142 (1999) ("Disparaging remarks about the qualifications or motivations of defense counsel, or lawyers in general, are disfavored.").

Similarly, a prosecutor may not engage in "prejudicial name-calling." Commonwealth v. Rivera, 52 Mass. App. Ct. 321, 328 (2001) ("We have cautioned counsel for the Commonwealth to avoid prejudicial name-calling."). See Commonwealth v. Rutherford, 476 Mass. 639, 644 (2017) (arguing that an expert "needs to become a human being" is inappropriate); Commonwealth v. Cosme, 410 Mass. 746, 754 (1991) (prosecutor's comments regarding two defense witnesses were "tasteless and improper"); Commonwealth v. Saunders, 75 Mass. App. Ct. 505, 511 (2009) ("A prosecutor should not use extreme epithets to characterize the defendant.").

"A prosecutor's role at a trial does not change where the defendant represents himself." Commonwealth v. Sapoznik, 28 Mass. App. Ct. 236, 240 n.3 (1990).

The disciplinary authority governing the special responsibilities of a prosecutor is Mass. R. Prof. C. 3.8(h) (1999).

***Retaliatory Reply*.** Fighting fire with fire does not mean that a party has a right to exceed the proper bounds of closing argument because defense counsel did so. It means only that "a prosecutor may properly comment to correct 'an erroneous impression created by opposing counsel.'" Commonwealth v. Kozec, 399 Mass. 514, 519 n.9 (1987), quoting Commonwealth v. Bradshaw, 385 Mass. 244, 277 (1982). Compare Commonwealth v. Rivera, 425 Mass. 633, 647 (1997) ("The prosecutor was entitled to respond to defense

counsel's improper suggestions regarding the use of prior convictions, and his reminder to the jury of the limited use of the defendant's prior convictions, although not artful, is not a ground for reversal."), and Commonwealth v. Prendergast, 385 Mass. 625, 633–634 (1982) (The defense counsel cited the defendant's hospital records as evidence that the defendant was mentally ill and dangerous and, therefore, not criminally responsible. The prosecutor's statement that the hospital records did not prevent the jury from finding the defendant criminally responsible was within his "right of retaliatory reply."), with Commonwealth v. McCoy, 59 Mass. App. Ct. 284, 296 (2003) (prosecutor "exceeded the bounds of fair, corrective response" when he "impermissibly appealed to the jury's emotional concern for crime-free streets by inferentially urging their trust in the police witnesses who had long protected those streets").

Subsection (b)(3)(A). This subsection is derived from Commonwealth v. Beaudry, 445 Mass. 577, 580 (2005); Commonwealth v. Pearce, 427 Mass. 642, 646 (1998); and Hart v. Morris & Co., 259 Mass. 211, 214–215 (1927). The right to argue inferences from the evidence does not include the right to "lead the jury to an improper inference not from the evidence but from the apparent personal knowledge of the attorney." Commonwealth v. Nordstrom, 364 Mass. 310, 315 (1973). See also Commonwealth v. Jones, 471 Mass. 138, 147–149 (2015) (improper for prosecutor to argue that defendant might have assaulted another victim if child had not moved away).

For the rule that a party may not misstate the evidence, see Commonwealth v. Sanders, 451 Mass. 290, 298–300 (2008) (multiple misstatements of evidence); Commonwealth v. Coren, 437 Mass. 723, 731 (2002) ("We conclude that the prosecutor exceeded the scope of proper argument by misstating important aspects of the testimony beyond inferences that might reasonably have been drawn from the evidence, and thereby committed error."); Commonwealth v. Sheehan, 435 Mass. 183, 191 (2001) (prosecutor had "no support in the evidence for labelling the defendant a 'predator,' and the remark [therefore] was unwarranted"); Commonwealth v. Daley, 66 Mass. App. Ct. 254, 257 (2006) (prosecutor misstated the evidence when he told the jury that trooper "detected a 'strong' odor of alcohol"); Commonwealth v. Vazquez, 65 Mass. App. Ct. 305, 312 (2005) (prosecutor misstated evidence when describing length of a kiss); and Commonwealth v. Gonzalez, 59 Mass. App. Ct. 622, 629 (2003) (no "basis in the evidence" for prosecutor's "suggestion of a possibility that the defendant might have possessed a weapon at the time of his arrest").

For the rule that a party may not refer to facts not in evidence, see Commonwealth v. Dirgo, 474 Mass. 1012, 1013–1014 (2016) (A party cannot suggest that evidence would have been available but for a prohibition of law, in this case, the first complaint doctrine. It was error for the prosecutor to argue she could have provided a "parade" of witnesses to corroborate the complainant's testimony but for the first complaint doctrine.); Commonwealth v. Harris, 443 Mass. 714, 732 (2005) ("Counsel may not, in closing, 'exploit[] the absence of evidence that had been excluded at his request.' Such exploitation of absent, excluded evidence is 'fundamentally unfair' and 'reprehensible.'" [Citations omitted.]); Commonwealth v. Daley, 439 Mass. 558, 565 & n.3 (2003) (error for prosecutor to argue that "the defendant's 'character' as a dealer in crack cocaine and as a 'thief' should be used by the jury in assessing his credibility"); and Commonwealth v. Grimshaw, 412 Mass. 505, 508 (1992) ("A prosecutor is barred from referring in closing argument to matter that has been excluded from evidence, and a prosecutor should also refrain from inviting an inference from the jury about the same excluded subject matter" [citation omitted].).

For the rule that a party may not use evidence for a purpose other than the limited purpose for which it was admitted, see Commonwealth v. Cheremond, 461 Mass. 397, 413–414 (2012); Commonwealth v. Daley, 439 Mass. 558, 565–566 & n.3 (2003); Commonwealth v. Bregoli, 431 Mass. 265, 277–278 (2000); Commonwealth v. McIntyre, 430 Mass. 529, 543 (1999); Commonwealth v. Rosa, 412 Mass. 147, 156 (1992) ("A prosecutor may not present to the jury evidence admitted for a limited purpose as if it were substantive evidence."); and Commonwealth v. Burns, 49 Mass. App. Ct. 677, 683 (2000) (where prosecutor impeached witness with grand jury testimony, subsequent "substantive use" of same testimony in closing argument was improper). See also Commonwealth v. Howard, 469 Mass. 721, 738 (2014) (even when evidence of prior bad acts has been properly admitted, it is improper to cite that evidence in support of propensity-based argument in closing).

It is improper to argue that a witness should be believed because the witness appeared in court to testify. See Commonwealth v. Polk, 462 Mass. 23, 39 (2012). While a prosecutor may argue that a testifying

defendant has an interest in the outcome of a case and this may affect his or her credibility, it is improper to argue that the testimony of the criminal defendant is inherently incredible simply because he or she is on trial. Commonwealth v. Niemic, 472 Mass. 665, 674–675 (2015). A prosecutor must proceed with great caution before suggesting that a child who is alleged to be the victim of a sexual assault could only have acquired knowledge of sexual acts from the experience of victimization. See Commonwealth v. Beaudry, 445 Mass. 577, 580, 581–582 (2005) (declining to assume that twelve-year-old child is unfamiliar with sexual acts and terminology, while noting that an argument that a child had age-inappropriate knowledge could be made if supported by expert witness testimony); Commonwealth v. Helberg, 73 Mass. App. Ct. 175, 179 (2008), quoting Commonwealth v. Fuller, 22 Mass. App. Ct. 152, 158 (1986) ("[A] prosecutor may not suggest that a child sexual abuse victim 'wouldn't have that kind of idea in her head unless something like that happened to her.'").

***Disciplinary Authority*.** See Mass. R. Prof. C. 3.4(e) (2015), 3.8(i) (1999), 8.4(d) (2015); Private Reprimand No. 91-21, 7 Mass. Att'y Discipline Rep. 356 (1991) (among other issues, lawyer in administrative proceeding alluded in closing to matters ruled inadmissible); Admonition No. 05-04, 21 Mass. Att'y Discipline Rep. 671 (2005), available at http://perma.cc/Y8R2-ZWEJ (among other issues, prosecutor referred in closing arguments to police reports excluded from evidence as hearsay); and Admonition No. 01-20, 17 Mass. Att'y Discipline Rep. 694 (2001), available at http://perma.cc/R5FD-E5JX (prosecutor referred in closing argument to defendant's prior convictions, despite instructions from judge not to do so).

***Use of Props*.** Counsel may not display objects not in evidence and should discuss any "plan to employ dramatic props with the judge during the pre-argument conference." Commonwealth v. Hoppin, 387 Mass. 25, 30–32 (1982).

***Use of Chalks*.** A judge has "considerable, but not unrestrained, discretion as to the degree to which chalks can be used" to illustrate the evidence for the jury and to make use of such aids in closing argument (citation omitted). Commonwealth v. Walker, 10 Mass. App. Ct. 255, 264 (1980). See also Goldstein v. Gontarz, 364 Mass. 800, 814 (1974) ("Permission to use a blackboard as a graphic aid is discretionary with the trial judge.").

***Collateral Sources*.** In general, information of "outside source" compensation is legally irrelevant and should not be referred to in the closing argument. See Goldstein v. Gontarz, 364 Mass. 800, 808–809 (1974). See also Commonwealth v. Murray, 22 Mass. App. Ct. 984, 985 (1986) (improper to suggest that victim of theft had recovered his loss because recovery would not diminish the crime).

***Missing Witnesses*.** If the trial judge declines to give a missing witness instruction, counsel is not permitted to argue that an adverse inference should be drawn against the other side for not calling the witness. Commonwealth v. Saletino, 449 Mass. 657, 670–672 (2007). However, a party is permitted to argue consciousness of guilt or liability even without a jury instruction. Commonwealth v. Franklin, 465 Mass. 895, 915 (2013). See also Commonwealth v. Saletino, 449 Mass. at 671–672 (explaining that defense counsel is always permitted to argue that Commonwealth has not produced sufficient evidence to warrant conviction beyond a reasonable doubt).

Subsection (b)(3)(B). This subsection is derived from Commonwealth v. Kee, 449 Mass. 550, 560 (2007); Commonwealth v. Ciampa, 406 Mass. 257, 265 (1989); Commonwealth v. Lindsey, 48 Mass. App. Ct. 641, 645 (2000); Commonwealth v. Omonira, 59 Mass. App. Ct. 200, 205 (2003); and Warren v. Edgeco, Inc., 8 Mass. App. Ct. 171, 177 (1979). "The jury are presumed to recognize that the prosecutor is an advocate, not a witness." Commonwealth v. Mitchell, 428 Mass. 852, 856–857 (1999) (prosecutor's "use of phrases 'I think,' 'I suggest,' to preface some remarks did not, viewed in their proper context, imply that the prosecutor had personal knowledge or was stating a personal belief"). "Where credibility is at issue, it is certainly proper for counsel to argue from the evidence why a witness should be believed." Commonwealth v. Thomas, 401 Mass. 109, 116 (1987). A prosecutor may make a fair response to an attack on the credibility of a government witness. Commonwealth v. Chavis, 415 Mass. 703, 713 (1993). See also Commonwealth v. Brewer, 472 Mass. 307, 315 (2015) (prosecutor's statement that jury had "no reason to doubt" witness was a proper response to defense's assertion that witness was not credible). An argument that a witness had a motive to lie must be based on the evidence. Commonwealth v. Murchison, 418 Mass. 58, 61 (1994).

Counsel should avoid phrases such as "I think," "I feel," and "I believe" because they express a personal opinion concerning the credibility of witnesses. See Commonwealth v. Finstein, 426 Mass. 200, 205 n.1 (1997). In contrast, repeated use of the pronoun "we" is troubling. See Commonwealth v. Burts, 68 Mass. App. Ct. 684, 688–689 (2007) ("We are troubled by the prosecutor's repeated use of the pronoun 'we,' which, when considered in light of the substance of some of those statements and phrases, conveyed, at least inferentially, the prosecutor's belief or opinion about either certain evidence or the credibility of certain witnesses.").

***Disciplinary Authority*.** See Mass. R. Prof. C. 3.4(e) (2015), 3.8(i) (1999), 8.4(d) (2015); Matter of the Discipline of an Attorney, 2 Mass. Att'y Discipline Rep. 110, 112 (1980) (among other problems with closing argument, prosecutor said—as to defendant's testimony to the contrary—"believe me," no one in Chelsea is selling heroin at half price, and that "I would guess" the defendant supplemented his income by selling drugs); and Private Reprimand No. 91-21, 7 Mass. Att'y Discipline Rep. 356 (1991) (among other issues, lawyer in closing argument in administrative proceeding presented his personal opinion on merits of case).

***Improper Vouching*.** "Improper vouching occurs if 'an attorney expresses a personal belief in the credibility of a witness, or indicates that he or she has knowledge independent of the evidence before the jury.'" Commonwealth v. Ortega, 441 Mass. 170, 181 (2004), quoting Commonwealth v. Wilson, 427 Mass. 336, 352 (1998). Thus, argument based on an attorney's "own subjective assessment of the evidence is improper." Commonwealth v. Santiago, 425 Mass. 491, 498 (1997). See also Commonwealth v. Earltop, 372 Mass. 199, 203 (1977) (error for prosecutor to argue that he was "firmly convinced in [his] mind" of defendant's guilt). Cf. Commonwealth v. Kozec, 399 Mass. 514, 521 (1987) ("It is not improper to make a factually based argument that, due to the demeanor, disclosed circumstances, and appearance of a witness, a particular witness should be believed or disbelieved.").

***Plea Agreements*.** Where a plea agreement requires a witness to give truthful testimony, the prosecutor must avoid any argument that the government has special knowledge or a method to determine the witness's veracity. See Commonwealth v. Marrero, 436 Mass. 488, 501 (2002) ("[A]lthough the prosecutor was free to encourage the jury to read the [plea and immunity] agreement (especially in light of the defendants' closing arguments to the jury that [the witness] was a 'pretty street smart' witness and one who 'got her deal' under which she 'ha[d] to testify a certain way'), he should not have stated that [the witness] 'tells the truth, at least that's as far as [he] could follow it'" [footnote omitted].); Commonwealth v. Ciampa, 406 Mass. 257, 265 (1989) ("A prosecutor in closing argument may restate the government's agreement with the witness and may argue reasonable inferences from the plea agreement's requirement of truthful testimony. If, however, a prosecutor goes beyond the terms and circumstances of the plea agreement and suggests that the government has special knowledge by which it can verify the witness's testimony, reversible error may occur." [Citations omitted.]).

***Disciplinary Authority*.** See Mass. R. Prof. C. 3.4(e) (2015), 3.8(h), (i) (1999), 8.4(d) (2015); Matter of Nelson, 25 Mass. Att'y Discipline Rep. 413 (2009), available at http://perma.cc/86SC-PSRJ (among other issues with closing argument, prosecutor improperly vouched for witnesses, claiming, as to one, to have verified witness's account by following his route to crime scene and, as to other, to have "looked at" witness and seen how he had turned his life around); and Matter of the Discipline of an Attorney, 2 Mass. Att'y Discipline Rep. 110 (1980) (among other problems with closing argument, prosecutor appeared to vouch for credibility of police witnesses).

Subsection (b)(3)(C). This subsection is derived from Commonwealth v. Kozec, 399 Mass. 514, 517 (1987); Commonwealth v. Smith, 387 Mass. 900, 909–910 (1983); Commonwealth v. Shelley, 374 Mass. 466, 470 (1978); London v. Bay State Ry. Co., 231 Mass. 480, 485–486 (1919); and Commonwealth v. Vazquez, 65 Mass. App. Ct. 305, 312 (2005).

