

ANNOUNCED WITNESS DOES NOT TESTIFY

I. WHERE ANNOUNCED WITNESS DOES NOT APPEAR

When you were being impaneled as the jury in this case, you were told the names of the potential witnesses for this trial. This was done solely for the purpose of screening out any potential jurors who might know any of the possible witnesses, or might be related to any of them.

The fact that someone's name appeared on that list does not mean that they were definitely going to be a witness in this case. If someone was named at that point but has not appeared as a witness, you are to draw no inferences from that fact. You are to decide this case solely on the evidence that is before you.

It is common to give the jury venire the names and municipalities of prospective witnesses. The jury should not be told whether a witness will appear for the Commonwealth or the defense. *Commonwealth v. Nawn*, 394 Mass. 1, 3-4, 474 N.E.2d 545, 548 (1985); *Commonwealth v. Hesketh*, 386 Mass. 153, 159-160, 434 N.E.2d 1238, 1242-1243 (1982); *Commonwealth v. Bolduc*, 383 Mass. 744, 745-748, 422 N.E.2d 764, 765-766 (1981); *Commonwealth v. Pasciuti*, 12 Mass. App. Ct. 833, 834-838, 429 N.E.2d 374, 375-376 (1981).

This cautionary instruction may be used if an announced witness does not appear, although often it may be preferable to let it pass silently unless a particular witness's potential appearance was somehow highlighted before the jury. See also the supplementary instruction to Instruction 3.500 (Absent Witness).

II. WHERE WITNESS INVOKES TESTIMONIAL PRIVILEGE

In this case a witness has claimed his (her) (constitutional) (statutory) privilege not to testify. The witness has a legal right to do so, and you are not to draw any inferences, favorable or unfavorable to either the defense or the Commonwealth, because the witness has done so.

You are not to speculate about what the witness's testimony might have been. You must decide this case solely on the evidence that is before you.

Where it is known that a witness will invoke a testimonial privilege, this should be done on voir dire and not before the jury. *Commonwealth v. Martin*, 372 Mass. 412, 413, 421 n.17, 362 N.E.2d 507, 508, 512 n.17 (1977) (privilege against self-incrimination); *Commonwealth v. Lewis*, 12 Mass. App. Ct. 562, 574, 427 N.E.2d 934, 941 (1981) (same); *United States v. Johnson*, 488 F.2d 1206, 1211 (1st Cir. 1973) (same); *Commonwealth v. Labbe*, 6 Mass. App. Ct. 73, 79-80, 373 N.E.2d 227, 232 (1978) (spousal privilege). A mistrial may be required if the prosecutor elicits a claim of privilege before the jury if this (1) was done intentionally to prejudice the defendant or (2) does in fact materially prejudice the defendant. *Namet v. United States*, 373 U.S. 179, 185-191, 83 S.Ct. 1151, 1154-1157 (1963); *Martin*, 372 Mass. at 414 & n.4, 362 N.E.2d at 508 & n.4; *Commonwealth v. Fazio*, 375 Mass. 451, 460 n.3, 378 N.E.2d 648, 654 n.3 (1978).

When a witness invokes a testimonial privilege before the jury where it was not known in advance that the witness would definitely do so, the judge should give a forceful cautionary instruction not to draw any adverse inferences against the defendant. *Hesketh*, 386 Mass. at 157, 434 N.E.2d at 1242 (privilege against self-incrimination); *Commonwealth v. Granito*, 326 Mass. 494, 497-499, 95 N.E.2d 539, 542 (1951) (same); *Commonwealth v. DiPietro*, 373 Mass. 369, 388-391, 367 N.E.2d 811, 823 (1977) (spousal privilege).

See generally *Jury Trial Manual for Criminal Offenses Tried in the District Court* § 4.07.