

TAKING THE VERDICT AND DISCHARGING THE JURY

When the defendant, the attorneys and the jury have all reassembled in the courtroom:

Clerk: Will the jury please rise. Will the defendant also please rise and face the jury. Mr. Foreman (Madam Forelady), has your jury agreed upon a verdict (your verdicts)?

Foreperson: “Yes” or “We have.”

Clerk: What say you, Mr. Foreman (Madam Forelady), as to complaint number _____, wherein the defendant is charged with _____, is he (she) guilty or not guilty?

If the verdict is guilty and the judge has submitted a lesser-included offense to the jury:

Guilty of what?

Members of the jury, hearken to your verdict as the court will record it. You, upon your oath, do say that the defendant is (guilty) (not guilty) of _____ *[offense]* on complaint number _____. So say you, Mr. Foreman (Madam Forelady). So say you all, members of the jury.

If there are multiple charges: **And as to complaint number _____,**

wherein the defendant is charged with

Continue as above for each additional charge.

If defendant has been acquitted on all charges: [Name of defendant] , **the jury**

having returned (a) verdict(s) of not guilty on this (these)

complaint(s), the Court orders that you be discharged and go

without day on this (these) complaint(s).

See *Jury Trial Manual for Criminal Offenses Tried in the District Court*, Appendix VIII.

"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, 615 N.E.2d 938, 941 n.5 (1993). See supplemental instruction 1, *infra*, for a formulary for polling the jury. A verdict should not be recorded if any juror expresses dissent from the verdict. *Commonwealth v. Nettis*, 418 Mass. 715, 718 n.3, 640 N.E.2d 468, 471 n.3 (1994). 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, 568 N.E.2d 604, 610 (1991). See supplemental instruction 2, *infra*, for a charge directing the jury to return to deliberations.

DISCHARGING THE JURY

Judge:

Members of the jury, during this trial I told you in my

instructions that the verdict was your responsibility and your responsibility

alone. For that reason, I never comment to the jury on the verdict they

have reached. I will say to you, though, that it is clear that you took your

responsibilities very seriously, and that you approached your decision carefully and conscientiously.

Your jury service is now complete. On behalf of all the people of the Commonwealth, as well as the parties involved in this case, I thank you for that public service.

Jury service is not only one of the burdens of citizenship, it is also one of its privileges. As a foreign visitor observed almost 175 years ago, in the United States jury service “invests the people . . . with the direction of society.” I hope that your time here has increased your understanding of how important jury service is to the workings of a democracy. I hope also that you have learned something about how our courts function, and how much they need your interest and your support as citizens.

The court officer will now escort you back to the jury assembly room, where you will be discharged. Thank you again.

When discharging the jury, the judge may thank the jurors for their public service, but should not praise or criticize the jury's verdict. 2 ABA Standards for Criminal Justice, *Trial by Jury* § 15-4.6 (2d ed. 1980). See *Commonwealth v. McGrath*, 364 Mass. 243, 246, 303 N.E.2d 108, 111 (1973); *Commonwealth v. Dane Entertainment Servs., Inc.*, 18 Mass. App. Ct. 446, 450, 467 N.E.2d 222, 226 (1984).

The first paragraph of the model instruction is drawn from L.B. Sand, J.S. Siffert, W.P. Loughlin & S.A. Reiss, 1 *Modern Federal Jury Instructions* 9-13 (Nov. 1990 supp.). The reference in the third paragraph is to Alexis DeTocqueville, *Democracy in America* (1835) (“[T]he institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority [and] invests the people, or that class of citizens, with the direction of society”), quoted in *Powers v. Ohio*, 499 U.S.

400, 407, 111 S.Ct. 1364, 1368 (1991).

SUPPLEMENTAL INSTRUCTIONS

1. Polling the jury.

Clerk: Juror No. _____ , what say you, is the defendant guilty or not guilty? or Juror No. _____ , is the verdict announced by the (foreman) (forelady) your verdict?