It is permissible to argue relevant inferences from the evidence, even where the subject matter is potentially gruesome or inflammatory, but care must be given not to urge the jury to go beyond the proper use of such evidence and to make a decision based on improper considerations. See Commonwealth v. Raymond, 424 Mass. 382, 389–390 (1997) ("the gruesomeness of the crimes and the suffering of the victims were relevant to the issue whether the defendant's actions constituted extreme atrocity or cruelty"). See

also Commonwealth v. Rutherford, 476 Mass. 639, 644 (2017) (improper to argue that defendant thought victim's life was worth $500 because defendant sold one of victim's television sets, among many stolen items, for $500); Commonwealth v. Cadet, 473 Mass. 173, 181 (2015) (while court emphasized that "the better practice is for the prosecutor, defense counsel, the judge, and all of the witnesses to refrain from describing the person killed as the 'victim,'" jury was likely not swayed by the use of the term). Contrast Commonwealth v. Niemic, 472 Mass. 665, 675 (2015) (emotional impact of victim's death on witnesses who saw it was not a proper matter for consideration by jury and it was improper to comment on it); Commonwealth v. Lodge, 431 Mass. 461, 470–471 (2000) (improper to argue that victim was "entitled to the right to live and [the defendant] took it"); Commonwealth v. Hamilton, 426 Mass. 67, 75 (1997) (comment that "there is no greater wrong that can be done to an individual than to deprive him of his very existence" improperly appealed to jurors' sympathies); Commonwealth v. Ward, 28 Mass. App. Ct. 292, 295 (1990) (repeated references to extent of urban crime and duty to aid law-abiding citizens was an improper appeal to emotions and fear of jury). It is improper to comment on the defendant's lack of remorse. Commonwealth v. Borodine, 371 Mass. 1, 9 (1976). "The nature of an appeal to sympathy is not so much a misstatement of evidence as an obfuscation of 'the clarity with which the jury would look at the evidence and encourage the jury to find guilt even if the evidence does not reach the level of proof beyond a reasonable doubt.'" Commonwealth v. Guy, 454 Mass. 440, 445 (2009), quoting Commonwealth v. Santiago, 425 Mass. 491, 501 (1997), cert. denied, 525 U.S. 1003 (1998). "Comments that appeal to emotions are ones that have the effect of engendering the jury's anger toward the defendant or his counsel so as to evoke an emotional rather than an intellectual response." Commonwealth v. Seng, 436 Mass. 537, 556 (2002). Words such as "brutally" and "viciously" may be used when they are apt descriptions of the evidence. Commonwealth v. Mejia, 463 Mass. 243, 254 (2012). See also Commonwealth v. Rock, 429 Mass. 609, 615 (1999) ("While the prosecutor may, in opening statement or summation, 'tell the jury something of the person whose life ha[s] been lost in order to humanize the proceedings,' the testimony of a relative may not be elicited for the sole purpose of creating sympathy" [citation omitted].).

***Disciplinary Authority*.** See Mass. R. Prof. C. 8.4(d) (2015); Matter of Nelson, 25 Mass. Att'y Discipline Rep. 413 (2009), available at http://perma.cc/86SC-PSRJ (among other problems with closing argument, prosecutor improperly implied to jury that they should avenge victim); and Admonition No. 01-03, 17 Mass. Att'y Discipline Rep. 659 (2001), available at http://perma.cc/R5FD-E5JX (prosecutor made improper appeal to jury in closing argument for sympathy for victim).

***Illustrations*.**

- ***Attacking Credibility*.** See Commonwealth v. Bishop, 461 Mass. 586, 598 (2012) (expert's billing rate is admissible as evidence of bias, and the jury may be reminded that an expert was retained by the defendant; "[b]ut it is improper for a prosecutor to suggest that an expert witness's testimony was 'bought' by a defendant or to characterize the witness as a 'hired gun' where, as here, there was no evidence that he was paid more than his customary fee"); Commonwealth v. Kee, 449 Mass. 550, 560 (2007) (prosecutor's comments in closing argument about experience of police witnesses proper to show why those witnesses should be believed and did not amount to improper vouching); Commonwealth v. Obershaw, 435 Mass. 794, 807 (2002) (permissible to call defendant a liar where there "was substantial evidence that defendant had changed his story between his statements to the police and his testimony at trial and that his account at trial strained credulity"); Commonwealth v. Olszewski, 401 Mass. 749, 760 (1988), cert. denied, 513 U.S. 835 (1994) (prosecutor is not permitted to use "police on trial" maxim); Commonwealth v. Clary, 388 Mass. 583, 592 (1983) ("prosecutor's insinuations regarding the defendant's sexual preference clearly were likely to instigate prejudice against her").
- ***Resort to Stereotypes*.** Both prosecutors and defense counsel should refrain from what is termed "broad brushing" or arguments based on racial, ethnic, or gender stereotypes. See Commonwealth v. Murchison, 35 Mass. App. Ct. 269, 275 (1993), and cases cited. See also Commonwealth v. Rosario, 430 Mass. 505, 515–516 (1999) (describing defendant as a "monster"); Commonwealth v. Saunders, 75 Mass. App. Ct. 505, 511–512 (2009) (describing defendant as "[s]wooping down like a vulture").

– ***No Motive to Lie*.** There is no per se rule against a prosecutor's comment that a witness has no motive to lie when it is based on the evidence and is understood as a retaliatory reply to a defense attack on the credibility of the witness. See Commonwealth v. Smith, 450 Mass. 395, 408 (2008); Commonwealth v. Helberg, 73 Mass. App. Ct. 175, 179 (2008). If defense counsel challenges the credibility of the alleged victim in his or her closing argument, the prosecutor may invite the jury to consider whether the witness has a motive to lie and may identify the evidence that demonstrates the accuracy and reliability of the witness's testimony. See Commonwealth v. Polk, 462 Mass. 23, 39–40 (2012). Compare Commonwealth v. Ramos, 73 Mass. App. Ct. 824, 826 (2009) ("prosecutor may not . . . suggest to the jury that a victim's testimony is entitled to greater credibility merely by virtue of her willingness to come into court to testify"), with Commonwealth v. Pina, 430 Mass. 266, 269 (1999) (where there is evidence of a witness's fear of testifying, "a prosecutor may argue that it took 'courage' or 'character' for a witness to testify").

– ***Reference to Damages*.** In a civil case, "[a]n argument concerning money damages indulging in significant references to numerical amounts that have no basis in the record is improper. Repeated, substantive discussions of hypothetical damages in other circumstances, and especially references to verdicts in other cases, are not proper." Harlow v. Chin, 405 Mass. 697, 704 (1989).

– ***Justice to the Victim*.** In Commonwealth v. Niemic, 472 Mass. 665 (2015), the Supreme Judicial Court addressed appealing to the jury for justice for the victim:

> "It is improper for a prosecutor to characterize a criminal trial as a dispute between a deceased victim on the one hand, and the defendant on the other, and to exhort the jury to dispense justice *evenly* between them. The deceased is not a party to th[e] case. A criminal trial places the interests of the Commonwealth and the defendant against one another. An argument that asks the jury to give justice to the victim is an improper appeal to sympathy for the victim."

Id. at 676, citing Commonwealth v. Drumgold, 423 Mass. 230, 253 (1996).

Subsection (b)(3)(D). This subsection is derived from Commonwealth v. Finstein, 426 Mass. 200, 205 n.1 (1997), where the court cautioned against so-called "Golden Rule" arguments in which jurors are asked to place themselves or a relative in the shoes of a party, witness, or victim, and against defense counsel asking jurors to put themselves or a relative in the shoes of the defendant. See also Commonwealth v. Bizanowicz, 459 Mass. 400, 420 (2011); Commonwealth v. Valentin, 420 Mass. 263, 274 (1995) ("The prosecutor's suggestion, in effect that the jurors put themselves in the shoes of the two witnesses, was poorly phrased, and the argument should not have been made.").

Subsection (b)(3)(E). This subsection is derived from Commonwealth v. Amirault, 404 Mass. 221, 240 (1989). See Doyle v. Ohio, 426 U.S. 610, 618–619 (1976) (defendant's post-Miranda silence cannot be used against him), and Griffin v. California, 380 U.S. 609, 615 (1965) (defendant's decision not to testify at trial cannot be used against him).

***Misstatements of Law*.** For the rule that a party may not make misstatements of law, see Commonwealth v. Scesny, 472 Mass. 185, 202 (2015) (error for prosecutor to repeatedly characterize admitted defense evidence related to third-party defense as "irrelevant and immaterial 'information,' unworthy of even being called 'evidence'"); Commonwealth v. Bins, 465 Mass. 348, 367 (2013); Commonwealth v. Morales, 461 Mass. 765, 783 (2012) ("We agree with the defendant that the prosecutor erroneously misstated the law of deliberately premeditated murder during his closing argument by improperly suggesting that on that theory of murder only an intent to kill was required to be proved."); Commonwealth v. Weaver, 400 Mass. 612, 615–616 (1987) (error for prosecutor to argue that his duty was to present all the evidence and to assist jury to discover the truth, whereas function of defense counsel was to create doubts in minds of the jury); Commonwealth v. Killelea, 370 Mass. 638, 646 (1976) (misstatement of meaning of not guilty by reason of insanity); and Commonwealth v. Pagano, 47 Mass. App. Ct. 55, 62 (1999) (misstatement of presumption

of innocence). In particular, a party should not attempt to define "reasonable doubt." Commonwealth v. Snow, 30 Mass. App. Ct. 443, 447 (1991).

Although a party may not misstate principles of law, the party must be allowed to "argue the law as applied to the evidence." Bloom v. Town Taxi, Inc., 336 Mass. 78, 80 (1957) (new trial required where judge refused to allow the plaintiffs to "argue the law as applied to the evidence"; refusal "impaired the right of the plaintiffs to have their cases fully presented to the jury").

Shifting the Burden of Proof. Counsel may not make any statement that shifts the burden of proof. Commonwealth v. Johnson, 463 Mass. 95, 112 (2012), quoting Commonwealth v. Amirault, 404 Mass. 221, 240 (1989) ("As a general rule, a 'prosecutor . . . cannot make statements that shift the burden of proof from the Commonwealth to the defendant.'"). See Commonwealth v. Silva, 471 Mass. 610, 622–623 (2015) (permissible for prosecutor to state that "there is not a scintilla of evidence to support [the proposition that the defendant was merely present,]" because statement was "directed at the defendant's defense and not at the defendant's failure to testify"); Commonwealth v. Trinh, 458 Mass. 776, 787 (2011) (prosecutor engaged in burden shifting when he suggested that defendant had "an affirmative duty to bring forth evidence of his innocence, thereby lessening the Commonwealth's burden to prove every element of a crime"); Commonwealth v. Miranda, 458 Mass. 100, 117 (2010) ("To the extent that the [prosecutor's] remarks may have implied the unstated observation that . . . the defendant left the balance of the Commonwealth's evidence from these witnesses uncontested, this indirect implication does not approach the sort of burden shifting that results from direct comment on a defendant's failure to contradict testimony"); Commonwealth v. Stewart, 454 Mass. 527, 539–540 (2009) (no burden shifting where prosecutor stated "[t]here may be no trace evidence that places [the defendant] there . . . but there is nothing that excludes him from being there; that proves he wasn't there"); Commonwealth v. Montez, 450 Mass. 736, 747 (2008) ("The prosecutor's statement that defense counsel never addressed the evidence about . . . incidents was not a comment on the defendant's failure to present evidence, and it did not impermissibly shift the burden of proof to the defendant"); Commonwealth v. Silanskas, 433 Mass. 678, 700 (2001) ("[T]he Commonwealth may not comment on the defendant's failure to produce evidence."); Commonwealth v. Feroli, 407 Mass. 405, 408–409 (1990) ("A prosecutor is entitled to emphasize the strong points of the Commonwealth's case and the weaknesses of the defendant's case, even though he may, in so doing, prompt some collateral or passing reflection on the fact that the defendant declined to testify."); Commonwealth v. Ayoub, 77 Mass. App. Ct. 563, 567 (2010) ("We do not conclude, as the defendant proposes, that these statements amounted to improper personal comment on the defendant's credibility and suggested that the defendant had failed to prove his innocence. Rather, they constitute commentary on the weakness of the defendant's case.").

Denigration of Constitutional Rights. A prosecutor may not ask the finder of fact to infer guilt based on the defendant's exercise of a constitutional right. See Commonwealth v. Cook, 419 Mass. 192, 203 (1994) (improper for prosecutor to argue that "jury should 'not be intimidated by the phrase "beyond a reasonable doubt"'"); Commonwealth v. Thomas, 401 Mass. 109, 113 (1987), quoting Commonwealth v. Smith, 387 Mass. 900, 903 (1983) ("We reiterate that '[l]awyers shall not and must not misstate principles of law nor may their summations infringe or denigrate constitutional rights.'"); Commonwealth v. Person, 400 Mass. 136, 141 (1987) (prosecutor may not ask jury to draw inference of guilt from defendant's exercise of right to advice of counsel); Commonwealth v. Hanino, 82 Mass. App. Ct. 489, 498 (2012), quoting Commonwealth v. Haraldstad, 16 Mass. App. Ct. 565, 574 (1983) ("Although it would have been preferable had the prosecutor avoided the word 'rehearsed,' there is a qualitative difference between implying that it is improper for counsel to prepare a witness and 'casting doubt on testimony by calling attention to extraordinary parallels between what a group of witnesses who could talk to each other have said on the stand'" [citation omitted].); Commonwealth v. Hughes, 82 Mass. App. Ct. 21, 29–31 (2012) ("plain error" for prosecutor to suggest in "closing argument that the jury could conclude that the Commonwealth's case was strong, because the defendant chose to put on witnesses even though he had no obligation to do so"); Commonwealth v. Dodgson, 80 Mass. App. Ct. 307, 314 (2011) ("A prosecutor should generally avoid using the term 'rehearse' because it may impinge on the defendant's right to prepare for trial."); Commonwealth v. Youngworth, 55 Mass. App. Ct. 30, 39–40 (2002) (prosecutor's statements were "not reasonably construable as 'inferentially attack[ing] the defendant for asserting his right to trial' or 'calling on the jury to punish him for exercising that right'").

Uncontradicted or Uncontested Evidence. The Supreme Judicial Court has stated that

> "[r]eferences to material facts as uncontradicted or uncontested invariably approach the border of the forbidden territory of speculation regarding the absence of testimony by the defendant. 'A claim that certain evidence is uncontested should be made with caution and only after careful reflection concerning the specific circumstances in which the defendant could have produced contradictory evidence.'"

Commonwealth v. Buzzell, 53 Mass. App. Ct. 362, 366–367 (2001), quoting Commonwealth v. Hawley, 380 Mass. 70, 83–84 (1980). See also Commonwealth v. Wilson, 443 Mass. 122, 132 (2004); Commonwealth v. Borodine, 371 Mass. 1, 10 (1976), cert. denied, 429 U.S. 1049 (1977) (prosecutor's references to facts as "uncontested" were improper because the defendant was the only person who could contradict them).

Commenting on Criminal Defendant's Silence or Testimony. Except in rare circumstances, the prosecutor may not comment on the defendant's invocation of his or her right to silence. Thus, a prosecutor may not make any statement that is "reasonably susceptible" of being interpreted as a comment on a defendant's decision not to testify. Commonwealth v. Pena, 455 Mass. 1, 19 (2009); Commonwealth v. Botelho, 87 Mass. App. Ct. 846, 853 (2015). Compare Commonwealth v. Beneche, 458 Mass. 61, 75–76 (2010) (prosecutor should not have mentioned defendant's statement, "I don't want to talk about it," because "a defendant's statements about his desire not to speak with police may suggest to the jury that the defendant is guilty simply because he chose to exercise his constitutional right to silence"), and Commonwealth v. Brum, 438 Mass. 103, 121 (2003) ("It does not appear that there was any need to resort to the defendant's invocation of his right to remain silent as a method of explaining any abrupt end to either interview, or any other permissible basis for admitting evidence of the defendant's refusal to answer further questions."), with Commonwealth v. Torres, 442 Mass. 554, 578 (2004) ("[W]e have recognized that, in some rare circumstances, a defendant's invocation of his right to remain silent may be presented to the jury in order to avoid juror confusion about why an interview ended abruptly"), and cases cited; Commonwealth v. Caputo, 439 Mass. 153, 166 (2003) ("prosecutor's reference in his closing statement to the defendant's invocation of his right to remain silent was permissible" because "defense counsel elicited [invocation], and because in his closing argument the prosecutor referred to the statement solely to challenge the defendant's claim of coercion"); and Commonwealth v. Martinez, 431 Mass. 168, 183 (2000) (although errors and prosecutorial misconduct occurred, considered individually and collectively, errors did not create substantial likelihood of miscarriage of justice). A prosecutor's comments on "omissions" in the defendant's statement to the police following the defendant's receipt of Miranda warnings are not improper comments on the defendant's silence. See Commonwealth v. Lodge, 89 Mass. App. Ct. 415, 419 (2016).

