

COMMONWEALTH OF MASSACHUSETTS
Supreme Judicial Court

At the Supreme Judicial Court holden at Boston within and
for said Commonwealth on the twenty-fifth day of April, in the
year two thousand and twenty-two:

present,

<u>KIMBERLY S. BUDD</u>)	
)	Chief Justice
<u>FRANK M. GAZIANO</u>)	
)	Justices
<u>DAVID A. LOWY</u>)	
)	
<u>ELSPETH B. CYPHER</u>)	
)	
<u>SCOTT L. KAFKER</u>)	
)	
<u>DALILA ARGAEZ WENDLANDT</u>)	
)	
<u>SERGE GEORGES, JR.</u>)	

ORDERED: That the Massachusetts Rules of Criminal Procedure
adopted by order dated October 19, 1978, as amended,
to take effect on July 1, 1979, are hereby amended as
follows:

Rule 5 By deleting Mass. R. Crim. P. 5 (a) and inserting in
lieu thereof the following new Mass. R. Crim. P. 5
(a):

(a) Summoning Grand Juries.

(1) Selection of Grand Jurors. As prescribed by law,
the appropriate number of jurors shall be summoned in

the manner and at the time required, from among whom the court shall select not more than twenty-three grand jurors and may select up to four alternate grand jurors to serve in said court as long as and at those specific times required by law, or as required by the court. In the exercise of discretion, a judge may replace a sitting grand juror with an alternate grand juror upon a finding of hardship, inconvenience, public necessity, or other good cause shown. When the public interest so requires, a judge may empanel a second grand jury and both shall be subject to the same laws, rules, and requirements.

(2) Place and Time of Sitting. The regular grand jury shall be called upon and directed to sit by the Chief Justice of the Superior Court Department whenever and wherever within the Chief Justice's discretion the conduct of regular criminal business and timely prosecution within a particular county so dictate. Notwithstanding the foregoing, special grand juries shall be summoned in the manner prescribed by the General Laws.

Rule 5 By deleting Mass. R. Crim. P. 5 (b) and inserting in lieu thereof the following new Mass. R. Crim. P. 5 (b):

(b) Foreperson, Foreperson Pro Tem, Clerk, Clerk Pro Tem.

(1) Election of Foreperson and Clerk. After the grand jurors have been empanelled they shall retire and elect one of their number as foreperson and one of their number as clerk. The foreperson and the prosecuting attorney shall have the power to administer oaths and affirmations to witnesses who appear to testify before the grand jury, and the foreperson shall, under the foreperson's hand, return to the court a list of all witnesses sworn before the grand jury during the sitting.

(2) Election of Foreperson Pro Tem. If the foreperson is unable to serve for any part of the period the grand jurors are required to serve, a foreperson pro tem shall be elected in the same manner as provided herein for election of the foreperson. The foreperson pro tem shall serve until the foreperson returns or

for the remainder of the term if the foreperson is unable to return.

(3) Clerk. The clerk shall be charged with keeping a record of their proceedings, and, if the grand jury so directs, to deliver such record to the attorney general or district attorney. If the clerk is unable to serve for any part of the period the grand jurors are required to serve, a clerk pro tem shall be elected.

Rule 5 By deleting the heading of Mass. R. Crim. P. 5 (e) and inserting in lieu thereof the following new heading:

Quorum, Finding, and Return of Indictment.

Rule 5 By inserting the following sentence after the heading and before the existing text of Mass. R. Crim. P. 5 (e):

A quorum of thirteen grand jurors must be present to hear any evidence, consider any proposed indictment, or take any other official action.

Rule 5 By inserting the words "unless for reasons of public safety or security the judge decides to take the return of the indictment remotely" after the words "in open court" in the last sentence of Mass. R. Crim. P. 5 (e).

Rule 5 By deleting the words "he or she" in the last sentence of Mass. R. Crim. P. 5 (f) and inserting in lieu thereof the words "that person".

Rule 5 By deleting the words "The prosecuting attorney" in the first sentence of Mass. R. Crim. P. 5 (g) and inserting in lieu thereof the words "A prosecutor".

Rule 5 By inserting the following sentence after the first sentence of Mass. R. Crim. P. 5 (g):

If a prosecutor is present during deliberation and voting, the prosecutor shall be permitted to answer only questions of law.

Rule 5 By inserting the following new Mass. R. Crim. P. 5 (i) following the existing Mass. R. Crim. P. 5 (h):

(i) The Record of Proceedings. All grand jury proceedings, except the grand jury's own deliberations, shall be recorded in a manner that permits reproduction and transcription. This shall include, but not be limited to, empanelment, removal of any grand juror, legal instructions provided to the grand jury by a judge or a prosecutor in connection with the proceeding, questions to a prosecutor from a grand juror and the prosecutor's responses, before or during deliberations, and a record of all those present during the proceedings, excluding the names of the grand jurors.

The amendments accomplished by this order shall take effect on May 1, 2022.

