

**REDUCING THE JURY,
SELECTION OF THE FOREPERSON,
AND SENDING OUT THE JURY**

Judge. When we impanel a jury at the beginning of a trial, we never know whether some personal emergency will arise during the course of the trial which will require one of the jurors to be excused from further jury duty. To avoid having to start the trial over again if that should occur, we impanel seven jurors, even though the case will eventually be decided by only six of you.

The time has now come to reduce your number to that six. The clerk will draw one of your names at random. That juror will be designated as an alternate juror, and will not take part in your deliberations unless it is necessary to provide a substitute for one of the other jurors.

If fate makes you the alternate juror, please don't take it personally. Your presence up to this point, and your continuing availability if you should be needed, is itself an important contribution to the administration of justice. The court officer will make you as comfortable as possible while the jury deliberates.

The clerk will now reduce the jury to six jurors.

The clerk should place the names of all the jurors in the drum, draw the names of the one or two alternates, and address them as follows:

Clerk: Juror Number ____ in seat number ____, you are hereby designated as an alternate juror. *Repeat the prior sentence if there is a second alternate juror.* **You will be kept separate and apart in the attendance of the court officer unless you are later drawn to replace a sitting juror.**

Juror Number ____, [state name of juror], I appoint you to be the foreperson of this jury. As the jury foreperson you will have three jobs: first, you will be the liaison, or link, between the jury and the Court. As you deliberate, if you have any questions about the law, you should write it down on a piece of paper, and hand it to the court officer. The court officer cannot answer any of your questions about the case. I will either send back an answer in writing or have you come back into the courtroom for further instructions.

Second, as foreperson, it is your job to encourage discussion among your fellow jurors. To that end, the foreperson should see that all jurors have a chance to participate in the discussion and that all points of view are considered. As the foreperson, however, you do not have a greater voice or vote than any of your fellow jurors.

Finally, as foreperson, you have an administrative role. After all

six jurors have agreed upon a verdict, fill in the verdict slip, date it and sign it at the bottom, place it in an envelope, and then let the court officers know you have reached a verdict. You will then be brought back into the courtroom, where you will announce the verdict in open court in response to questions from the clerk. The deliberating jurors will then be asked if they agree with that verdict.

If several offenses are charged: **There is one verdict slip for each charge.**

Explain verdict slips as necessary.

For all of the jurors, I emphasize that you may not use cellular telephones or any other personal wireless device during deliberations. Incoming or outgoing calls or other electronic communications may disrupt the deliberative process or allow for the receipt of improper extraneous information.

You are not to conduct any outside research or investigation, by means of the internet or otherwise, about the law or facts of this case.

The clerk will now swear the court officer(s) who will escort you to your deliberations.

Clerk swears court officer(s): **Do you solemnly swear or affirm that you will**

take charge of this jury and keep them together in some convenient place until they have agreed, that you will not speak to them nor suffer anyone else to speak to them, except by order of Court or to ask them if they have agreed, so help you God?

Judge: **Members of the jury, you may now retire to consider your verdict(s).**

NOTES:

1. **Reduction of jury and designation of alternate jurors.** Alternate jurors are not identified until immediately prior to jury deliberations, pursuant to the procedure described in G.L. c. 234A, § 68.
2. **Time of selection of foreperson.** Although G.L. c. 234A, § 68A states, “[a]fter a jury has been impanelled and sworn, the court shall appoint a foreperson,” common practice in the District Court is to select a foreperson at the close of the instructions, just prior to deliberations. The manner in which the foreperson is chosen lies in the discretion of the judge,
3. **Alternate jurors not permitted in deliberations room.** Pursuant to G.L. c. 234A, § 68, alternate jurors are to be kept separate from the jury. Even with the defendant’s consent, it is a violation of the defendant’s constitutional right to a fair trial and reversible error for a judge to permit alternate jurors to remain with the other jurors during deliberations, even under a cautionary instruction not to participate. *Commonwealth v. Sheehy*, 412 Mass. 235, 238-240 (1992); *Commonwealth v. Smith*, 403 Mass. 489, 490-497 (1988).
4. **Information sometimes found in complaints that must not be disclosed to the jury.** Judges and session clerks must be vigilant that criminal complaints do not contain information that must not be disclosed to the jury. For the convenience of counsel and the sentencing judge, District Court criminal complaints, in addition to the charging language for each offense, indicate the **potential penalties** for the offense, but these must not be disclosed to the jury. *Commonwealth v. Bart B.*, 424 Mass. 911, 913 (1997); *Commonwealth v. Smallwood*, 379 Mass. 878, 882-883 (1980); *Commonwealth v. Buckley*, 17 Mass. App. Ct. 373, 375-377 (1984). For complaints charging **subsequent offenses**, the jury must not know during the initial trial that the defendant is charged as a subsequent offender. G.L. c. 278, § 11A. Similarly, the jury should not be informed of any **alias** that is unconnected to the crime and unnecessary to establish the defendant’s identity as the perpetrator, *Commonwealth v. Martin*, 57 Mass. App. Ct. 272, 275 (2003), or of any **alternative ways of committing the offense** that are charged in the complaint but inapplicable to the case being tried, *Commonwealth v. Johnson*, 45 Mass. App. Ct. 473, 477 n. 6 (1998).
Since it is discretionary whether or not to send the complaint to the jury, *Commonwealth v. Johnson*, 43 Mass. App. Ct. 509, 513 (1997), it appears that the simplest way to handle such situations is for the judge not to send the complaint to the jury room, and instead to rely on properly-drafted verdict slips to structure the jury’s deliberations. Alternately, the clerk may be instructed to prepare a properly-redacted version of the complaint to be given to the jury.

It may also be necessary to redact evidence if it is to be sent to the jury room. See, e.g.,

Commonwealth v. Dargon, 457 Mass. 387, 394 (2010) (ultimate conclusions concerning the charged crimes must be redacted from medical records admitted under c. 233, § 79 and submitted to jury); *Commonwealth v. Cueva*, 94 Mass. App. Ct. 780, 785-786 (2019) (failure to redact RMV records which contained references to defendant's "chem test refusal" was reversible error).

5. **Cellular phones and internet research during deliberations.** Judges should not allow the use of cellular telephones and other personal wireless devices during jury deliberations since they "may disrupt the deliberative process of the jury or allow for the receipt of improper extraneous information." *Commonwealth v. Rodriguez*, 63 Mass. App. Ct. 660, 676 n.9 (2005). In addition, "given the simplicity, speed, and scope of Internet searches, allowing a juror to access with ease extraneous information about the law and the facts, trial judges are well advised to reference Internet searches specifically when they instruct jurors not to conduct their own research or investigations." *Rodriguez*, 63 Mass. App. Ct. at 678 n.11.

6. **Questions.** Any questions or notes submitted by the jury should be marked for identification and included within the clerk's file.