In Commonwealth v. McCray, 40 Mass. App. Ct. 936, 937 (1996), the Appeals Court found that the Commonwealth properly conceded that the "prosecutor erred when he argued that the defendant had 'the benefit of [the complainant's] testimony over the course of the two days' and 'was able to conform her story with that.'" The Supreme Judicial Court has since explained that such comments are not necessarily improper. See Commonwealth v. Gaudette, 441 Mass. 762, 767 (2004) ("[A] prosecutor may, if there is a basis in the evidence introduced at trial, attack the credibility of a defendant on the ground that his testimony has been shaped or changed in response to listening to the testimony of other witnesses."). See also Commonwealth v. Mendez, 476 Mass. 512, 521–522 (2017) (prosecutor permissibly argued that defendant conformed his trial testimony to Commonwealth's evidence at trial when his initial statement to police officers on night of incident was different from his testimony at trial). The propriety of such a comment may depend on whether the defendant made a pretrial statement to police. See Commonwealth v. Person, 400 Mass. 136, 138–143 (1987) (prosecutor impermissibly commented on defendant's right to remain silent when he stated that the defendant, who had not made a statement prior to trial, sat through prosecutor's presentation at trial and fabricated a story that countered prosecution's theory of case).

Prearrest Silence. "[I]mpeachment of a defendant with the fact of his pre-arrest silence should be approached with caution, and, whenever it is undertaken, it should be prefaced by a proper demonstration that it was 'natural' to expect the defendant to speak in the circumstances"; "the use of [pretrial silence] for impeachment purposes cannot be justified in the absence of unusual circumstances." Commonwealth v. Nickerson, 386 Mass. 54, 62 & n.6 (1982). Compare Commonwealth v. Womack, 457 Mass. 268, 277–278

(2010) ("The defendant's silence in response to [the lieutenant's] query into his reason for standing outside the store for two seconds without entering was not an exercise of his right to remain silent, but a failure to respond to a particular question. As such it was admissible in evidence, and subject to comment" [citation omitted].), and Commonwealth v. Thompson, 431 Mass. 108, 118 (2000) ("[T]he prosecutor here did not comment on the defendant's failure to proclaim his innocence, but rather on his failure to ask appropriate questions that an innocent party would ordinarily ask. The defendant did not invoke at any time his right to stop the questioning and be silent. Instead, the defendant agreed to give a far-ranging statement over several hours. It was therefore proper for the prosecutor to comment on the fact that the defendant did not ask appropriate questions."), with Commonwealth v. Haas, 373 Mass. 545, 558–559 (1977) (prosecutor's comments, asking jury to infer guilt from fact that defendant had not spontaneously volunteered his innocence during interrogation by police, were improper).

***Statements Concerning the Role of the Jury*.** A prosecutor may not make any comment that could be interpreted to suggest that jurors have a duty to convict. Commonwealth v. Miller, 457 Mass. 69, 79–80 (2010); Commonwealth v. Francis, 450 Mass. 132, 140 (2007). Neither party may suggest that jurors may need to explain the verdict. Commonwealth v. Quinn, 61 Mass. App. Ct. 332, 334–335 (2004). "It [is] also inappropriate for the prosecutor to tell the jurors that they [are] the 'conscience of the community.' They bear no such burden; their role in a trial is limited to finding the facts on the basis of the evidence dispassionately and impartially." Commonwealth v. Mathews, 31 Mass. App. Ct. 564, 573 (1991), cert. denied sub nom. Mathews v. Rakiey, 504 U.S. 922 (1992). See also Commonwealth v. Scesny, 472 Mass. 185, 200 (2015) ("prosecutor's characterization of his role as representing the 'citizens' ran the risk of suggesting that the prosecutor was representing the jurors-as-citizens against the defendant, and in that way misrepresenting or at least confusing the jurors' actual role as neutral fact finders"). A party should not discuss the consequences of a verdict with jury. See Commonwealth v. Duguay, 430 Mass. 397, 404 (1999) ("clearly error for the prosecutor to address the issue of punishment" with the jury); Commonwealth v. Ruddock, 428 Mass. 288, 292–293 (1998) ("Of course, a prosecutor should not argue to the jury that, if found not guilty by reason of insanity, a defendant will be released."). Finally, while jurors may be encouraged to examine the physical evidence, it is improper to suggest that they should conduct outside experiments or investigation. See Commonwealth v. Beauchamp, 424 Mass. 682, 691 (1997) ("the prosecutor should not encourage the jury to conduct experiments or to obtain outside information of any sort").

***Disciplinary Authority*.** See Mass. R. Prof. C. 8.4(d) (2015) and Admonition No. 05-04, 21 Mass. Att'y Discipline Rep. 671 (2005), available at http://perma.cc/Y8R2-ZWEJ (among other issues, prosecutor, without court authorization, improperly commented during closing on defendant's failure to call a witness).

***Prosecutor's Comment on Defendant's Courtroom Appearance or Conduct*.** The appearance and demeanor of a person in a courtroom is evidence even if the person does not take the stand. See Commonwealth v. Roderick, 411 Mass. 817, 819 (1992) (mentally retarded victim who did not testify); Commonwealth v. Smith, 387 Mass. 900, 907 (1983) (defendant who did not testify); Commonwealth v. Houghton, 39 Mass. App. Ct. 94, 100 (1995) (victim who did testify). In a criminal case, "a prosecutorial argument that the jury should draw inferences against a defendant who did nothing but behave properly in the courtroom is improper." Commonwealth v. Young, 399 Mass. 527, 531 (1987) (reversal based on this improper comment by prosecutor: "Did you notice how he just sits there stone-faced, cool, never blinks an eye, doesn't get upset about anything? He's very in control. He doesn't show his emotions when he doesn't want to, does he?"); Commonwealth v. Kozec, 399 Mass. 514, 523 (1987) (unfair and improper for prosecutor to comment that "the defendant looked sorry when the victim testified because she knew the truth about what happened between them would come out"). See also Commonwealth v. Valliere, 366 Mass. 479, 494–495 (1974) (improper for prosecutor to suggest that defendant demonstrates consciousness of guilt by reading transcripts or suggesting questions to counsel). Contrast Commonwealth v. Cohen, 412 Mass. 375, 385–386 (1992); Commonwealth v. Pina, 406 Mass. 540, 548 (1998) (where evidence showed that defendant changed his hairstyle and shaved his mustache soon after crime, proper for prosecutor to pose argument during closing about why a person would do that); Commonwealth v. Smith, 387 Mass. 900, 907 (1983) (prosecutor's comments about defendant's demeanor during trial, including that he was "smirking," "laughing," and "squirming," were permissible where jury was entitled to observe demeanor of defendant

and prosecutor did not suggest he had knowledge that jury did not share); Commonwealth v. Rogers, 43 Mass. App. Ct. 782, 787 (1997) (proper to refer to defendant's size in comparison to size of victim).

***Use of Rhetorical Questions*.** Rhetorical questions are not per se impermissible. See Commonwealth v. Grant, 418 Mass. 76, 83 (1994), quoting Commonwealth v. Smallwood, 379 Mass. 878, 892 (1980) (It is "well settled that a prosecutor may ask the jury rhetorical questions that touch on the defendant's constitutional right not to incriminate himself without violating that right provided the questions are not 'of such a nature that a jury would naturally and necessarily construe them to be directed to the failure of the defendant to testify.'"); Commonwealth v. Habarek, 402 Mass. 105, 111 (1988) (no error in prosecutor asking rhetorically and in reference to motive, "Why? Why does a person do that?"); Commonwealth v. Lawton, 82 Mass. App. Ct. 528, 541–542 (2012); Commonwealth v. Flint, 81 Mass. App. Ct. 794, 807 (2012) ("In the face of . . . direct assertions of evidence of improper motives underlying the victim's accusations, it was fair for the prosecutor to reply by asking the jury rhetorically, 'Why would a person make up something like this? What is the motive to fabricate? Are they being honest? Are they responsive to questions? Are they being direct? Do they appear to be forthcoming? Do they appear to be genuine? Do they sound as if they are giving contrived answers?'"). See also Commonwealth v. Nelson, 468 Mass. 1, 12–13 (2014) (rhetorical question did not shift burden of proof to defendant).

Subsection (b)(3)(F). This subsection is derived from Fyffe v. Massachusetts Bay Transp. Auth., 86 Mass. App. Ct. 457, 478 (2014). "Jury nullification is inconsistent with a jury's duty to return a guilty verdict of the highest crime proved beyond a reasonable doubt." Commonwealth v. Kirwan, 448 Mass. 304, 319 (2007). See Commonwealth v. Fernette, 398 Mass. 658, 670–671 n.23 (1986) ("We recognize that jurors may return verdicts which do not comport with the judge's instructions. We do not accept the premise that jurors have a right to nullify the law on which they are instructed by the judge, or that the judge must inform them of their power."). Counsel should avoid any reference to the appellate process. Commonwealth v. Finstein, 426 Mass. 200, 205 n.1 (1997).

Subsection (c). This subsection is derived from Commonwealth v. Johnson, 374 Mass. 453, 458 (1978) (objection to closing argument not made until close of judge's final instructions is ordinarily not timely to preserve issue for appellate review), and Commonwealth v. Beaudry, 445 Mass. 577, 587 (2005) (timely objection to an improper closing argument followed by "focused, particularized [curative] instructions" is not sufficient to preserve for appeal the issue of adequacy of the instructions to cure the improper argument where defense counsel acquiesced in the curative instruction). See Harlow v. Chin, 405 Mass. 697, 706 (1989) (if judge fails to cure alleged error, counsel must bring judge's attention to alleged errors and omissions at end of charge).

Subsection (d). This subsection is derived from Commonwealth v. Witschi, 301 Mass. 459, 462 (1938); O'Neill v. Ross, 250 Mass. 92, 96–97 (1924); Posell v. Herscovitz, 237 Mass. 513, 514–515 (1921); and Commonwealth v. Truong, 34 Mass. App. Ct. 668, 671 (1993). The judge is "the directing and controlling mind at the trial, and not a mere functionary to preserve order and lend ceremonial dignity to the proceedings." Whitney v. Wellesley & Boston St. Ry. Co., 197 Mass. 495, 502 (1908). See also Beit v. Probate & Family Ct. Dep't, 385 Mass. 854, 859 (1982); Sussman v. Commonwealth, 374 Mass. 692, 697 (1978). In discussing the duty of the judge in the circumstances of Commonwealth v. Cabot, the Supreme Judicial Court stated as follows:

> "It was the duty of the judge to emphasize the fact that the argument [by the prosecutor] had been grossly improper, to point out in plain, unmistakable language the particulars in which it was unwarranted and to instruct the jury to cast aside in their deliberations the improper considerations that had been presented to them, using such clear and cogent language as would correct the obviously harmful effect of the argument."

Commonwealth v. Cabot, 241 Mass. 131, 150–151 (1922). See also Commonwealth v. Pearce, 427 Mass. 642, 646 (1998) (trial judges have authority to interrupt "any argument" not "based solely on the evidence and all inferences therefrom"); Rolanti v. Boston Edison Corp., 33 Mass. App. Ct. 516, 529 (1992) ("It is well established under our practice that a trial judge must take 'rigorous and emphatic action' to counteract

prejudicial statements made in front of the jury."). A judge has "considerable latitude" in the "choice of methods" to correct improper argument. Commonwealth v. Watson, 377 Mass. 814, 823 (1979), quoting Commonwealth v. Clark, 3 Mass. App. Ct. 481, 488 (1975). See Commonwealth v. Montecalvo, 367 Mass. 46, 56 (1975) (judge may guard against improper arguments by stopping counsel, instructing jury to disregard such an argument, or by combining both methods).

***Responses to Improper Argument*.** For examples of proper responses to improper argument, see Rivera v. Club Caravan, Inc., 77 Mass. App. Ct. 17, 21 (2010) (trial judge was appropriately specific and forceful in instructing jury to disregard reference in opening statement to blood alcohol level that would not be admitted in evidence); Salter v. Leventhal, 337 Mass. 679, 698 (1958); and Hart v. Morris & Co., 259 Mass. 211, 215 (1927). A judge may not limit closing arguments to the line of thought that the judge believes will prevail or is most consistent with the evidence. O'Driscoll v. Lynn & Boston R.R., 180 Mass. 187, 190 (1902). See also Gath v. M/A-Com, Inc., 440 Mass. 482, 495 (2003) (judge's instruction sufficient to correct improper argument on damages); Commonwealth v. Cutty, 47 Mass. App. Ct. 671, 675–676 (1999) (judge must not prevent party from making relevant arguments that are based on evidence and fair inferences from evidence).

> "[A] judge need take no vow of silence. He is there to see that justice is done, or at least to see that the jury have a fair chance to do justice. . . . The judge ought not to let the jury be diverted from the real issue. The skill of counsel must not be allowed to mislead the jury by raising false issues or by appeals to emotion and prejudice. . . . It is not always easy for a judge to see his duty clearly. But a first-rate trial judge will find and tread the narrow path that lies between meddlesomeness on the one hand and ineffectiveness and impotence on the other."

Commonwealth v. Brown, 462 Mass. 620, 632 (2012), quoting Commonwealth v. Haley, 363 Mass. 513, 519 (1973).

***Preventative Measures*.** There are several practical steps that judges may take to minimize the risk of error in closing arguments. One practice is to conduct a pre–closing argument conference to address the boundary lines of proper argument and any questions counsel may have. Commonwealth v. Finstein, 426 Mass. 200, 205 n.1 (1997). A judge also may wish to give a cautionary instruction to the jury before closing argument. See Commonwealth v. Olmande, 84 Mass. App. Ct. 231, 239–243 (2013) (Agnes, J., concurring).

Section 1114. Restitution

(a) Nature and Extent of Remedy. Restitution is a judicially determined penalty in the form of money or services imposed against the defendant in a criminal case or a juvenile in a delinquency case for the benefit of the victim of a crime. A judge may order restitution as a condition of probation provided that the judge finds, or the parties, in consultation with the probation department, agree, that (1) the victim has suffered economic loss that is causally related to the defendant's criminal conduct, (2) the award does not exceed the victim's economic loss, and (3) the defendant has the ability to pay the money or perform the services.

(b) Procedural Requirements. The defendant has the right to counsel and the right to be heard at a restitution hearing. Cross-examination of the victim is limited to the issue of restitution and does not extend to matters concerning guilt or innocence. Hearsay is admissible, but an award of restitution cannot rest entirely on unsubstantiated and unreliable hearsay. The Commonwealth has the burden of proving both a causal connection between the crime and the victim's economic loss and the amount of the loss by a preponderance of the evidence.

(c) Judicial Determination. The amount of restitution ordered by the court must be based on evidence presented to the court or on a stipulation by the parties. The judge must determine (1) the amount of actual economic loss proved, (2) the appropriate length of the probation period, and (3) the defendant's maximum monthly ability to pay. The defendant bears the burden of proving an inability to pay.

NOTE

Subsection (a). This subsection is derived from Commonwealth v. Henry, 475 Mass. 117 (2016); Commonwealth v. Denehy, 466 Mass. 723 (2014); Commonwealth v. McIntyre, 436 Mass. 829 (2002); Commonwealth v. Malick, 86 Mass. App. Ct. 174 (2014); and Commonwealth v. Avram A., 83 Mass. App. Ct. 208 (2013). See also G. L. c. 258B, § 1 (defining restitution as "money or services which a court orders a defendant to pay or render to a victim as part of the disposition"). Restitution is an "entirely judicially determined penalty" that is separate and distinct from "punishments such as imprisonment and fines that are accompanied by statutory prescriptions." Commonwealth v. Denehy, 466 Mass. at 737. There is no right to trial by jury in connection with an order for restitution. Commonwealth v. Nawn, 394 Mass. 1, 8–9 (1985).

