

SEATING OF ALTERNATE JUROR

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

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

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

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

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

NOTES:

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

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

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