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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 (2010).

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.

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

(a) Admission or Exclusion of Evidence.

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is injuriously affected, and:

- (1) As to evidence admitted, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
- (2) As to evidence excluded, the substance of the evidence was made known to the court by an offer of proof or was apparent from the context within which the questions were asked.
- (3) A motion in limine, seeking a pretrial evidentiary ruling, is insufficient to preserve appellate rights unless there is an objection at the time the evidence is offered.
- (4) The denial of a motion to suppress evidence on constitutional grounds, however, is reviewable without further objection at trial.

(b) Record of Offer and Ruling.

The court may add any other or further statement which clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question-and-answer form.

(c) Hearing of Jury.

In jury cases, proceedings shall be conducted so as to prevent inadmissible evidence from being made known to the jury.

(d) Substantial Risk of a Miscarriage of Justice in Criminal Cases.

Nothing in this section precludes taking notice of plain errors in criminal cases, although not brought to the attention of the trial judge, if such error constitutes a substantial risk of a miscarriage of justice.

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, 533 N.E.2d 1318, 1321–1322 (1989).

Subsection (a)(1). This subsection is derived from *Commonwealth v. Marshall*, 434 Mass. 358, 365, 749 N.E.2d 147, 155 (2001), and *Commonwealth v. Pickles*, 364 Mass. 395, 399, 305 N.E.2d 107, 109 (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, 770 N.E.2d 1, 5 (2002). “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, 421 N.E.2d 1206, 1209 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.*

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, 227 N.E.2d 3, 8–9 (1967) (jury trials); *Commonwealth v. Mazzone*, 55 Mass. App. Ct. 345, 348, 770 N.E.2d 547, 550 (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, 823 N.E.2d 404, 406–407 (2005). Generally, counsel should make an objection to a question before the answer is given. See *Commonwealth v. Baptiste*, 372 Mass. 700, 706, 363 N.E.2d 1303, 1307 (1977). Pro se litigants are bound by the same rules of procedure as litigants with counsel. *Mains v. Commonwealth*, 433 Mass. 30, 35–36, 739 N.E.2d 1125, 1130 (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, 749 N.E.2d at 155, 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, 305 N.E.2d at 109–110.

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, 545 N.E.2d 602, 606 n.5 (1989); *Commonwealth v. Barbosa*, 399 Mass. 841, 844, 507 N.E.2d 694, 696 (1987). Counsel should renew any prior objection with specificity following the charge. *Fein v. Kahan*, 36 Mass. App. Ct. 967, 968 n.4, 635 N.E.2d 1, 2 n.4 (1994).

Subsection (a)(2). This subsection is derived from *Commonwealth v. Chase*, 26 Mass. App. Ct. 578, 581, 530 N.E.2d 185, 188 (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, 530 N.E.2d at 188.

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, 349 N.E.2d 379, 380 (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, 5 N.E.2d 554, 555 (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, 142 N.E. 834, 836 (1924).

An offer of proof is not necessary where the context is clear, see *Commonwealth v. Donovan*, 17 Mass. App. Ct. 83, 88, 455 N.E.2d 1217, 1220–1221 (1983), or where there is no doubt what the testimony will be, see *Commonwealth v. Caldron*, 383 Mass. 86, 89 n.2, 417 N.E.2d 958, 960 n.2 (1981); *Commonwealth v. Smith*, 163 Mass. 411, 429, 40 N.E. 189, 195 (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, 176 N.E. 208, 210 (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, 305 N.E.2d 824, 828 (1973).

Subsection (a)(3). This subsection is taken nearly verbatim from *Commonwealth v. Whelton*, 428 Mass. 24, 25–26, 696 N.E.2d 540, 543 (1998).

Subsection (a)(4). This subsection is derived from *Commonwealth v. Martin*, 447 Mass. 274, 279, 850 N.E.2d 555, 560 (2006).

Subsection (b). The first sentence is taken nearly verbatim 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 (c). 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, 687 N.E.2d 1258, 1262 (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 *Ruszczyc v. Secretary of Pub. Safety*, 401 Mass. 418, 422, 517 N.E.2d 152, 155 (1988).