In Commonwealth v. McIntyre, the court explained that to establish a nexus between the defendant's criminal conduct and the victim's loss, the Commonwealth must prove that the "loss . . . is causally connected to the offense and bears a significant relationship to the offense. . . . [W]e look to the underlying facts of the charged offense, not the name of the crime [of which the defendant was convicted or] to which the defendant entered a plea." Commonwealth v. McIntyre, 436 Mass. at 835. The court's power to award restitution in criminal cases is "unquestionable" and derives from a judge's power to order conditions of probation under G. L. c. 276, §§ 87 and 87A, and G. L. c. 279, § 1. Commonwealth v. Denehy, 466 Mass. at 737. In Denehy, the Supreme Judicial Court rejected the argument that the constitutional principle that requires that certain factual determinations relating to sentencing must be found by a jury beyond a reasonable doubt does not apply to an award of restitution. Id. at 737–738. Restitution may not be ordered to reward anyone or to create an incentive for the dismissal of criminal charges. Commonwealth v. Rotonda, 434 Mass. 211, 221 (2001). Cf. G. L. c. 276, § 55 (accord and satisfaction). Restitution may be ordered as a condition of probation in the case of a conviction or a continuance without a finding. Commonwealth v. Rotonda, 434 Mass. at 221–222. An order of restitution is distinct from an order that the defendant pay the costs of the prosecution. See G. L. c. 280, § 6 (all such payments go to the Commonwealth not the victim). It is not necessary that the victim of a crime file a claim with an insurer to be eligible for restitution. Commonwealth v. Williams, 57 Mass. App. Ct. 917 (2003) (rescript).

The nexus between the defendant's criminal conduct and the economic loss suffered by the victim does not require proof of every element of each crime with which the defendant is charged. Instead, the Commonwealth must establish "a significant causal relationship" between the facts admitted by the defendant or that form the basis of the crimes of which he or she is convicted and the economic losses suffered by the victim. See Commonwealth v. Denehy, 466 Mass. at 723 (There was a sufficient nexus between the defendant's conviction for assault by means of a dangerous weapon and disorderly conduct and damage to the eyeglasses of the police officer attacked by the defendant even though the defendant was found not guilty of the charge of assault and battery on a police officer.); Commonwealth v. McIntyre, 436 Mass. at 835 (There was a sufficient causal relationship between damage to the victim's automobile and the defendant's conviction for stabbing the victim because, after the stabbing, the defendant returned to the scene and set his dog on the victim; eventually, as the victim retreated to his car to avoid the ongoing assault, the defendant kicked the victim's car door and fender.); Commonwealth v. Palmer P., 61 Mass. App. Ct. 230, 232 (2004) (Although the juvenile was found not delinquent of larceny, the facts related to the delinquency finding on the charge of breaking and entering during the daytime with intent to commit a felony was sufficient to support an order for restitution to the victim in the amount of $1,000 for the loss of his personal property.). But see Commonwealth v. Casanova, 65 Mass. App. Ct. 750, 750 (2006) (The evidence was not sufficient to establish a causal relationship between the victim's injuries as a result of being struck in the face and stomach by the defendant and the victim's decision one month later to withdraw from college, which

caused him to incur a loss of $8,046 in tuition he had paid, although the court indicated that medical expenses, court-related travel expenses, property loss and damage, lost pay, and lost vacation days required to be used to attend court might be compensable as restitution.).

The Commonwealth must prove that the defendant's criminal conduct is the cause in fact of the victim's economic loss, and that such loss was a reasonably foreseeable consequence of the defendant's conduct. Negligent acts of the victim or a third party that occur after the defendant's criminal conduct do not necessarily break the causal connection between the defendant's criminal conduct and the victim's economic loss underlying an order of restitution. Commonwealth v. Buckley, 90 Mass. App. Ct. 177, 184 (2016) (due to miscommunication, victim was not notified for several months that police had recovered his vehicle and in interim had purchased replacement vehicle; negligence by third party did not break causal connection).

In Commonwealth v. Avram A., 83 Mass. App. Ct. 208 (2013), an order to pay restitution in the amount of $1,063.78 against a twelve-year-old juvenile who had admitted to sufficient facts for a delinquency finding was upheld, along with an order extending the juvenile's probation as a sanction for nonpayment of the restitution. The public policy of the Commonwealth favors the award of restitution to victims of crime "to the greatest extent possible." G. L. c. 258B, § 3. "There is no question that restitution is an appropriate consideration in a criminal sentencing." Commonwealth v. Nawn, 394 Mass. 1, 6 (1985), citing Novelty Bias Binding Co. v. Shevrin, 342 Mass. 714, 717 (1961). See also G. L. c. 276, § 92A (providing that upon conviction of any one of enumerated offenses, defendant is required to pay restitution "for any financial loss sustained by the victim of his crime, his dependents or an insurer").

Subsection (b). This subsection is derived from Commonwealth v. Denehy, 466 Mass. 723 (2014); Commonwealth v. Nawn, 394 Mass. 1, 6–8 (1985); and Commonwealth v. Casanova, 65 Mass. App. Ct. 750, 755–756 (2006). See Commonwealth v. Avram A., 83 Mass. App. Ct. 208 (2013) (in case involving two incidents of tagging, upholding restitution order based in part on estimates of cost of repairs made by examining photographs of damage); Commonwealth v. Williams, 57 Mass. App. Ct. 917 (2003) (rescript) (repair cost estimates by various vendors for damage to glass in building and vehicle rather than actual costs for repairs was sufficient to support award of restitution). The victim has the right to assistance from the prosecutor in documenting and obtaining restitution. See G. L. c. 258B, § 3(e). The prosecutor may offer testimony from the victim and expert witness testimony.

There is no right to a trial by jury in connection with an order for restitution. Commonwealth v. Nawn, 394 Mass. at 8–9.

Strict evidentiary rules are not imposed at a restitution hearing. Commonwealth v. Molina, 476 Mass. 388, 407 (2017). The defendant has a presumptive right to call witnesses, but the trial judge has the discretionary authority not to require a victim to testify, and to preclude the defendant from calling the victim as a witness, if the judge determines that the interest of insulating the victim from further trauma overcomes the defendant's presumptive right to call the victim.

> "In particular, in determining whether the countervailing interests overcome the presumption after considering the totality of the circumstances, the judge conducting a restitution hearing should consider whether, based on an individualized assessment of the proposed witness, there is an unacceptable risk that the witness's physical, psychological, or emotional health would be significantly jeopardized if the witness were required to testify in court at the probation hearing."

Id. at 407–408.

Subsection (c). This subsection is derived from Commonwealth v. Henry, 475 Mass. 117 (2016). The Commonwealth bears the burden of proving that the victim's actual economic loss is causally connected to defendant's crime by a preponderance of the evidence. Id. at 121. The length of probation supervision imposed at the time of the sentence should not be based on the financial ability of the defendant but on the amount that will serve the dual goals of rehabilitation and protection of the public. Id. at 125. If the only basis for imposing probation is to collect restitution, the period of probation may be only for a brief period of time, thirty or sixty days. Id. at 125 n.8. Factors to be considered in determining the defendant's ability to pay are

the financial resources of the defendant, including income and net assets, and defendant's financial obligations such as food, shelter, and clothing for the defendant and any dependents. Id. at 126. A payment order made as a condition of probation may not "cause a defendant a substantial financial hardship." Id. at 127. Restitution as a condition of probation is established at the monthly amount the defendant is able to pay multiplied by the number of months of probation, but no more than the actual economic loss. Id. at 125. Where the victim is a retailer, economic loss is based on the wholesale, not retail, price, unless the Commonwealth proves the items "would have been sold were they not stolen." Id. at 129.

Probation can be revoked or extended only upon a finding that the failure to pay the restitution amount was wilful and that there was an ability to pay. Id. at 121.

Section 1115. Evidentiary Issues in Care and Protection and Termination of Parental Rights Cases

(a) General Rule. Evidence in child protective cases—both parental unfitness and termination of parental rights (TPR) proceedings—is admissible according to the rules of the common law and the Massachusetts General Laws.

(b) Official/Public Records and Reports.

(1) Probation Records, Including Criminal Activity Record Information (CARI). Adult probation records, including CARI, are official records that are admissible as evidence of a parent's character. Juvenile delinquency probation records are inadmissible in care and protection cases by operation of statute.

(2) Department of Children and Families (DCF) Records and Reports.

(A) G. L. c. 119, § 51A**, Reports.** Section 51A reports are admissible for the limited purpose of providing background information.

(B) G. L. c. 119, § 51B**, Investigation Reports.** Primary facts contained in Section 51B investigations are admissible. Statements of opinion, conclusions, and judgment contained in these reports are not admissible.

(C) DCF Service Plans, Affidavits, Foster Care Review Reports, Case Review Reports, and Family Assessments. Primary facts contained in these DCF records are admissible as official records. Assessments prepared by private entities under contract with the DCF also are admissible as official records.

(D) DCF Social Worker Investigation Reports. Reports of investigations into the facts of a child welfare case generated by DCF social workers generally are admissible under G. L. c. 119, § 21A, as official records. Parties seeking to challenge the contents of a Section 21A report must be afforded the opportunity to cross-examine the author should they request to do so.

(3) Drug and Alcohol Treatment Records. Drug and alcohol treatment records are confidential under State and Federal law. Such records may, however, be released to the parties by judicial order after application showing good cause therefor, including the need to avert a substantial risk of death or serious bodily harm, which specifically includes incidents of suspected child abuse and neglect.

(4) School Records. School records generally are admissible as official records, with the exception of records of clinical history and evaluations of students with special needs.

(5) Police Reports. Police reports regarding police responses are admissible as business records insofar as the report is a record of the police officers' firsthand observations. Opinions and evaluations are not admissible. Hearsay statements within the report generally are not admissible unless the statement satisfies another hearsay exception.

(c) Written Court Reports.

(1) Court Investigation Reports. Written reports of court-appointed investigators are admissible.

(2) Guardian Ad Litem (GAL) Reports. Written guardian ad litem reports may properly be admitted into evidence and are entitled to such weight as the court sees fit to give them.

(3) Court-Appointed Special Advocate (CASA) Reports. Written CASA reports may properly be admitted into evidence and are entitled to such weight as the court sees fit to give them.

(4) Court-Ordered Psychiatric, Psychological, and Court Clinic Evaluation Reports. Written psychiatric, psychological, and Court Clinic evaluation reports generally are not admissible in evidence.

(d) Children's Out-of-Court Statements.

(1) Statements Not Related to Sexual Abuse. Out-of-court statements made by children to social workers, teachers, experts, and evaluators, which statements are not related to sexual abuse, are admissible if they fall within an established exception to the hearsay rule.

(2) Statements Related to Sexual Abuse.

(A) Cases Involving TPR. An out-of-court statement of a child under the age of ten describing any act of sexual contact performed on or with the child, the circumstances under which it occurred, or the identity of the perpetrator offered in a TPR trial is admissible, provided that the statement is offered as evidence of a material fact and is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, that the person to whom the statement was made or who heard the child make the statement testifies, that the court finds that the child is "unavailable" as a witness, and that the court finds the statement to be reliable.

(B) Custody Proceedings Not Involving TPR. In care and protection cases and other child custody proceedings that do not involve termination of parental rights, a child's hearsay statement that describes any act of sexual contact performed on or with the child or the circumstances under which it occurred, or that identifies the perpetrator, is admissible, provided that the person to whom the statement was made or who heard the statement testifies, that the judge finds that the statement is offered as evidence of a material fact and is more probative on the point for which it is offered than any other

evidence that the proponent can procure through reasonable effort, and that the judge finds the statement to be reliable.

(e) Testimony.

(1) Children. Children may testify in care and protection and TPR proceedings if the court determines, after consultation with the child's attorney, that the child is competent and willing to do so.

(2) Foster/Preadoptive Parents. Foster parents and preadoptive parents have the right to attend care and protection trials and to be heard, subject to the usual evidentiary rules, but are not parties to care and protection or TPR proceedings.

(3) Parents Called by Adverse Party. A parent may be called as a witness by an opposing party. An adverse party who calls the parent as a witness may question the parent witness according to the rules of cross-examination.

(4) Social Workers. Social workers may be called as witnesses in care and protection and TPR proceedings regarding disclosures by a client that bear significantly on the client's ability to provide suitable care or custody if the court first determines (1) that the social worker has such evidence, (2) that it is more important to the welfare of the child that the communication be disclosed than that the social worker–client relationship be preserved, and, if a TPR case, (3) that the patient has been informed that any such disclosure would not be privileged.

(5) Psychotherapists. Psychotherapists may be called as witnesses in care and protection and TPR proceedings regarding disclosures by a patient that bear significantly on the patient's ability to provide suitable care and custody if the patient attempts to exercise the privilege at trial and the court then determines (1) that the psychotherapist has such evidence, (2) that it is more important to the welfare of the child that the information be disclosed than that the psychotherapist-patient relationship be preserved, and, if a TPR case, (3) that the patient has been informed that any such disclosure would not be privileged.

(6) Court-Appointed Investigators and G. L. c. 119, § 51B**, Investigators.** Court-appointed investigators appointed pursuant to G. L. c. 119, § 24, and investigators assigned to investigate G. L. c. 119, § 51A, reports pursuant to G. L. c. 119, § 51B, may be called as witnesses by any party for examination regarding the information contained in any such investigation report.

(7) Experts. Opinion testimony by persons qualified by the court as experts is admissible if it is based on scientific, technical, or specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact at issue.

(f) Other Evidence.

(1) Adoption Plans. Adoption plans prepared by the DCF are admissible.

(2) Bonding and Attachment Studies. Written reports of bonding and attachment studies are inadmissible. Evidence relevant to any such bonding and attachment study may be the subject of testimony from the evaluator.

(3) Judicial Findings from Prior Proceedings Regarding the Same Party or Parties. Judicial findings from prior proceedings regarding the same party or parties may be admissible if the findings are both relevant and material.

(g) Adverse Inference from a Party's Failure to Appear. The court may draw an adverse inference against a party who has received notice and fails to appear, without good cause, at trial, as long as a case adverse to the nontestifying party has been presented.

NOTE

Subsection (a). This subsection is derived from G. L. c. 119, § 21A. Cross-Reference: Section 103, Rulings on Evidence, Objections, and Offers of Proof.

Subsection (b). This subsection is derived from Commonwealth v. Slavski, 245 Mass. 405, 415 (1923).

Subsection (b)(1). This subsection is derived from Adoption of Irwin, 28 Mass. App. Ct. 41, 43 (1989), and G. L. c. 276, § 100. Probation records, including CARI, are records of the court system and are by statute available for use by the courts of the Commonwealth. Adoption of Irwin, 28 Mass. App. Ct. at 43. It is unnecessary to qualify probation records as business records because they are admissible as official records. Id. While not necessarily conclusive, a parent's criminal record, as well as observations of his or her criminal conduct, are relevant as to the issue of parental fitness. Care & Protection of Frank, 409 Mass. 492, 495 (1991). "An adjudication of any child as a delinquent child . . . or any disposition thereunder . . . shall not be received in evidence or used against such child for any purpose in any proceedings in any court except in subsequent delinquency or criminal proceedings against the same person." G. L. c. 119, § 60.

Cross-Reference: Note to Section 405(b), Methods of Proving Character: By Specific Instances of Conduct.

Subsection (b)(2)(A). A "Section 51A report" is a report filed with the DCF that "details suspected child abuse or neglect." G. L. c. 119, § 21. Such reports are admissible only to "set the stage," i.e., to explain the reasons for the filing of the petition. Care & Protection of Inga, 36 Mass. App. Ct. 660, 663–664 (1994), quoting Custody of Michel, 28 Mass. App. Ct. 260, 267 (1990). Competent evidence regarding an incident that was the subject of an unsubstantiated Section 51A report may be admitted at trial against a parent as long as the evidence is "sufficient to convey to a high degree of probability that the proposition is true." Adoption of Rhona I, 57 Mass. App. Ct. 479, 484 (2003), quoting Adoption of Iris, 43 Mass. App. Ct. 95, 105 (1997). See also Adoption of Lorna, 46 Mass. App. Ct. 134, 141 (1999).

