

WHEN A VERDICT DOES NOT APPEAR TO BE UNANIMOUS

This instruction should be given after the jury is polled, if it appears that a verdict is not unanimous.

The clerk has just inquired of each of you, asking whether the verdict read to me was the decision reached by each of the deliberating jurors. It appears that the verdict in this case may not be unanimous; that you may not all agree with it. As a reminder, whether your verdict is guilty or not guilty, it must be unanimous. Please return to the jury room and resume your deliberations.

The clerk should prepare a new verdict slip and mark the first one for identification.

NOTES:

A request to poll the jury must be made “before the verdict is recorded.” Mass. R. Crim. P. 27(d). “[A] verdict should not be recorded if any juror expresses dissent from the verdict.” See *Commonwealth v. Nettis*, 418 Mass. 715, 718 n.3 (1994). “A judge should observe the jury while they affirm their verdict in open court. If it appears that a juror does not agree with the verdict, inquiry should be made or the jury should be polled.” *Commonwealth v. Floyd P.*, 415 Mass. 826, 829 n.5 (1993). If there is such dissent, the judge may either direct the jury to continue their deliberations or declare a mistrial. *Commonwealth v. Fernandes*, 30 Mass. App. Ct. 335, 345 (1991). Whether the jury should be polled is within the judge’s discretion. See *Nettis*, 418 Mass. at 718-719, citing Mass. R. Crim. P. 27(d). See also *Fernandes*, *supra*.

After the verdict has been recorded, a judge should not allow a request for polling unless a juror has expressed a public disagreement with the verdict as it is being taken or recorded. *Commonwealth v. Reaves*, 434 Mass. 383, 395 & n. 17 (2001). Once a verdict is received, affirmed, and recorded, “neither a juror’s change of heart nor a juror’s subsequent disclosure of a subjective disagreement with her apparent vote provides a basis for vacating the verdict.” *Id.* at 396, quoting *Commonwealth v. Dias*, 419 Mass. 698, 703 (1995).