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, 892 N.E.2d 739, 745 (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 (d). This subsection is derived from *Commonwealth v. Alphas*, 430 Mass. 8, 13, 712 N.E.2d 575, 580 (1999); *Commonwealth v. Freeman*, 352 Mass. 556, 561–564, 227 N.E.2d 3, 7–9 (1967); and *Commonwealth v. Watkins*, 63 Mass. App. Ct. 69, 72–73, 823 N.E.2d 404, 406–407 (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, 712 N.E.2d at 580. 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. 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, 876 N.E.2d 862, 868 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, 584 N.E.2d 621, 624 n.1 (1992).

Section 104. Preliminary Questions

(a) Determination Made by the Court.

Preliminary questions concerning the qualification or competency of a person to be a witness, the existence of a privilege, the admissibility of evidence, or the determination of probable cause, e.g., justification for a search and seizure, shall be made by the court, subject to the provisions of Subsection 104(b). In making its determination, the court is not bound by the laws of evidence except those with respect to privileges.

(b) Relevancy Conditioned on Fact.

(1) When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding that the condition has been fulfilled.

(2) When the relevancy of evidence depends upon the admission of other evidence, which has not yet been admitted, the court may admit such evidence de bene, subject to a later motion to strike if the evidence is not forthcoming.

(c) Hearing of Jury.

Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require.

(d) Testimony by Accused.

The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case. A defendant who testifies at a preliminary hearing is nonetheless subject to cross-examination on issues that affect his or her credibility.

(e) Weight and Credibility.

The principles of law stated in this section do not limit the right of any party to introduce before the jury evidence relevant to weight or credibility.

NOTE

Subsection (a). This subsection is derived from *Nally v. Volkswagen of Am., Inc.*, 405 Mass. 191, 197–198, 539 N.E.2d 1017, 1021 (1989), and *Commonwealth v. Figueroa*, 56 Mass. App. Ct. 641, 646, 779 N.E.2d 669, 673 (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, 688 N.E.2d 1350, 1353–1354 (1998); *Davis v. Boston Elevated Ry. Co.*, 235 Mass. 482, 502, 126 N.E. 841, 846 (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, 610 N.E.2d 934, 937 (1993); *Commonwealth v. Polian*, 288 Mass. 494, 498–499, 193 N.E.2d 68, 70 (1934).

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, 439 N.E.2d 1223, 1230 (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, 668 N.E.2d 825 [1996]). See also *Carr v. Howard*, 426 Mass. 514, 531, 689 N.E.2d 1304, 1314 (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, 668 N.E.2d at 831–832. See, e.g., *Bays v. Theran*, 418 Mass. 685, 693, 639 N.E.2d 720, 725 (1994); *Bogas v. Chief of Police of Lexington*, 371 Mass. 59, 65–66, 354 N.E.2d 872, 878 (1976).

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, 450 N.E.2d 149, 152 (1983); *Commonwealth v. Miller*, 68 Mass. App. Ct. 835, 842, 865

N.E.2d 825, 831 (2007); *Commonwealth v. Gonzalez*, 59 Mass. App. Ct. 622, 624, 797 N.E.2d 449, 451 (2003); *Commonwealth v. Florek*, 48 Mass. App. Ct. 414, 419, 722 N.E.2d 20, 24 (2000). However, if a pretrial motion to suppress was heard and determined in advance of trial, and the evidence 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, 589 N.E.2d 306, 308 (1992).

After making certain preliminary findings of facts in criminal cases, the judge must instruct the jurors to disregard the evidence if they do not believe that the preliminary facts exist. See, e.g., *Commonwealth v. Tavares*, 385 Mass. 140, 152, 430 N.E.2d 1198, 1206 (humane practice rule), cert. denied, 457 U.S. 1137 (1982); *Commonwealth v. Key*, 381 Mass. 19, 22, 407 N.E.2d 327, 330 (1980) (dying declaration); *Commonwealth v. Boyer*, 52 Mass. App. Ct. 590, 598, 755 N.E.2d 767, 773 (2001) (statements by joint venturers). See also G. L. c. 233, § 78 (business records).