Subsection (b)(2)(B). This subsection is derived from Custody of Michel, 28 Mass. App. Ct. 260, 267 (1990), and Adoption of George, 27 Mass. App. Ct. 265, 272 (1994). Section 51B reports are required government documents and "may be considered for statements of fact, e.g., that there was screaming or beating or no food." Custody of Michel, 28 Mass. App. Ct. at 267. Hearsay statements contained in these reports may only be admitted for the truth asserted therein if they are statements of primary fact, or if they satisfy some other established exception to the hearsay rule. Adoption of George, 27 Mass. App. Ct. at 272. "'Primary fact' is not a self-defining phrase, but at least connotes facts which can be recorded without recourse to discretion and judgment, e.g., the fire alarm sounded at 10:30 p.m.; it was raining lightly at the time of the accident; the child was placed with Mr. and Mrs. Doe . . . ." Id. at 274. The exclusion of expressions of opinion, evaluation, or judgment from official records is a "practical working rule" that has exceptions. Id.

at 272. “More leeway” relative to admissibility may be given to material that “smacks of opinion” if the source of the opinion is available for cross-examination. Id. at 274.

Subsection (b)(2)(C). This subsection is derived from Adoption of George, 27 Mass. App. Ct. 265 (1994); Care & Protection of Zita, 455 Mass. 272, 275 n.6, 279–280 (2009) (petitions in care and protection cases are pleadings and are not evidence, and are separate and distinct from DCF affidavits, which are official records); and Care & Protection of Bruce, 44 Mass. App. Ct. 758, 766 (1998) (DCF affidavits are reports of agents of DCF and are admissible as official records). Statements of primary fact contained in these DCF documents, including affidavits supporting care and protection petitions, are admissible under the official records exception to the hearsay rule, see Section 803(8), after redaction of expressions of opinion, evaluation, or judgment. Adoption of George, 27 Mass. App. Ct. at 271, 274–275. Service plans also are admissible under a statutory exception to the hearsay rule contained in G. L. c. 119, § 29. See the note for Subsection (b)(2)(B) above regarding the meaning of “primary fact,” as well as regarding the extra “leeway” given to the admissibility of expressions of opinion, evaluation, or judgment included in these records. A private entity’s assessment or case review performed under a contract with the DCF is admissible in the same manner as an official record prepared by the DCF because the private entity was required to conduct the assessment as an agent of the DCF. Adoption of Vidal, 56 Mass. App. Ct. 916, 916 (2002).

Subsection (b)(2)(D). This subsection is derived from Care & Protection of Bruce, 44 Mass. App. Ct. 758, 765–766 (1998). As with other public/official records, DCF investigative reports admissible under G. L. c. 119, § 21A, must be limited to factual information. Opinions, conclusions, diagnoses, and evaluations contained within them should be redacted. Id. at 766. The admissibility of hearsay statements contained in these reports is subject to the court’s discretion. Such statements may be admitted subject to the availability for cross-examination of the author and his or her sources. Custody of Michel, 28 Mass. App. Ct. 260, 267 (1990). As with G. L. c. 119, § 51B, reports, statements of fact made by other DCF personnel under an official duty to report the facts to the author of a Section 21A report also are admissible. Adoption of George, 27 Mass. App. Ct. 265, 272 (1994).

Cross-Reference: Introductory Note (f)(5) to Article V, Privileges and Disqualifications; Section 507, Social Worker–Client Privilege.

Subsection (b)(3). This subsection is derived from G. L. c. 111B, § 11 (alcoholism treatment records); G. L. c. 111E, § 18 (drug rehabilitation treatment records); and 42 U.S.C. § 290dd-2 (substance abuse treatment records). Federal regulations require that, before issuing an order for release of these records to one or more parties, the court must determine that “disclosure [of the information] is necessary to protect against an existing threat to life or of serious bodily injury, including circumstances which constitute suspected child abuse and neglect and verbal threats against third parties [(among other things)].” 42 C.F.R. § 2.63(a)(1)–(3). Orders of appointment issued to court-appointed investigators do not satisfy the requirements of State and Federal law and therefore do not permit the court investigator to obtain drug and alcohol treatment records where the specific factual determination necessary for release of these records has not been made by the appointing judge.

Cross-Reference: Introductory Note (f)(5) to Article V, Privileges and Disqualifications.

Subsection (b)(4). This subsection is derived from Introductory Note (f)(2) and (f)(3) to Article V, Privileges and Disqualifications. There is no privilege preventing the introduction of relevant school records in evidence at trial, and most school records are admissible as official records. See Introductory Note (f)(2) to Article V, Privileges and Disqualifications (student records). Records of the clinical history and evaluations of students with special needs, created or maintained in accordance with G. L. c. 71B, are confidential but not privileged. G. L. c. 71B, § 3. See Introductory Note (f)(3) (special needs student records) and Introductory Note (d) (confidentiality versus privilege) to Article V, Privileges and Disqualifications.

Subsection (b)(5). This subsection is derived from G. L. c. 233, § 78. See Adoption of Paula, 420 Mass. 716, 727 (1995); Julian v. Randazzo, 380 Mass. 391 (1980). Besides the ordinary business records hearsay exception, there is an additional business records exception permitting second-level hearsay where the

proponent of a hearsay statement shows "that all persons in the chain of communication, from the observer to the preparer, reported the information as a matter of business duty or business routine." Irwin v. Town of Ware, 392 Mass. 745, 749 (1984), quoting Wingate v. Emery Air Freight Corp., 385 Mass. 402, 406 (1982).

Cross-Reference: Section 803(6)(A), Hearsay Exceptions; Availability of Declarant Immaterial: Business and Hospital Records: Entry, Writing, or Record Made in Regular Course of Business.

Subsection (c). This subsection is derived from G. L. c. 119, § 24.

Subsection (c)(1). By the express terms of G. L. c. 119, § 24, investigators' reports are admissible and become part of the record in care and protection cases. Care & Protection of Zita, 455 Mass. 272, 281 (2009), citing Custody of Michel, 28 Mass. App. Ct. 260, 265 (1990). Hearsay statements, including multilevel hearsay, contained within the reports, including opinions, clinical observations, and recommendations, are admissible probatively as long as the declarant is identifiable and the parties have a fair opportunity to rebut the statements of both the investigator and his or her sources through cross-examination or other means. Id.; Gilmore v. Gilmore, 369 Mass. 598, 604–605 (1976); Adoption of Astrid, 45 Mass. App. Ct. 538, 546 (1998). This principle applies to hearsay statements of children against their parents that are contained in investigators' reports. Care & Protection of Inga, 36 Mass. App. Ct. 660, 664 (1994). "When a judge appoints an investigator under G. L. c. 119, § 24, it signifies the judge's expectation that the [investigator] has the training and specialized knowledge which will enable the [investigator] to make and report acute observations about the interactions of family members, and their respective mental conditions." Custody of Michel, 28 Mass. App. Ct. at 266. Opinions of the court investigator as to the credibility of another witness (including the credibility of any source) are not admissible. Commonwealth v. Triplett, 398 Mass. 561, 567 (1986) ("[I]t is a fundamental principle that 'a witness cannot be asked to assess the credibility of his testimony or that of other witnesses'" [citation omitted].).

Subsection (c)(2). Guardian ad litem (GAL) reports are analogous to court investigator reports in that hearsay, including multilevel hearsay, generally is admissible. See the Note to Subsection (c)(1) above and Adoption of Sean, 36 Mass. App. Ct. 261, 263 (1994). Guardian ad litem reports containing hearsay information are admissible, including multilevel hearsay and clinical evaluations, if the guardian ad litem is available to testify at trial and the source of the material is sufficiently identified so that the affected party has an opportunity to rebut any adverse or erroneous material contained therein. Adoption of Sean, 36 Mass. App. Ct. at 264. Adoption of Sean leaves open the question whether expert opinions contained in GAL reports are admissible. Id. Where neither party offered the investigator's report into evidence, it is "sound practice" for the judge to give notice to the parties if the judge intends to use the report. See Custody of Two Minors, 19 Mass. App. Ct. 552, 559 (1985).

Subsection (c)(3). A CASA is analogous to a guardian ad litem. Adoption of Georgia, 433 Mass. 62, 68 (2000). See the Note to Subsection (c)(2) above. For a CASA report to be admitted into evidence, including reports containing multilevel hearsay, the CASA must be available to testify at trial, and the sources of the information contained in the report must be sufficiently identified so that the affected party has an opportunity to rebut. Id. at 68–69. A CASA is not qualified to file a report containing the CASA's expert opinions or to testify as an expert simply by being a CASA. Rather, when an objection is made regarding a CASA's qualifications to render an expert opinion, the court must determine whether the CASA is qualified to do so. Id. at 68 n.6. A CASA report may include "clinical evaluations" of others as long as the CASA is available to testify and the source of the evaluative material is sufficiently identified so that the affected party has an opportunity to rebut. Adoption of Sean, 36 Mass. App. Ct. 261, 264 (1994).

Subsection (c)(4). Written court-ordered psychiatric evaluation reports are inadmissible. Adoption of Seth, 29 Mass. App. Ct. 343, 351–352 (1990). Although those who conduct psychological evaluations, including psychological evaluations that are court ordered, may testify in care and protection and TPR proceedings (see Subsections [e][4], [5], and [6] below), there is no exception to the hearsay rule pertaining to written reports of such evaluations.

Cross-Reference: Section 503(d)(2), Psychotherapist-Patient Privilege: Exceptions: Court-Ordered Psychiatric Exam; Section 503(d)(5), Psychotherapist-Patient Privilege: Exceptions: Child Custody and Adoption Cases.

Subsection (d)(1). This subsection is derived from Custody of Michel, 28 Mass. App. Ct. 260, 267 (1990). Children's out-of-court statements to social workers, teachers, experts, and evaluators, including expressed preferences regarding where they want to live, are admissible insofar as the statements reflect the mental state of the children at the time. A child's state of mind is often a material issue in child custody cases. Id. A child's out-of-court hearsay statement made to an expert witness may also be admissible, not for the truth of the matter asserted, but rather to indicate the basis of an expert opinion given by the witness. Id. Similarly, a child's statement may be admissible when used for diagnostic or treatment purposes. Id. at 268. See Mass. G. Evid. § 705. A child's extrajudicial statement concerning a parent is not admissible as an admission by a party-opponent. Care & Protection of Sophie, 449 Mass. 100, 110 (2007); Mass. G. Evid. § 801(d)(2). With respect to a child's privileged communications to a social worker or psychotherapist, exceptions exist that permit such statements to be admitted in certain circumstances. See Mass. G. Evid. §§ 503(d), 507(c). Children's out-of-court statements to court-appointed investigators are admissible where there is "an opportunity to refute the investigator and the investigator's sources through cross-examination and other means." Custody of Michel, 28 Mass. App. Ct. at 266. The child's parent must be allowed the opportunity to effectively rebut such hearsay when the child does not testify and the trial judge has no other means by which to assess the credibility and accuracy of the child's statements. Id.

Subsection (d)(2). This subsection is derived from G. L. c. 233, §§ 82 and 83. Cross-Reference: Section 503(d)(5), Psychotherapist-Patient Privilege: Exceptions: Child Custody and Adoption Cases; Section 803(24), Hearsay Exceptions; Availability of Declarant Immaterial: Out-of-Court Statement of Child Describing Sexual Contact in Proceeding to Place Child in Foster Care.

Subsection (d)(2)(A). This subsection is derived from G. L. c. 233, § 82. "Child under the age of ten" refers to the age of the child at the time the out-of-court statements were made, not the age of the child at the time of trial. Adoption of Daisy, 460 Mass. 72, 78–79 (2011). The following procedures must be utilized in Section 82 proceedings: (1) the DCF must give prior notice to the parent of their intention to introduce a child's out-of-court statements regarding alleged sexual abuse; (2) the DCF must show by more than a mere preponderance of the evidence that a compelling need exists for use of such a procedure; (3) any separate hearing regarding the reliability of the child's out-of-court statements must be on the record; (4) specific findings must be issued that present the basis upon which the reliability of the statements was determined; and (5) independently admitted evidence must be presented that corroborates the out-of-court statements. See Mass. G. Evid. § 804(b)(9); Adoption of Quentin, 424 Mass. 882, 892 (1997); Adoption of Olivette, 79 Mass. App. Ct. 141, 147 (2011), quoting Adoption of Arnold, 50 Mass. App. Ct. 743, 752 (2001).

Cross-Reference: Section 804(b)(9), Hearsay Exceptions; Declarant Unavailable: The Exceptions: Out-of-Court Statement of Child Describing Sexual Contact in Civil Proceeding, Including Termination of Parental Rights.

Subsection (d)(2)(B). This subsection is derived from G. L. c. 233, § 83. See Section 803(24), Hearsay Exceptions; Availability of Declarant Immaterial: Out-of-Court Statement of Child Describing Sexual Contact in Proceeding to Place Child in Foster Care. Where a care and protection case is joined with a TPR proceeding, the hearing should comply with the stricter requirements of G. L. c. 233, § 82. Adoption of Tina, 45 Mass. App. Ct. 727, 733 (1998).

Subsection (e)(1). This subsection is derived from G. L. c. 119, § 21A, and G. L. c. 233, § 20. Every person is competent to be a witness, unless excepted by statute or common law. This includes children of all ages who (1) have the ability to observe, remember, and give expression to that which they have seen, heard, or experienced and (2) have an understanding sufficient to comprehend the difference between truth and falsehood, their duty to tell the truth, that lying is wrong, and that failure to tell the truth will result in punishment. Mass. G. Evid. § 601(b). In care and protection and termination of parental rights proceedings,

"[evidence] may include the testimony of the child if the court determines that the child is competent *and willing*, after consultation with counsel, if any, to testify." G. L. c. 119, § 21A (emphasis supplied). Judges must be sensitive to a child's limited stamina and have considerable latitude to devise procedures and modify the usual rules of trial to accommodate child and other witnesses with special needs. Commonwealth v. Brusgulis, 398 Mass. 325, 332 (1986).

Cross Reference: Section 601, Competency.

Subsection (e)(2). This subsection is derived from G. L. c. 119, § 29D. Foster and preadoptive parents have a statutory right to testify at trial. Such testimony must be taken as any other witness's, under oath and subject to cross-examination. Adoption of Sherry, 435 Mass. 331, 337 (2001).

Subsection (e)(3). This subsection is derived from G. L. c. 233, § 22. Absent a valid assertion of a Fifth Amendment privilege, a parent may be required to testify in care and protection and TPR proceedings. Adoption of Salvatore, 57 Mass. App. Ct. 929, 930 (2003). The burden is on the party asserting the Fifth Amendment privilege to establish its existence. Commonwealth v. Brennan, 386 Mass. 772, 780 (1982). Negative inferences may be drawn against a party who asserts the privilege. See Care & Protection of Sharlene, 445 Mass. 756, 767 (2006). See also Mass. G. Evid. § 511. Whether to draw the adverse inference is a matter within the discretion of the judge, who should take into consideration all of the circumstances. See Adoption of Talik, 92 Mass. App. Ct. 367, 372 (2017).

Subsection (e)(4). This subsection is derived from G. L. c. 112, §§ 135, 135A, and 135B.

General Laws c. 112, § 135A, requires that from the initial phase of the professional relationship, a social worker shall inform the client about the confidential nature of their communications and not disclose any information acquired or revealed from the client except, inter alia, in the initiation of, or to give testimony in connection with, a proceeding under Paragraph C of G. L. c. 119, § 23, to commit a child facing abuse or neglect to the custody of the department or agency, or to transfer custody by way of an emergency order, or to dispense with the need for consent to adoption of the child in the care or custody of the department or agency.

