

## **DEFENDANT'S ABSENCE MIDTRIAL**

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

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

**You are not to speculate about the reasons for the defendant's absence. You are not to draw any inferences against the defendant from that absence, since there are many reasons why a defendant may not be present for the full trial. You are not to consider it in any way or discuss it in your deliberations. It should not influence your verdict(s) in any way. Your responsibility is to decide the charge(s) against the defendant, based solely on the evidence before you.**

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

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

"When a defendant fails to appear midtrial, the judge is to determine whether the trial should proceed in the defendant's absence or whether a mistrial should be declared. In determining this question, the judge must determine whether the defendant's absence is without cause and voluntary. This judicial determination, in turn, requires that there be time allotted for some measure of inquiry and investigation into the reasons for the defendant's absence and the results of the efforts to locate the defendant. To this end, the judge should grant a recess of such duration as the judge deems appropriate to allow for investigation."<sup>9</sup>

There must be evidence introduced on the record. The preferable practice . . . is that a voir dire hearing should be held directed to the evidence garnered concerning the circumstances of the defendant's failure to appear and the efforts to find the defendant.

"Following this hearing, the judge should state a finding concerning whether the defendant's absence is without cause and voluntary. If the judge determines not to declare a mistrial, but rather to continue the trial in absentia, then the judge should give a neutral instruction to the jury to the effect that the defendant may not be present for the remainder of the trial, that the trial will continue, and that the defendant will continue to be represented by his attorney. If there will be no evidence adduced before the jury concerning consciousness of guilt, the judge may add that the jury should not speculate as to the reasons for the defendant's absence and should not draw adverse inferences, as there are many reasons why a defendant may not be present for the full trial . . . ."

*Commonwealth v. Muckle*, 59 Mass. App. Ct. 593, 639-640 (2003) (citations omitted). The Appeals Court detailed that the judge should undertake, "a reasonably diligent investigation to determine if there is good cause for the defendant's absence from trial might entail some of the following steps: independent police inquiry; contact with the defendant's family and significant other persons in the defendant's life; calls to the places where the defendant lives and works; and inquiry of emergency health facilities in the immediate area where there is a reasonable probability the defendant may have been treated. Of course, defense counsel also should check to see if the defendant has communicated with counsel's law office." *Id.* at 640, n. 9. "We reemphasize . . . that where . . . a defendant has disappeared from a trial without any apparent explanation, [t]here ought to be as vigorous an effort as may be feasible to find the defendant, and some formality in the presentation of the evidence that is gathered about the circumstances of the defendant's disappearance" before the judge decides to instruct the jury to ignore the defendant's absence and not draw any inference against him or her because of it. *Commonwealth v. Carey*, 55 Mass. App. Ct. 908, 908-909 (2002).