ORDERED:

<u>KIMBERLY S. BUDD</u>)	
)	Chief Justice
)	
<u>FRANK M. GAZIANO</u>)	
)	Justices
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<u>SERGE GEORGES, JR.</u>)	

REPORTER'S NOTES

MASSACHUSETTS RULES OF CRIMINAL PROCEDURE

Rule 5: The Grand Jury

Reporter's Notes—2022

These amendments to Mass. R. Crim. P. 5 codify existing law and practice concerning basic aspects of grand jury selection and operation. Several of the amendments were proposed by the Supreme Judicial Court's Committee on Grand Jury Proceedings in its Final Report to the Justices (June 2018). The amendments address (1) the selection and use of alternate grand jurors, (2) the empaneling of a second grand jury, (3) the quorum for a grand jury, (4) the permissible scope of the prosecutor's presence during grand jury deliberation, and (5) the requirement for recording of the grand jury proceeding. The amendments also eliminate references to gender and add headings for readability.

The amendment to Mass. R. Crim. P. 5 (a) provides for empaneling alternate grand jurors. While Mass. R. Crim. P. 20 (d) provides for empaneling alternate trial jurors, the Rules did not authorize selection of alternate grand jurors. Grand jurors face the same issues of illness or disability as do trial jurors, exacerbated because grand jurors typically sit for far longer periods than do trial jurors. See *Commonwealth v. Wilcox*, 437 Mass. 33, 37 (2002). General Laws c. 277, § 4 already provides for the replacement of grand jurors, and selection of alternates at the start of the process avoids delay if replacement becomes necessary. The replacement of a grand juror with an alternate is committed to the sound discretion of the judge, upon a showing of good cause.

While the availability of alternate grand jurors will enable them, like alternate trial jurors, to hear the evidence and witnesses presented to the grand jury, under the Supreme Judicial Court's "'practical' view of grand jury proceedings . . . [a] grand juror need not have heard all the evidence presented against a defendant in order to vote to return an indictment." *Commonwealth v. Walczak*, 463 Mass. 808, 845 (2012) (Spina, J., concurring in part) (citing *Wilcox*, id.). This amendment to Mass. R. Crim. P. 5 (a) also eliminates references to gender.

The amendment to Mass. R. Crim. P. 5 (b) eliminates references to gender and adds headings for readability. It also clarifies that the same method is used for selecting the foreperson and the clerk, as well as the foreperson pro tem and the clerk pro tem, by eliminating the unintentional suggestion in the rule of any difference between electing the foreperson and appointing the clerk.

The amendment to Mass. R. Crim. P. 5 (d) eliminates references to gender.

The amendment to Mass. R. Crim. P. 5 (e) codifies, for convenience, the well-established common law minimum size for a grand jury to hear evidence or take action as thirteen. *Commonwealth v. Wood*, 56 Mass. (2 Cush) 149 (1848), accord, *Crimm v. Commonwealth*, 119 Mass. 326, 331 (1876). Unlike the maximum number of grand jurors (set forth in Rule 5 (a) (1)),

this size for a quorum has not been in the rule where it can be easily found. While a grand jury requires at least thirteen members for a quorum, only twelve need assent to an indictment. Mass. R. Crim. P. 5 (e); *Commonwealth v. Smith*, 9 Mass. 107, 109 (1812). In addition, the amendment recognizes that an indictment, usually returned in open court, may be returned remotely when necessary.

The amendment to Mass. R. Crim. P. 5 (f) eliminates references to gender.

The amendment to Mass. R. Crim. P. 5 (g) clarifies that if at the request of the grand jury the prosecutor is present during deliberation and voting, the prosecutor should not comment on factual questions but should answer only questions of law. This longstanding rule in Massachusetts was also recognized as a best practice by the Supreme Judicial Court's Committee on Grand Jury Proceedings. Final Report at 21-23. See also, *Attorney General v. Pelletier*, 240 Mass. 264, 310 (1922) (Prosecutor present during deliberations at grand jury's request "cannot participate in the deliberations or express opinions on questions of fact or attempt in any way to influence the action. His duty is ended when he has laid before the grand jury the evidence and explained the meaning of the law.").

The amendment adding section (i) to Mass. R. Crim. P. 5 implements *Commonwealth v. Grassie*, 476 Mass. 202, 220 (2017), in which the Court held that the entire grand jury proceedings, except deliberations, must be recorded in a manner that permits reproduction and transcription. The recording shall also include any legal instructions and communications to the grand jury by a judge or a prosecutor, and a record of all present excluding the names of the grand jurors.

If, at the request of the grand jury, a prosecutor is present for any of the grand jury's deliberations and voting, any communication by the prosecutor or instruction relating to a question of law should be recorded. *Grassie*, 476 Mass. at 220. As the Supreme Judicial Court's Committee on Grand Jury Proceedings noted in its Final Report, "Grand jury proceedings should never go 'off the record.'" Final Report at 20. (Citing E.B. Cypher, *Criminal Practice and Procedure* § 26.13 (4th ed. 2014)).