General Laws c. 112, § 135B, creates a privilege enabling a client to refuse to disclose, or prevent a witness from disclosing, any communication between the client and the social worker relative to the diagnosis or treatment of the client's mental or emotional condition. The exception to the privilege in this subsection is taken nearly verbatim from G. L. c. 112, § 135B(g).

Cross-Reference: Section 104, Preliminary Questions; Section 507, Social Worker–Client Privilege.

Subsection (e)(5). This subsection is derived from G. L. c. 233, § 20B. See Section 503(a) for definitions of "psychotherapist," "patient," and "communications," and Section 503(b) and (d) for descriptions of, and exceptions to, the privilege. See also Commonwealth v. Lamb, 365 Mass. 265, 270 (1974). Because the privilege is not self-executing, the patient must attempt to assert it during the trial. Adoption of Carla, 416 Mass. 510, 515 (1993).

Cross-Reference: Introductory Note to Article V, Privileges and Disqualifications; Section 503, Psychotherapist-Patient Privilege.

Subsection (e)(6). This subsection is derived from G. L. c. 119, § 21A.

Subsection (e)(7). This subsection is modeled after Sections 702, 703, and 705. Massachusetts law, unlike Federal law, allows expert opinion on the ultimate issue. Mass. G. Evid. § 704. Expert testimony that simply "vouches" for the credibility of other witnesses, opines as to whether a child told the truth, makes legal conclusions, or renders an opinion within the common understanding of the trier of fact is inadmissible. See Mass. G. Evid. § 704. See also Care & Protection of Rebecca, 419 Mass. 67, 83 (1994); Adoption of Olivette, 79 Mass. App. Ct. 141, 152 (2011).

Cross-Reference: Section 702, Testimony by Expert Witnesses.

Subsection (f)(1). This subsection is derived from G. L. c. 210, § 3(c). Section 3(c) requires the court to consider the adoption plan by the DCF, which plan need not be in writing but may be presented to the court through testimony. Adoption of Stuart, 39 Mass. App. Ct. 380, 393–394 (1995). It is not necessary that the plan be fully developed or that the plan identify prospective adoptive parents, but it must have sufficient content and substance to permit the court to meaningfully evaluate and consider the suitability of the DCF adoption plan. Adoption of Lars, 46 Mass. App. Ct. 30, 31 (1998).

Subsection (f)(2). Bonding and attachment evaluators may testify in the same manner as any other witness. Expert opinions held by such evaluators are admissible subject to Sections 702, Testimony by Expert Witnesses, and 703, Bases of Opinion Testimony by Experts.

Cross-Reference: Section 201, Judicial Notice of Adjudicative Facts; Section 803(22), Hearsay Exceptions; Availability of Declarant Immaterial: Judgment of a Previous Conviction.

Subsection (f)(3). Findings of fact in a prior care and protection proceeding that are not "out of date, or the product of a proceeding where the parent may not have a compelling incentive to litigate," may be admitted in a subsequent proceeding to the extent that they are both relevant and material. Adoption of Paula, 420 Mass. 716, 721 (1995). The parties and the judge are not bound by the prior findings, which carry no special evidentiary weight, and evidence may be offered by any party as to any of the issues covered by the prior findings, either to support or contradict them. Id. at 722. Where a prior proceeding is on appeal, the better practice is for the judge to decline to admit the prior findings in the subsequent proceeding. Adoption of Simone, 427 Mass. 34, 43 (1998), citing Adoption of Paula, 420 Mass. at 722.

Subsection (g). This subsection is derived from Adoption of Talik, 92 Mass. App. Ct. 367, 370–373 (2017). Whether to draw the adverse inference is a matter within the discretion of the judge, who should take into consideration all of the circumstances. Id. at 372. No adverse inference may be drawn "unless a case against the interests of the affected party is presented, so that failure of the party to testify would be a fair subject of comment." Id., citing Custody of Two Minors, 396 Mass. 610, 616 (1986).

Section 1116. Peremptory Challenges of Potential Jurors

(a) General Principles. This section applies to the use of peremptory challenges in civil, criminal, and juvenile cases. Peremptory challenges of potential jurors, which generally do not have to be supported by a reason, may not be based on a belief that the juror is biased because of the juror's membership in a discrete community group, including groups based on gender, race, creed, religious belief, or national origin. Peremptory challenges may be based on a belief that a juror is biased as a result of factors such as age, employment, place of residence, educational level, income, demeanor, or conduct, or factors other than membership in a discrete community group.

(b) Objecting to a Peremptory Challenge. An objection to a peremptory challenge may be made by a party or the matter may be raised by the judge in the absence of an objection. Whether an objection to the exercise of a peremptory challenge should be overruled or sustained requires a three-stage analysis. The judge must make specific findings on the record at each stage.

(1) Stage One: Prima Facie Case of Unlawful Discrimination. There is a rebuttable presumption that a peremptory challenge is lawful. The party opposed to the peremptory challenge has the initial burden to present some evidence that the challenge is based on the juror's membership in a discrete community group and is not based on a personal characteristic of the juror. A single peremptory challenge may be sufficient to establish a prima facie case of unlawful discrimination. The judge must make an explicit finding on the record whether the presumption of regularity has been overcome.

(2) Stage Two: Burden Shifts to Party Exercising Challenge. Once the moving party has overcome the presumption of regularity, the burden shifts to the party which exercised the peremptory challenge to supply a group-neutral, bona fide reason for the peremptory challenge. The reason must be clear, reasonably specific, related to the case before the court, and personal to the juror. Good faith alone is insufficient. The judge must allow all parties to be heard and may take evidence.

(3) Stage Three: Evaluation of Group-Neutral Explanation. The judge must determine whether the explanation given by the party exercising the peremptory challenge is bona fide or a pretext. The judge must make two specific findings on the record regarding the explanation:

(A) whether the reason given for the peremptory challenge is based on a factor other than the juror's membership in a discrete community group, and

(B) whether the reason given for the peremptory challenge is genuine.

(c) Overruling the Objection. The judge must overrule the objection and allow the exercise of the peremptory challenge if the party opposed to the peremptory challenge has not established a prima facie case to overcome the presumption of regularity, or if the judge determines that

(1) the peremptory challenge was based on a specific reason other than the juror's membership in a discrete community group, and

(2) the reason given for the peremptory challenge was credible, genuine, and not a pretext.

(d) Sustaining the Objection. The judge must sustain the objection to the peremptory challenge if the judge determines that

(1) the peremptory challenge was not based on a specific reason other than the juror's membership in a protected class, or

(2) the reason given for the peremptory challenge was not credible or genuine, and was a pretext.

NOTE

Subsection (a). This subsection is derived from Commonwealth v. Soares, 377 Mass. 461, cert. denied, 444 U.S. 881 (1979). "Defendants have a right under the United States Constitution and the Massachusetts Declaration of Rights to be tried by an impartial jury." Commonwealth v. Obi, 475 Mass. 541, 550 (2016). All parties, including the Commonwealth, are entitled to a jury that has not been unfairly skewed. See Commonwealth v. Prunty, 462 Mass. 295, 308 (2012) (ensuring nondiscriminatory use of peremptory challenges is intended to benefit both sides in a criminal trial); Commonwealth v. Fruchtman, 418 Mass. 8, 13 (1994) ("[t]he Commonwealth is equally entitled to a fairly selected and representative jury . . ."); Anderson-Mole v. University of Mass., 49 Mass. App. Ct. 723, 724 (2000) ("[c]ivil litigants, as well as parties in criminal cases, are entitled to a jury that has not been unfairly skewed"). Potential jurors are also entitled to the opportunity to serve on a jury without fear of being discriminated against. Commonwealth v. Prunty, 462 Mass. at 308. "An erroneous denial of a peremptory challenge is a structural error, requiring reversal without a showing of prejudice." Commonwealth v. Oberle, 476 Mass. 539, 545 (2017); Gates v. Flood, 57 Mass. App. Ct. 739, 742–743 (2003).

***Protected Groups*.** The terms "discrete community group" and "protected group" reflect the language contained in Article 1 of the Declaration of Rights of the Constitution of the Commonwealth, as amended by Article 106 of the Amendments to the Massachusetts Constitution (Equal Rights Amendment), and include sex, race, color, creed, and national origin. Commonwealth v. Soares, 377 Mass. at 488 n.33. Contrast Commonwealth v. Wood, 389 Mass. 552, 564 (1983) (age is not a discrete or defined group); Commonwealth v. Acen, 396 Mass. 472, 477–478 (1986) (non-English speakers and noncitizens are not protected groups); Commonwealth v. Matthews, 406 Mass. 380, 389 (1990) (suburban parents and caretakers of adolescent children are not protected groups); and Commonwealth v. Evans, 438 Mass. 142, 149–150 (2002), cert. denied, 538 U.S. 966 (2003) (college students are not a protected group). The Supreme Judicial Court "has not considered the question whether the exercise of a peremptory challenge to remove a juror because of his or her sexual orientation or because the juror was transgendered would violate the guarantees of art. 12 or the equal protection clause." Commonwealth v. Smith, 450 Mass. 395, 405 (2008).

The party opposing the exercise of a peremptory challenge must demonstrate that the challenged juror is a member of a protected group. Commonwealth v. Suarez, 59 Mass. App. Ct. 111, 114 (2003). See Commonwealth v. Obi, 475 Mass. 541, 550–551 (2016) (judge's observation that juror wore headscarf traditionally worn by Muslim women and similar to that worn by Muslim victim was sufficient to establish juror's membership in discrete group).

Subsection (b). This subsection is derived from Commonwealth v. Soares, 377 Mass. 461, 488, cert. denied, 444 U.S. 881 (1979).

Either a party or the judge, sua sponte, may initially raise the issue of a potentially improper peremptory challenge. Commonwealth v. Maldonado, 439 Mass. 460, 463 (2003). See Commonwealth v. LeClair, 429 Mass. 313, 322 (1999) ("immaterial" whether issue is initially raised by judge or opposing party).

It is imperative that the judge make explicit findings on the record at each stage of the analysis. Commonwealth v. Maldonado, 439 Mass. at 465 (judge must make specific findings as to whether explanation for peremptory challenge is both adequate and genuine); Commonwealth v. Burnett, 418 Mass. 769, 771 (1994) (trial judge should make finding as to whether requisite prima facie showing of impropriety has been made).

***Timing of the Objection*.** To preserve the issue of an improper peremptory challenge on appeal, the objection to the peremptory challenge must be made as soon as it becomes evident that a pattern of unlawful challenges exists and prior to empanelment. Commonwealth v. Smith, 450 Mass. 395, 406 (2008) (trial judge's obligation to assess propriety of peremptory challenge is not triggered where counsel fails to object or assert that pattern of improper exclusion has been established); Commonwealth v. Colon-Cruz, 408 Mass. 533, 550 (1990) (a record in which a party has not had an opportunity to explain the use of peremptory challenges is inadequate to raise a challenge to an allegedly impermissible peremptory challenge); Commonwealth v. Sosnowski, 43 Mass. App. Ct. 367, 372–373 (1997) (propriety of peremptory challenge could not be reviewed on appeal because defendant failed to object at trial).

Subsection (b)(1). The court begins with the presumption that the exercise of a peremptory challenge is proper. See Commonwealth v. Maldonado, 439 Mass. 460, 463 (2003); Commonwealth v. Curtiss, 424 Mass. 78, 80 (1997). To rebut that presumption, the party opposing the peremptory challenge must establish a prima facie case of discrimination by showing (1) a pattern of excluding members of a discrete group, or in some circumstances a single member of a discrete group, and (2) individuals are being excluded solely on the basis of their membership in that group. See Commonwealth v. Garrey, 436 Mass. 422, 428 (2002). The second prong of the prima facie case has been described as whether it was "likely" that peremptory challenges were used to exclude members of a protected class. See id. This burden has since been described as not "a terribly weighty one." Commonwealth v. Maldonado, 439 Mass. at 464 n.4. See Commonwealth v. Jones, 477 Mass. 307, 325 (2017) (trial judge abused discretion where he treated presence of one empanelled African-American juror as dispositive in finding prima facie showing of discrimination had not been met); Commonwealth v. Obi, 475 Mass. 541, 550–551 (2016) (prima facie case met where challenged juror was Muslim, defendant was Muslim, and no other prospective jurors appeared to be Muslim); Commonwealth v. Rodriguez, 457 Mass. 461, 472 (2010) (removal of sole Hispanic juror

adequate to rebut presumption). But see Commonwealth v. Roche, 44 Mass. App. Ct. 372, 377–378 & n.3 (1998) (peremptory challenge of member of protected class does not, by itself, constitute prima facie showing of impropriety). However, the United States Supreme Court stated that the party opposing the peremptory challenge must offer "evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." Johnson v. California, 545 U.S. 162, 170 (2005) ("California's 'more likely than not' standard is at odds with the prima facie inquiry mandated by [Batson v. Kentucky, 476 U.S. 79 (1986)]").

Generally, a judge must make a finding that the prima facie case has been made before requiring the party who made the allegedly improper challenge to provide reasons for the peremptory challenge. Commonwealth v. Green, 420 Mass. 771, 776–777 (1995). See Commonwealth v. Calderon, 431 Mass. 21, 25–26 (2000) (requiring party exercising peremptory challenge to provide explanation may demonstrate implicit finding that prima facie case has been made). However, in the early stages of jury selection, the trial judge also has broad discretion to require an explanation without making the determination that a pattern of improper exclusion exists. See Commonwealth v. Scott, 463 Mass. 561, 571 (2012), quoting Commonwealth v. Van Winkle, 443 Mass. 230, 236 (2005) ("[w]here a venire contains 'a paucity of African-Americans' a judge has broad discretion to require an explanation without first making the determination that a pattern of improper exclusion exists"), quoting Commonwealth v. Garrey, 436 Mass. 422, 429 (2002).

Factors that may be considered in evaluating whether the prima facie showing has been established are the number and percentage of group members excluded and whether the challenged jurors are members of the same constitutionally protected group as the defendant or victim. See Commonwealth v. Obi, 475 Mass. 541, 551 (2016); Commonwealth v. Issa, 466 Mass. 1, 9 (2013). The trial judge may also consider other relevant circumstances when considering the second part of the prima facie case. See, e.g., Commonwealth v. Issa, 466 Mass. at 10 (judge did not abuse his discretion in considering other relevant circumstances, including prosecutor's statement that challenged juror looked familiar).

In some circumstances, a single peremptory challenge may be sufficient to rebut the presumption. See Commonwealth v. Issa, 466 Mass. at 9 (first part of prima facie test was satisfied by showing that prosecutor challenged only African-America male juror remaining in venire); Commonwealth v. Prunty, 462 Mass. 295, 306 n.15 (2012) (trial judge properly requested explanation for defendant's peremptory challenge of only African-American in venire). See also Commonwealth v. Maldonado, 439 Mass. 460, 463 n.3 (2003) ("the ultimate issue is not whether there is a 'pattern' of excluding a discrete group, but whether the challenge made to any member of the panel is impermissibly based on the juror's membership in one of the discrete groups protected under [Commonwealth v. Soares]").

It is within the trial judge's discretion to determine whether the party opposing the exercise of a peremptory challenge has rebutted the presumption of propriety. Commonwealth v. Issa, 466 Mass. at 10; Commonwealth v. Prunty, 462 Mass. at 304. See, e.g., Commonwealth v. Scott, 463 Mass. 561, 571 (2012) (judge did not abuse discretion in finding no pattern of discriminatory challenges); Commonwealth v. Aspen, 53 Mass. App. Ct. 259, 262 (2001) (appellate courts will not substitute their judgment for trial judge's concerning whether presumption has been rebutted if there is support for it on the record, because trial judge is in best position to decide if peremptory challenge appears improper).

