

## CREDIBILITY OF WITNESSES

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

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

In deciding whether to believe a witness and how much importance to give a witness's testimony, you must look at all the evidence, drawing on your own common sense and experience of life. Often it may not be *what* a witness says, but *how* he says it that might give you a clue whether or not to accept his version of an event as believable. You may consider a

witness's appearance and demeanor on the witness stand, his frankness or lack of frankness in testifying, whether his testimony is reasonable or unreasonable, probable or improbable. You may take into account how good an opportunity he had to observe the facts about which he testifies, the degree of intelligence he shows, whether his memory seems accurate. You may also consider his motive for testifying, whether he displays any bias in testifying, and whether or not he has any interest in the outcome of the case.

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

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

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

SUPPLEMENTAL INSTRUCTIONS

**1. *Jurors' experience.***

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

**2. *Interested witnesses.***

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

**3. Number of witnesses.**

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

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

**4. Discrepancies in testimony.**

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

**Innocent mistakes of memory do happen — sometimes people forget things, or get confused, or remember an event differently. In weighing such discrepancies, you should**

**consider whether they involve important facts or only minor details, and whether the discrepancies result from innocent lapses of memory or intentional falsehoods.**

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

5. *Prosecution witness with plea agreement contingent on truthful testimony.*

**In**

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

**(she) has received or hopes to receive.**

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

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

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

The model instruction is based in part on the instruction affirmed in *United States v. Silvestri*, 790 F.2d 186, 191-192 (1st Cir. 1986). See also Ninth Circuit Jury Instructions Committee, *Ninth Circuit Manual of Model Criminal Jury Instructions* § 4.9 (2003) (model instruction to effect that if a witness has received immunity or

other benefits in exchange for his or her testimony, or is an accomplice, in evaluating the witness's testimony, you should consider the extent to which or whether his or her testimony may have been influenced by such factors. In addition, you should examine that witness's testimony with greater caution than that of other witnesses); Judicial Council of the Eleventh Circuit, *Eleventh Circuit Pattern Jury Instructions (Criminal Cases)* Special Instruction 1.2 (2003) ("The testimony of some witnesses must be considered with more caution than the testimony of other witnesses. [An accomplice who has pleaded guilty in hopes of receiving leniency in exchange for his testimony] may have a reason to make a false statement because the witness wants to strike a good bargain with the Government. So, while a witness of that kind may be entirely truthful when testifying, you should consider such testimony with more caution than the testimony of other witnesses"); Committee on Standard Jury Instructions, *California Jury Instructions Criminal* Instruction 3.13 (2004) ("You may consider the testimony of a witness who testifies for the State as a result of [a plea agreement] [a promise that he will not be prosecuted] [a financial benefit]. However, you should consider such testimony with caution, because the testimony may have been colored by a desire to gain [leniency] [freedom] [a financial benefit] by testifying against the defendant").

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

NOTES:

1. **Specific classes of witnesses.** Generally it is in the judge's discretion whether to include additional instructions about specific classes of witnesses, such as police officers, *Commonwealth v. Anderson*, 396 Mass. 306, 316, 486 N.E.2d 19, 25 (1985); *A Juvenile*, 21 Mass. App. Ct. at 125, 485 N.E.2d at 204, or children, *Id.* While an exceptional case "may be conceived of where the judge would be bound to particularize on the issue of credibility," no such case has been reported in Massachusetts. *Id.* If additional, specific instructions are given in the judge's discretion, they must not create imbalance or indicate the judge's belief or disbelief of a particular witness. *Id.*, 21 Mass. App. Ct. at 125, 485 N.E.2d at 203.

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

2. **Police witnesses.** "[O]rdinarily a trial judge should comply with a defendant's request to ask prospective jurors whether they would give greater credence to police officers than to other witnesses, in a case involving police officer testimony," but a judge is required to do so only there is a substantial risk that the case would be decided in whole or in part on the basis of extraneous issues, such as "preconceived opinions toward the credibility of certain classes of persons." *Commonwealth v. Sheline*, 391 Mass. 279, 291, 461 N.E.2d 1197, 1205-1206 (1983). See *Anderson, supra*; *Commonwealth v. Whitlock*, 39 Mass. App. Ct. 514, 521, 658 N.E.2d 182, 187 (1995); *A Juvenile, supra*.

The judge may not withdraw the credibility of police witnesses from the jury's consideration. "The credibility of witnesses is obviously a proper subject of comment. Police witnesses are no exception . . . . With a basis in the

record and expressed as a conclusion to be drawn from the evidence and not as a personal opinion, counsel may properly argue not only that a witness is mistaken but also that a witness is lying . . . . [T]he motivations of a witness to lie because of his or her occupation and involvement in the matter on trial can be the subject of fair comment, based on inferences from the evidence and not advanced as an assertion of fact by counsel.” *Commonwealth v. Murchison*, 419 Mass. 58, 60-61, 634 N.E.2d 561, 563 (1994).

3. **Interested witnesses.** The defense is not entitled to require the judge to refrain from instructing the jury that, in assessing the credibility of a witness, they may consider the witness’s interest in the outcome of the case. It is appropriate for a judge to mention that interest in the case is one of the criteria for assessing the credibility of witnesses, as long as the judge does so evenhandedly. *Commonwealth v. Ramos*, 31 Mass. App. Ct. 362, 368-369, 577 N.E.2d 1012, 1016 (1991).

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

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