

# MASSACHUSETTS RULES OF CRIMINAL PROCEDURE

## Rule 5

### DRAFT Reporter's Notes—2021

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 impanelling 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 impanelling alternate grand jurors. While Mass. R. Crim. P. 20(d) provides for impanelling 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 but makes no substantive changes.

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)).