Subsection (b)(2). If the trial judge finds that the prima facie case has been met, the burden shifts to the party who sought to exercise the challenge to provide, if possible, a justification for that challenge that is "group neutral" or unrelated to the prospective juror's group affiliation. Commonwealth v. Scott, 463 Mass. 561, 570 (2012); Commonwealth v. Prunty, 462 Mass. 295, 306 (2012). While general assertions are not enough, the level of specificity does not have to rise to the level of specificity required to remove a juror for cause. Commonwealth v. Cavotta, 48 Mass. App. Ct. 636, 638 (2000) (attitude, bearing, and demeanor of juror during voir dire may constitute sufficient basis for peremptory removal). See also Commonwealth v. Soares, 377 Mass. 461, 491, cert. denied, 444 U.S. 881 (1979); Commonwealth v. Mathews, 31 Mass. App. Ct. 564, 568 (1991), cert. denied sub nom. Mathews v. Rakiey, 504 U.S. 922 (1992). The trial judge must not provide the group-neutral reason for the preemptory challenge. See Commonwealth v. Fryar, 414 Mass. 732, 740–741 (1993) (although trial judge properly found prima facie case had been made, reversible error for judge to supply group-neutral reason instead of waiting to hear from party exercising challenge). After the

party seeking to exercise the peremptory challenge asserts their group-neutral reason, the opposing party should be allowed to rebut the proffered explanation as mere pretext. See Commonwealth v. Maldonado, 439 Mass. 460, 464 n.6. (2003).

Subsection (b)(3). The third stage requires the judge to determine whether the reason provided was a bona fide reason for exercising the challenge or a mere pretext to avoid admitting facts of group discrimination. Commonwealth v. Soares, 377 Mass. 461, 491, cert. denied, 444 U.S. 881 (1979). In determining whether an explanation is bona fide or pretextual, the trial judge must make findings concerning two points: (1) whether the explanation is "adequate" and (2) whether the explanation is "genuine." Commonwealth v. Maldonado, 439 Mass. 460, 464 (2003). While the soundness of the proffered explanation may be a strong indicator of its genuineness, the two prongs of the analysis are not identical. Id. at 466.

The judge must make specific findings or provide an explanation which is ascertainable to an appellate court concerning whether the party asserting the challenge provided both an adequate and genuine explanation for the peremptory challenge. See Commonwealth v. Benoit, 452 Mass. 212, 220 (2008) (trial judge's specific findings aid appellate courts in ascertaining whether judge "considered both the adequacy and the genuineness of the proffered explanation, and did not conflate the two into a simple consideration of whether the explanation was 'reasonable' or 'group neutral'") (quotation omitted). See also Commonwealth v. Rodriguez, 457 Mass. 461, 470–471 (2010); Commonwealth v. Lacoy, 90 Mass. App. Ct. 427, 432 (2016). An appellate court is "not in a position to give deference to the judge's findings" when the record does not reflect the trial judge's independent evaluation and determination of the adequacy and credibility of the challenging party's proffered reason for the peremptory challenge. Commonwealth v. Benoit, 452 Mass. at 223.

Subsection (b)(3)(A). Adequacy refers to the soundness of the proffered explanation. Commonwealth v. Maldonado, 439 Mass. 460, 464–465 (2003). An explanation is adequate if it is clear and reasonably specific, personal to the juror and not based on the juror's group affiliation, and related to the particular case being tried. Id. Subjective challenges, such as a challenge to a juror's looks or gestures, or a party's "gut feeling," should rarely be accepted as adequate because such explanations can easily be used as pretexts for discrimination. Commonwealth v. Benoit, 452 Mass. 212, 219 (2008) (the inquiry must determine whether explanation is belatedly contrived to avoid admitting facts of group discrimination). See, e.g., Commonwealth v. Obi, 475 Mass. 541, 550–551 (2016) (defense counsel's "gut feeling" that juror would not be sympathetic to defendant was insufficient); Commonwealth v. Calderon, 431 Mass. 21, 27 n.4 (2000) (juror who smiled at defense counsel did not justify challenge). Similarly, mere affirmations of good faith are not sufficient. See Commonwealth v. Carleton, 36 Mass. App. Ct. 137, 144 (1994). A trial judge's determination that the explanation offered by the party exercising the peremptory challenge is adequate is within the sound discretion of the judge and will not be disturbed so long as there is support for the ruling in the record. Commonwealth v. Scott, 463 Mass. 561, 570 (2012). See Commonwealth v. Prunty, 462 Mass. 295, 309–310 (2012) (trial judge entitled to disbelieve defendant's facially race-neutral reason for exercising peremptory challenge); Commonwealth v. LeClair, 429 Mass. 313, 323 (1999).

Subsection (b)(3)(B). "An explanation is genuine if it is in fact the reason for the exercise of the challenge." Commonwealth v. Maldonado, 439 Mass. 460, 465 (2003). The mere denial of an improper motive is inadequate to establish the genuineness of the explanation. Id. A reasonable justification in the abstract must be rejected if the judge does not believe that it reflects the challenging party's actual thinking. Id. See Commonwealth v. Oberle, 476 Mass. 539, 546–547 (2017) (in domestic violence case in which defendant was charged with assaulting his female partner, trial judge did not abuse his discretion in finding a lack of genuineness of defendant's proffered reasons for peremptory challenge of woman juror after all three of defendant's previous peremptory challenges had been of women); Commonwealth v. Prunty, 462 Mass. 295, 309 (2012) (trial judge warranted in finding that defendant's challenge, allegedly based on juror's occupation, was not genuine); Commonwealth v. LeClair, 429 Mass. 313, 323 (1999) (affirming judge's disallowance of peremptory challenge after he determined that it was disingenuous).

If the trial judge determines that the peremptory challenge was improper, "the judge has the authority to fashion relief without declaring a mistrial." Commonwealth v. Reid, 384 Mass. 247, 254–255 (1981) (de-

fendant's improper use of peremptory challenges of prospective male jurors authorized trial judge to strike all jurors and begin with a new venire).

Subsection (c). An objection to a peremptory challenge must be overruled if the prima facie case has not been made. See, e.g., Commonwealth v. Issa, 466 Mass. 1, 10 (2013) ("judge did not abuse his discretion in finding that the defendant had failed to rebut the presumption"); Commonwealth v. Scott, 463 Mass. 561, 571 (2012) (finding of no pattern of discriminatory challenges within judge's discretion).

Subsection (c)(1). An objection to a peremptory challenge must be overruled if the challenge was based on a factor other than the juror's membership in a discrete community group. See, e.g., Commonwealth v. Nom, 426 Mass. 152, 155 (1997) (explanation that prospective juror's prior domestic arrest was reason for challenge was based on factor other than juror's race); Commonwealth v. Barnoski, 418 Mass. 523, 533–534 (1994) (judge overruled objection to peremptory challenge and accepted prosecutor's specific examples of juror's demeanor as being reason for challenge, which were unrelated to juror's ethnicity).

Subsection (c)(2). An objection to a peremptory challenge must be overruled if the explanation for the challenge is credible, genuine, and not pretext. See, e.g., Commonwealth v. Rodriguez, 457 Mass. 461, 470–471 (2010) (explanation that challenge to prospective juror was based on juror's inability to follow instructions and experience in court was sufficient and credible).

Subsection (d)(1). An objection to a peremptory challenge must be sustained if the explanation for the challenge is not adequate. See, e.g., Commonwealth v. Obi, 475 Mass. 541, 552 (2016) (explanation that defense counsel had gut feeling that juror would not be sympathetic to defendant was not adequate); Commonwealth v. Rodriguez, 431 Mass. 804, 808–809 (2000) (after pattern of excluding female jurors was established, defendant's attempt to challenge another female juror was invalid because not liking her looks was insufficient gender-neutral reason for peremptory challenge); Commonwealth v. Calderon, 431 Mass. 21, 26–28 (2000) (challenge based primarily on juror's husband's occupation inadequate).

Subsection (d)(2). An objection to a peremptory challenge must be sustained if the explanation for the challenge is not genuine and constitutes mere pretext. See, e.g., Commonwealth v. Prunty, 462 Mass. 295, 310 (2012) (explanation that peremptory challenge was used to remove juror based on her occupation was not genuine); Commonwealth v. Carvalho, 88 Mass. App. Ct. 840, 844 (2016) (explanation for challenge that "looking at the juror's experience, I don't feel that she would be a person that would be fair and equitable to my client" was not bona fide); Commonwealth v. Povez, 84 Mass. App. Ct. 660, 665 (2013) (explanation that juror was challenged because his father worked as a janitor in Federal court was adequate but not genuine).

Section 1117. Civil Commitment Hearings for Mental Illness

(a) Mental Health Commitment Hearings. In order to commit or retain a person in a mental health facility or in Bridgewater State Hospital, the petitioner must prove beyond a reasonable doubt that

(1) the respondent is mentally ill;

(2) by reason of that illness, the failure to commit or retain the respondent in a facility would create a likelihood of serious harm to the respondent or another; and

(3) if the respondent is already committed to a mental health facility or to Bridgewater State Hospital, discharge of the patient from said facility is imminent.

(b) Law of Evidence. The law of evidence applies in commitment hearings for persons with mental illness.

(c) Expert Opinion Testimony. Expert opinion testimony, whether by a treating psychiatrist or any other witness, is admissible if

(1) the expert witness testimony will assist the trier of fact;

(2) the witness is qualified as an expert in the relevant area of inquiry;

(3) the facts or data in the record are sufficient to enable the witness to give an opinion that is not merely speculation;

(4) the expert opinion is based on a body of knowledge, a principle, or a method that is reliable; and

(5) the expert has applied the body of knowledge, the principle, or the method in a reliable manner to the particular facts of the case.

(d) Basis for Expert Opinion. The facts or data upon which an expert witness may base an opinion or inference include

(1) facts observed by the witness or otherwise in the witness's direct personal knowledge;

(2) evidence already in the record or that will be presented during the course of the proceedings, which facts may be assumed to be true in questions put to the witness; and

(3) facts or data not in evidence if the facts or data are independently admissible in evidence and are a permissible basis for an expert to consider in formulating an opinion.

(e) Psychotherapist-Patient and Social Worker–Client Privileges. A patient shall have the privilege of refusing to disclose, and of preventing a witness from disclosing, any communication, wherever made, between that patient and a psychotherapist or between that patient and a social worker relative to the diagnosis or treatment of the patient's mental or emotional condition.

(1) The privilege does not apply to a disclosure made by a psychotherapist or social worker who, in the course of diagnosis or treatment of the patient, determines that the patient is in need of treatment in a hospital for mental or emotional illness or that there is a threat of imminently dangerous activity by the patient against himself or herself or another person, and who, on the basis of that determination, discloses such communication for the purpose of either placing or retaining the patient in such hospital, provided, however, that the provisions of this section shall continue in effect after the patient is in that hospital, or after placing the patient under arrest or under the supervision of law enforcement authorities.

(2) Whenever a psychiatrist, psychologist, or social worker interviews a patient on behalf of the Commonwealth with the purpose of preparing for a hearing, whether or not the interview was ordered by the court, the patient must be warned before the interview begins that everything said during the interview is not subject to privilege and may be presented against him or her in the hearing.

(A) The privilege must be knowingly and willfully waived for the contents of the conversation to be admissible at the hearing.

(B) No statement shall be admitted if such statement constitutes a confession or admission of guilt to the crime charged.

(f) Hospital Records. Records kept by hospitals pursuant to G. L. c. 111, § 70, and by mental health facilities pursuant to G. L. c. 123, § 36, shall be admissible as evidence if such records relate to the treatment and medical history of such cases. Records required to be kept by hospitals under the law of any other United States jurisdiction may be admissible.

(g) Medical Bills, Records, and Reports. Records and reports of an examination and itemized bills for services rendered are admissible as

(1) evidence of the necessity of such services or treatments;

(2) the diagnosis, prognosis, or opinion as to the proximate cause of the condition so diagnosed; or

(3) the opinion as to disability or incapacity, if any, proximately resulting from the condition so diagnosed.

NOTE

Subsection (a). This subsection is derived from G. L. c. 123, §§ 7, 8; Commonwealth v. Nassar, 380 Mass. 908, 912–914 (1980); and Superintendent of Worcester State Hosp. v. Hagberg, 374 Mass. 271, 276 (1978).

Subsection (a)(2). "Likelihood of serious harm" is defined in G. L. c. 123, § 1, as

> "(1) a substantial risk of physical harm to the person himself as manifested by evidence of, threats of, or attempts at, suicide or serious bodily harm; (2) a substantial risk of physical harm to other persons as manifested by evidence of homicidal or other violent behavior or evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them; or (3) a very substantial risk of physical impairment or injury to the person himself as manifested by evidence that such person's judgment is so affected that he is unable to protect himself in the community and that reasonable provision for his protection is not available in the community."

G. L. c. 123, § 1. The type of "serious harm" proven at the hearing must be the same as the type alleged in the petition. Matter of S.S., 2016 Mass. App. Div. 101, 103, citing Blixt v. Blixt, 437 Mass. 649, 665–666 (2002).

Subsection (a)(3). This subsection is derived from Acting Supt. of Bournewood Hosp. v. Baker, 431 Mass. 101, 105 (2000).

Subsection (b). This subsection is derived from the District Court's Standards of Judicial Practice: Civil Commitment and Authorization of Medical Treatment for Mental Illness, Standard 5:01 (2011) ("[G. L. c.] 123 proceedings are formal judicial determinations in which a substantial deprivation of liberty is at stake and there are no statutory provisions or case decisions suspending the rules of evidence").

Cross-Reference: Section 803(6)(C), Hearsay Exceptions; Availability of Declarant Immaterial: Business and Hospital Records: Medical and Hospital Services.

Subsection (c). This subsection is derived from Commonwealth v. Lanigan, 419 Mass. 15, 26 (1994), adopting the rule from Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

Cross-Reference: Section 702, Testimony by Expert Witnesses (including Note "Five Foundation Requirements").

Subsection (d). This subsection is derived from Department of Youth Servs. v. A Juvenile, 398 Mass. 516, 531–532 (1986), and Section 703, Bases of Opinion Testimony by Experts. Because expert testimony plays a crucial role in almost all proceedings under G. L. c. 123, §§ 7, 8, and 35, the most important evidentiary questions in such proceedings often arise from the basis of the expert's opinion. A testifying expert will usually review the patient's medical records, raising the same issues of reliable hearsay and privilege that would constrain the admission of those records into evidence. Adoption of Seth, 29 Mass. App. Ct. 343, 352 (1990); Section 1118(a), Civil Commitment Hearings for Alcohol and Substance Use Disorders: Civil Commitment Proceedings Pursuant to G. L. c. 123, § 35, for Individuals with Alcohol and Substance Use Disorders (commitment proceedings pursuant to G. L. c. 123, § 35, "shall include expert testimony"). Experts may also want to interview caregivers, family members, and other clinicians about the patient's history and behaviors. The contents of such conversations are not a permissible basis for an expert's opinion in hearings pursuant to G. L. c. 123, §§ 7 and 8 (unless they are subject to an exception to the rule against hearsay or are otherwise independently admissible) but may form the basis for an expert opinion in a hearing under G. L. c. 123, § 35, as long as the contents of the conversations are substantially reliable. Matter of G.P., 473 Mass. 112, 120–122 (2015); Department of Youth Servs. v. A Juvenile, 398 Mass. at 527, 531; Matter of J.W., 2016 Mass. App. Div. 74, 77–78. "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." Department of Youth Servs. v. A Juvenile, 398 Mass. at 532. If a party requests a voir dire on the expert's basis for opinion, the facts and data used to form that opinion should be evaluated as though they were themselves being admitted into evidence. Id. at 531; Adoption of Seth, 29 Mass. App. Ct. 343, 352 (1990).

