# WHEN JURORS CANNOT AGREE

**Our constitution and laws provide that in a criminal case the principal way for deciding questions of fact is the verdict of a jury. In most cases — and perhaps, strictly speaking, in all cases — absolute certainty cannot be attained or expected.**

**The verdict to which each juror agrees must of course be his or her own verdict, the result of his or her own convictions, and not merely an acquiescence in the conclusion of the other jurors. Still, in order to bring six minds to a unanimous result, you must examine the issues you have to decide with candor and with a proper regard and respect for each other's opinions. You should consider that it is desirable that the case be decided. You should consider that you have been selected in the same manner, and from the same source, as any future jury would be. There is no reason to suppose that the case will ever be submitted to six persons who are more intelligent, more impartial, or more competent to decide it than you are, or that more or clearer evidence will be produced on one side or the other. With all this in mind, it is your duty to decide this case if you can do so conscientiously.**

**In order to make a decision more attainable, the law always imposes the burden of proof on one side or the other. In this criminal case, the burden of proof is on the Commonwealth to establish every part of it, every essential element, beyond a reasonable doubt. If you are left in doubt as to any essential element, the defendant is entitled to the benefit of that doubt, and must be acquitted.**

**In conferring together, you ought to give proper respect to each other's opinions, and listen with an open mind to each other's arguments. Where there is disagreement, those jurors who are for acquittal should consider whether a doubt in their own minds is a reasonable one, if it makes no impression on the minds of other jurors who are equally honest, equally intelligent, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and who have taken the same oath as jurors. On the other hand, those jurors who are for conviction ought seriously to ask themselves whether they may not reasonably doubt the correctness of their judgment, if it is not shared by other members of the jury. They should ask themselves whether they should distrust the weight or adequacy of the evidence if it has failed to convince the minds of their fellow jurors.**

**I would ask you now to return to your deliberations with these thoughts in mind.**

The model instruction above and the alternate instruction below are adapted from the two alternative models set out in *Commonwealth v. Rodriguez*, 364 Mass. 87, 101-103, 300 N.E.2d 192, 202-203 (1973). The first is an amended version of a traditional charge developed from *Commonwealth v. Tuey*, 8 Cush. 1, 2-3 (1851); the second, a model charge recommended by the American Bar Association. Judges have been urged not to stray from the language in the recommended model instructions. *Commonwealth v. Sosnowski*, 43 Mass. App. Ct. 367, 374, 682 N.E.2d 944, 949 (1997).

It is appropriate for the judge to give such a charge when the jury is deadlocked, but because it "has a certain 'sting' to it," it should not be given prematurely, and digression from the recommended language is discouraged. *Commonwealth v. O'Brien*, 65 Mass. App. Ct. 291, 839 N.E.2d 845 (2005). As to when such a charge is appropriate, see *Jury Trial Manual for Criminal Offenses Tried in the District Court* § 2.85. Subject to the limitations of G.L. c. 234, § 34 (see note 1 below), there is no per se rule that giving such a charge more than once is inherently coercive. *Commonwealth v. Connors*, 13 Mass. App. Ct. 1005, 1006, 433 N.E.2d 454, 455-456 (1982).

The judge should not mention to the jury the possible expense or inconvenience of a second trial. *Commonwealth v. Pleasant*, 366 Mass. 100, 105-106, 315 N.E.2d 874, 877-878 (1974); *Commonwealth v. Resendes,* 30 Mass. App. Ct. 430, 434, 569 N.E.2d 413, 416 (1991).

ALTERNATE INSTRUCTION

**The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree to that verdict. Your verdict must therefore be unanimous.**

**It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violating your individual judgment and conscience. Each of you must decide the case for yourself, but you should do so**

**only after considering the evidence impartially with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if you become convinced that it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.**

**You are not partisans for one side or the other. You are judges, the judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.**

**I would ask you now to return to your deliberations with these thoughts in mind.**

*Rodriguez,* 364 Mass. at 102, 300 at 203 (Appendix B); 3 ABA Standards for Criminal Justice, *Trial by Jury*, commentary to § 15-4.4(a) (2d ed. 1980).

NOTES:

1. **Restriction on sending out jury more than twice.** "If a jury, after due and thorough deliberation, return to court without having agreed on a verdict, the court may state anew the evidence or any part thereof, explain to them anew the law applicable to the case and send them out for further deliberation; but if they return a second time without having agreed on a verdict, they shall not be sent out again without their own consent, unless they ask from the court some further explanation of the law." G.L. c. 234, § 34.

2. **"Pre–*Tuey-Rodriguez*" charge.** When the jury prematurely suggests that it may be at an impasse, but the judge concludes that the jury is not yet deadlocked and that a full *Tuey-Rodriguez* charge is not yet called for, the Appeals Court recommends that the judge instruct the jury using the ABA-recommended language in the first two paragraphs of the alternate instruction. "It seems reasonable to us that the jury's perception be acknowledged in some fashion. In so doing, a judge must exercise caution that the jury not be encouraged to give up the effort to reach unanimity, while at the same time ensuring that the jurors understand that conscientious disagreement is nevertheless

acceptable . . . . The [ABA's] language is plainly intended to serve the useful function of communicating to jurors the nature of their obligations in circumstances short of the true deadlocks that require use of the *Tuey-Rodriguez* charge, and there should be resort to it at appropriate times." *Commonwealth v. O'Brien,* 65 Mass. App. Ct. 291, 296, 839 N.E.2d 845, 849 (2005).

Regardless of which instruction is utilized, after the jury has twice engaged in "due and thorough deliberation" the judge may not send them out again without their consent. G.L. c. 234, § 34 (see note 1, *supra*). To avoid subsequent problems with § 34, it is suggested that the judge state clearly for the record whenever the judge determines that a potential impasse has not occurred "after due and thorough deliberation."