Cross-Reference: Section 1101(c)(3), Applicability of Evidentiary Sections: Sections Inapplicable: Miscellaneous Proceedings.

Subsection (b)(1). This subsection is derived from *Commonwealth v. Perry*, 432 Mass. 214, 234, 733 N.E.2d 83, 101 (2000); *Commonwealth v. Leonard*, 428 Mass. 782, 785–786, 705 N.E.2d 247, 250 (1999); and *Fauci v. Mulready*, 337 Mass. 532, 540, 150 N.E.2d 286, 291 (1958). “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, 705 N.E.2d at 250. Contrast Section 104(a) (judge finds facts by preponderance of evidence).

Subsection (b)(2). This subsection is derived from *Harris-Lewis v. Mudge*, 60 Mass. App. Ct. 480, 485 n.4, 803 N.E.2d 735, 740 n.4 (2004). 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, 48 N.E.2d 630, 635 (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, 153 N.E.2d 887, 893 (1958). See *Commonwealth v. Navarro*, 39 Mass. App. Ct. 161, 166, 654 N.E.2d 71, 75 (1995). See also Section 611(a), Manner and Order of Interrogation and Presentation: Control by 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 *Ruszyk v. Secretary of Pub. Safety*, 401 Mass. 418, 422–423, 517 N.E.2d 152, 155 (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, 650 N.E.2d 1242, 1250–1251 (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, 650 N.E.2d at 1251 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, 696 N.E.2d 909, 918 (1998); *Commonwealth v. Festa*, 369 Mass. 419, 424–425, 341 N.E.2d 276, 280 (1976); *Commonwealth v. Williams*, 105 Mass. 62, 67 (1870).

Section 105. Limited Admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall 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, 552 N.E.2d 558, 566 (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, 740 N.E.2d 176, 179 (2000); *Commonwealth v. Hollyer*, 8 Mass. App. Ct. 428, 431, 395 N.E.2d 354, 356 (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, 740 N.E.2d at 179. “[T]here is no requirement that the judge give limiting instructions sua sponte.” *Commonwealth v. Sullivan*, 436 Mass. 799, 809, 768 N.E.2d 529, 537 (2002). “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, 740 N.E.2d at 179. “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, 230 N.E.2d 808, 810 (1967).

Section 106. Doctrine of Completeness

(a) Remainder of Writings or Recorded Statements.

When a party introduces all or part of a writing or statement, the court may permit the adverse party to introduce or admit any other part of such writing or statement, provided that it 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. Eugene*, 438 Mass. 343, 350–351, 780 N.E.2d 893, 899 (2003), and *Commonwealth v. Clark*, 432 Mass. 1, 14–15, 730 N.E.2d 872, 885 (2000). 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, 700 N.E.2d 823, 827 (1998), quoting *Commonwealth v. Robles*, 423 Mass. 62, 69, 666 N.E.2d 497, 502 (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. at 351, 780 N.E.2d at 899. “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, 793 N.E.2d 1278, 1282 (2003). 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, 708 N.E.2d 95, 98 (1999). See Section 611(a), Manner and Order of Interrogation and Presentation: Control by Court. The doctrine is not applicable to a defendant’s effort to admit the alibi portion of his or her

statement which has nothing to do with the statement offered by the Commonwealth. *Commonwealth v. Thompson*, 431 Mass. 108, 115, 725 N.E.2d 556, 563–564, cert. denied, 531 U.S. 864 (2000).

Subsection (b). This subsection is derived from *Commonwealth v. Ruffen*, 399 Mass. 811, 813–814, 507 N.E.2d 684, 686 (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, 831 N.E.2d 901, 907–908 (2005) (court required to admit evidence); *Burke v. Memorial Hosp.*, 29 Mass. App. Ct. 948, 950, 558 N.E.2d 1146, 1149 (1990), citing *Commonwealth v. Wakelin*, 230 Mass. 567, 576, 120 N.E. 209, 213 (1918).