***Bases for Expert Opinion in Mental Health Hearings*.** The following is a list of common bases for expert opinion testimony in mental health hearings that are permissible as a foundation for expert opinion:

- Objective observations, whether made by the expert themselves or by nurses, doctors, or other treatment professionals recording them in hospital records. Adoption of Abigail, 23 Mass. App. Ct. 191, 199 (1986); G. L. c. 233, § 79. See also P.W. v. M.S., 67 Mass. App. Ct. 779, 787 (2002) (privilege does not preclude admission of conclusions based on objective indicia rather than on patient's statements).
- Medical history, including prior hospitalizations and diagnoses, if such diagnoses do not imply or contain privileged communications between a psychotherapist and patient, and such history is recorded in the medical records from a source with firsthand knowledge, meriting a presumption of reliability. Bouchie v. Murray, 376 Mass. 524, 531 (1978); Adoption of Saul, 60 Mass. App. Ct. 546, 552 (2004). See also Commonwealth v. Kobrin, 395 Mass. 284, 294 (1985); Section 803(6)(B), Hearsay Exceptions; Availability of Declarant Immaterial: Business and Hospital Records: Hospital Records, and the accompanying note; Section 803(6)(C), Hearsay Exceptions; Availability of Declarant Immaterial: Business and Hospital Records: Medical and Hospital Services, and the accompanying note.
- Conversations with the respondent, subject to prior notice and waiver of the psychotherapist-patient privilege. Commonwealth v. Barboza, 387 Mass. 105, 108 (1982); Commonwealth v. Lamb, 365 Mass. 265, 270 (1974); Matter of Laura L., 54 Mass. App. Ct. 853, 857 (2002).
- Facts or data that may be hearsay but are otherwise independently admissible such as conversations about direct observations made by other clinicians, if not privileged, or by family members. See Commonwealth v. Markvart, 437 Mass. 331, 336–337 & n.4 (2002) (holding expert opinion may be based on hearsay if facts or data contained therein would be admissible if presented in another form).

The following is a list of common bases for expert opinion testimony in mental health hearings that are impermissible as a foundation for expert opinion:

- Hospital records or medical reports that contain or reference the contents of privileged communications. Adoption of Seth, 29 Mass. App. Ct. 343, 352 (1990).
- Diagnoses or other information that necessarily imply the contents of privileged communications. Adoption of Saul, 60 Mass. App. Ct. 546, 552 n.8 (2004); Adoption of Seth, 29 Mass. App. Ct. at 352.
- Conversations with the respondent not subject to prior warnings and a waiver of privilege. Department of Youth Servs. v. A Juvenile, 398 Mass. 516, 531–532 (1986); Commonwealth v. Lamb, 365 Mass. 265, 270 (1974).
- Other evidence that would be inadmissible if offered in the proceeding, including hearsay not noted above as permissible. Department of Youth Servs. v. A Juvenile, 398 Mass. 516, 531 (1986). See also Section 801, Definitions; Section 802, The Rule Against Hearsay.

Cross-Reference: Section 703, Bases of Opinion Testimony by Experts.

Subsection (e). This subsection is taken nearly verbatim from G. L. c. 233, § 20B, and G. L. c. 112, § 135B. Objective observations by a psychotherapist are admissible if not accompanied by any communication. Matter of Laura L., 54 Mass. App. Ct. 853, 861 (2002), citing Sheridan, petitioner, 412 Mass. 599, 605 (1992), and Adoption of Abigail, 23 Mass. App. Ct. 191, 198–199 (1986).

Cross-Reference: Section 503, Psychotherapist-Patient Privilege; Section 507, Social Worker–Client Privilege.

Subsection (e)(1). This subsection is taken nearly verbatim from G. L. c. 233, § 20B(a). The rule does not apply where the patient is already in the custody of the State or in an ordinary judicial proceeding. Commonwealth v. Lamb, 365 Mass. 265, 268 (1974). "The legislature's intention was to dispense with the privilege only when there is an imminent threat that a person who should be in custody will instead be at large." Id. A treating psychiatrist may disclose the contents of privileged communications under this exception even if the conversation occurred during the course of an involuntary commitment under a section of G. L. c. 123. Walden Behavioral Care v. K.I., 471 Mass. 150, 157 (2015). The exception for G. L. c. 233, § 20B(a), is met as long as there is "an imminent threat that a person who should be in custody will instead be at large," the examination was conducted "to determine the care and treatment" needed by the patient, and the examination was not specifically ordered by a court or sought by the Commonwealth "for the purpose of supporting a petition seeking [the respondent's] involuntary commitment." Id. at 159.

Cross-Reference: Section 503(d)(1), Psychotherapist-Patient Privilege: Exceptions: Disclosure to Establish Need for Hospitalization or Imminently Dangerous Activity; Section 507(c)(1), Social Worker–Client Privilege: Exceptions.

Subsection (e)(2). This subsection is derived from Commonwealth v. Lamb, 365 Mass. 265, 270 (1974), and Department of Youth Servs. v. A Juvenile, 398 Mass. 516, 526 (1986). This exception only applies when an examination is conducted by or for the Commonwealth or under a court order and is conducted pursuant to, or in anticipation of, a future proceeding. Walden Behavioral Care v. K.I., 471 Mass. 150, 159–160 (2015); Commonwealth v. Seabrooks, 433 Mass. 439, 450–451 (2001).

Regarding communications that occur during any court-ordered examination, the privilege applies unless the Lamb warning was given and the privilege waived, even if the communications are proffered as evidence of imminent harm. Matter of Laura L., 54 Mass. App. Ct. 853, 858–859 (2002).

Any examination for the involuntary administration of medication pursuant to the provisions of G. L. c. 123, § 8B, requires the provision of the Lamb warning. See G. L. c. 123, § 8B(h) (The psychotherapist-patient privilege, established by G. L. c. 233, § 20B, "shall not prohibit the filing of reports or affidavits, or the giving of testimony, pursuant to this section, for the purpose of obtaining treatment of a patient,

provided that such patient has been informed prior to making such communications that they may be used for such purpose and has waived the privilege."); Matter of T.M., 2017 Mass. App. Div. 99, 102 (hospital's motion to amend treatment plan was still a proceeding under G. L. c. 123, § 8B, in which the psychotherapist-patient privilege applies); In re Commitment of M.B., 2013 Mass. App. Div. 8, 11 ("unambiguously clear" that psychotherapist-patient privilege applies to proceedings under G. L. c. 123, § 8B).

***Appointment of Guardian*.** If a patient cannot knowingly and voluntarily waive the statutory privilege, then a guardian should be appointed to act on the patient's behalf. G. L. c. 233, § 20B. A person may not be competent to waive the privilege if that person does not have "sufficient present ability to consult with his attorney with a reasonable degree of rational understanding" and does not have "a rational as well as factual understanding of the proceedings." Commonwealth v. Vailes, 360 Mass. 522, 524 (1971), quoting Dusky v. United States, 362 U.S. 402, 402 (1960). Where there is some doubt, the court should make an inquiry as to whether an individual is capable of making a knowing and voluntary waiver of the privilege. Commonwealth v. DelVerde, 401 Mass. 447, 451 n.8 (1988); Matter of Laura L., 54 Mass. App. Ct. 853, 857 (2002); Adoption of Kirk, 35 Mass. App. Ct. 533, 539 (1993).

Cross-Reference: Section 503(d)(2), Psychotherapist-Patient Privilege: Exceptions: Court-Ordered Psychiatric Exam.

Subsection (f). This subsection is derived from G. L. c. 233, § 79, and Bouchie v. Murray, 376 Mass. 524, 527–529 (1978). In the case of hospital admissions for psychiatric reasons, the fact and dates of such admissions are admissible as part of the medical record, and the reasons for such admissions are admissible if such reasons do not implicate any communications between a psychotherapist and patient. Commonwealth v. Clancy, 402 Mass. 664, 667 (1988). Privileged communications between a patient and psychotherapist or patient and social worker are not admissible under the hospital records exception. Usen v. Usen, 359 Mass. 453, 457 (1971). Records containing privileged information must be thoroughly redacted before they can be submitted into evidence. Commonwealth v. Clancy, 402 Mass. at 669. Records clearly within the privilege are not ordinarily open for examination by counsel because "the purpose of [G. L. c. 233, § 20B,] is to protect justifiable expectations of confidentiality." Id. at 667, citing Usen v. Usen, 359 Mass. at 457; Petitions of the Dep't of Social Servs. to Dispense with Consent to Adoption, 399 Mass. 279, 286 (1987). If a hospital record contains notations relating to psychiatric treatment by doctors and nurses who are not psychotherapists, it may be reviewed by counsel and admitted into evidence, as long as it is redacted to exclude communications or notes of communications between the patient and a psychotherapist. Petitions of the Dep't of Social Servs. to Dispense with Consent to Adoption, 399 Mass. at 288. Objective observations by a psychotherapist, social worker, nurse, or other party, recorded in the medical records, are admissible as long as they do not imply the contents of any privileged communication. Adoption of Abigail, 23 Mass. App. Ct. 191, 198–199 (1986).

Cross-Reference: Section 803(6)(B), Hearsay Exceptions; Availability of Declarant Immaterial: Business and Hospital Records: Hospital Records.

Subsection (g). This subsection is derived from G. L. c. 233, § 79G, and Section 803(6)(C), Hearsay Exceptions; Availability of Declarant Immaterial: Business and Hospital Records: Medical and Hospital Services.

Reports from a psychologist or psychiatrist are admissible by statute under G. L. c. 233, § 79G, but similar to the hospital records exception (see Subsection[f], above), a report by a treating psychotherapist may not contain or imply the contents of any privileged communication. G. L. c. 233, § 79G; Adoption of Seth, 29 Mass. App. Ct. 343, 353 (1990). These reports are admissible even if prepared in anticipation of litigation. O'Malley v. Soske, 76 Mass. App. Ct. 495, 498 (2010). The limit contained in G. L. c. 233, § 79, that information contained in medical records must be germane to the patient's treatment to be admissible, is expressly overridden in G. L. c. 233, § 79G, which permits the doctor's opinion on proximate cause, diagnosis, and prognosis, as well as treating information. Commonwealth v. Schutte, 52 Mass. App. Ct. 796, 799–800 (2001). Psychiatric diagnoses contained in medical reports are therefore admissible, but only as long as such diagnoses do not disclose the contents of any privileged communication. See Adoption of Saul, 60 Mass. App. Ct. 546, 552–553 n.8 (2004) (finding that diagnostic terms "schizophrenia" and "schizoaf-

fective disorder" were not themselves privileged where such terms do not reveal the contents of privileged communications, while diagnoses of kleptomania, pathological gambling, or pedophilia, among others, may inherently convey some contents of privileged communication).

Cross-Reference: Section 803(6)(C), Hearsay Exceptions; Availability of Declarant Immaterial: Business and Hospital Records: Medical and Hospital Services.

Section 1118. Civil Commitment Hearings for Alcohol and Substance Use Disorders

(a) Civil Commitment Proceedings Pursuant to G. L. c. 123, § 35, for Individuals with Alcohol and Substance Use Disorders. In order to involuntarily commit a person with an alcohol or substance use disorder, the court must find by clear and convincing evidence, based on a hearing which shall include expert testimony and may include other evidence, that

(1) the respondent is an individual with an alcohol or substance use disorder, and

(2) there is a likelihood of serious harm to the respondent, the petitioner, or any other person as a result of the respondent's alcohol or substance use disorder.

The respondent shall have the right to cross-examine witnesses, present independent expert evidence, call witnesses, and submit documents or other evidence.

(b) Hearsay in G. L. c. 123, § 35, Proceedings. The rules of evidence do not apply in proceedings to commit individuals with alcohol and substance use disorders, except that privileges and statutory disqualifications do apply.

(1) Hearsay evidence is admissible but may only be relied upon if the judge finds it to be substantially reliable.

(2) Hearsay may be found to be substantially reliable by weighing some or all of the following factors. These factors are nonexclusive, and there is no requirement that hearsay satisfy each of the criteria to be considered substantially reliable.

(A) The level of factual detail, rather than generalized and conclusory assertions.

(B) Whether the statement is based on personal knowledge and direct observation.

(C) Whether the statement is corroborated by other evidence.

(D) Whether the statement was provided under circumstances that support the veracity of the source.

(E) Whether the statement was provided by a disinterested witness.

(c) Refusal to Testify in G. L. c. 123, § 35, Proceedings. No adverse inference may be drawn from a respondent's refusal to testify or to speak with the examining clinician. The respondent's refusal to testify or speak with the examining clinician does not prohibit the clinician from offering an opinion despite such refusal and reporting such refusal to the court.

NOTE

Subsection (a). This subsection is derived from G. L. c. 123, § 35; Rule 6(a) of the Uniform Trial Court Rules for Civil Commitment Proceedings for Alcohol and Substance Use Disorders (2016); and Matter of G.P., 473 Mass. 112, 118–120 (2015).

***Significant Statutory Amendment*.** An amendment to G. L. c. 123, § 35, effective on April 24, 2016, eliminated a requirement for "competent medical testimony" and replaced it with a requirement for "expert testimony." Although the decision in Matter of G.P., 473 Mass. at 118–120, discussed the former "competent medical testimony" language, the decision remains relevant regarding the "clear and convincing" standard.

***Definitions*.** A person has a "substance use disorder" for the purpose of the statute if that person chronically or habitually consumes or ingests a substance to the extent that (1) such use substantially injures their health or substantially interferes with their social or economic functioning, or (2) that person has lost the power of self-control over the use of such controlled substances. G. L. c. 123, § 35.

Cross-Reference: Note to Section 1117(a)(2), Civil Commitment Hearings for Mental Illness: Mental Health Commitment Hearings (quoting definition of "likelihood of serious harm" from G. L. c. 123, § 1).

Subsection (b). This subsection is taken nearly verbatim from Rule 7(a) of the Uniform Trial Court Rules for Civil Commitment Proceedings for Alcoholic and Substance Abuse (2015), as approved of in Matter of G.P., 473 Mass. 112, 122 (2015) ("The flexible nature of due process permits accommodation of these circumstances by not requiring strict adherence to the rules so long as there is fairness in the proceeding."). Because expert testimony is required by statute in G. L. c. 123, § 35, proceedings, it is essential that rules regarding the waiver of privilege be strictly adhered to when the court-appointed clinician interviews the respondent. See Commonwealth v. Lamb, 365 Mass. 265, 270 (1974); Section 1117(d)(3), Civil Commitment Hearings for Mental Illness: Basis for Expert Opinion (facts or data not in evidence).

Subsection (b)(1). This subsection is taken nearly verbatim from Rule 7(a) the Uniform Trial Court Rules for Civil Commitment Proceedings for Alcoholic and Substance Abuse (2015), as approved of in Matter of G.P., 473 Mass. 112, 122 (2015).

Subsection (b)(2). This subsection is derived from factors for weighing the reliability of hearsay in probation revocation hearings. Matter of G.P., 473 Mass. 112, 121–122 (2015); Commonwealth v. Patton, 458 Mass. 119, 132–133 (2010), citing Commonwealth v. Durling, 407 Mass. 108, 114–118 (1990), and Commonwealth v. Delaney, 36 Mass. App. Ct. 930, 932 (1994). In Matter of G.P., 473 Mass. 112 (2015), the Supreme Judicial Court discussed the requirement that hearsay be "substantially reliable" by relating it to the admissibility of such hearsay in probation revocation proceedings. Matter of G.P., 473 Mass. at 121–122, citing Commonwealth v. Patton, 458 Mass. at 132–133, and Commonwealth v. Durling, 407 Mass. at 114–118. The same factors apply for weighing whether to rely on hearsay evidence in support of commitment under G. L. c. 123, § 35. Matter of G.P., 473 Mass. at 122; Matter of J.W., 2016 Mass. App. Div. 74, 77. In Section 35 hearings the core goal, consistent with due process, is for the evidence to "provid[e] an accurate and reliable determination" of the underlying question of fact. Matter of G.P., 473 Mass. at 121–122; Commonwealth v. Durling, 407 Mass. at 116. Hearsay is presumptively reliable if it is admissible under standard evidentiary rules. Commonwealth v. Patton, 458 Mass. at 132; Commonwealth v. Durling, 407 Mass. at 118.

Cross-Reference: Section 801, Definitions; Section 803, Hearsay Exceptions; Availability of Declarant Immaterial; Section 804, Hearsay Exceptions; Declarant Unavailable.

Subsection (c). This subsection is derived from Rule 7(b) of the Uniform Trial Court Rules for Civil Commitment Proceedings for Alcohol and Substance Use Disorders (2016) and G. L. c. 123, § 35.

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