Any request to poll the jury must be made “before the verdict is recorded” (Mass. R. Crim. P. 27[d]). 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. 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.” *Commonwealth v. Reaves*, 434 Mass. 383, 395, 750 N.E.2d 464 (2001). Whether the jury should be polled is within the judge’s discretion. Mass. R. Crim. P. 27(d). See *Jury Trial Manual for Criminal Offenses Tried in the District Court* § 2.87.

2. Return to deliberations after polling.

The clerk has just polled each of you, asking whether the verdict read to me was the decision reached by each and every one of you. It is apparent that the verdict in this case may not be unanimous; that one or more of you may not have agreed with it. Please return to the jury room, talk with one another, and try to deliberate there. Try to reach an agreement if you can. Do not hesitate to reexamine your own opinions and change your mind, but do not give up your honest

beliefs just because others disagree with you or just to get the case over with. Your verdict in a criminal case, whatever it is, must be unanimous.

The model instruction is based on Federal Judicial Center, *Pattern Criminal Jury Instructions* § 59 (1983 ed.).

3. *Where jury is permitted to remain for sentencing.* Now that your term

of service as jurors is ended, I invite you to remain in the courtroom for a few more minutes while I impose sentence.

It is often said that there are several goals of sentencing: to protect the public in the future, to punish the defendant for breaking the law, to rehabilitate the defendant to live within the law, to deter others from breaking the law, and in some cases to make restitution available to the victim.

The Legislature has set the outside parameters within which the sentence for this offense must fall. Within those parameters, it is my responsibility as a judge — and often not an easy one — to try to balance those differing goals with each other in a sentence that does justice both for the defendant and for our society.

See District Court Standards of Judicial Practice, *Sentencing and Other Dispositions* § 1.01 (September, 1984).

4. *Not discussing details of deliberations.*

Before I dismiss you, I want

to say a few words about any inquiries you might receive about this case. Now that the case is over, my authority to give you instructions is also over. But I want to offer you some suggestions which I will simply ask you to think about.

You are not obliged to answer any questions that anyone may ask you about this case. There is no rule that prohibits you, once you are discharged, from discussing your jury service with anyone you choose to. But it is my recommendation that you not discuss with outsiders the details of your deliberations and how you came to reach your verdict.

From where you sit, you can see that rail in front of you which separates you jurors from the rest of us and from the public. That rail is a symbol of the privacy that jurors have traditionally accorded each other, and have been entitled to from the rest of us. Obviously, it is crucial, in order for our jury

system to work, that jurors feel completely free to speak their mind during deliberations, without worrying about being embarrassed or pestered after their term of service is over. Former jurors must be able to resume their private lives without owing an explanation or justification to anyone. For that reason, it is normally in the best interests of future jurors for you to continue the longstanding tradition that jury deliberations remain private, even after the verdict.

If a situation ever arises where justice requires that former jurors be interviewed, that can always be done under the supervision of the Court. In that way, the integrity of the jury system is preserved and former jurors are not bothered unnecessarily.

Particularly in a case of public notoriety, it may be appropriate to explain to jurors that, although they have the right to speak with the press and others about the details of their deliberations, the confidentiality of jury deliberations is essential to the freedom and independence of future juries, in order to avoid the embarrassment and chilling effect that expected publication of deliberations would cause, and in order to discourage the harassment of jurors by defeated parties. *Clark v. United States*, 238 U.S. 1, 12-13, 53 S.Ct. 465, 468-469 (1933); *Commonwealth v. Smith*, 403 Mass. 489, 499, 531 N.E.2d 556, 562 (1988) (Abrams, J., concurring); *Woodward v. Leavitt*, 107 Mass. 458, 460 (1871); *Cook v. Castner*, 9 Cush. 266, 278 (1852); *Hannum v. Belchertown*, 19 Pick. 311, 313 (1837).

A post-verdict "searching or pointed examination of jurors in behalf of a party to a trial is to be emphatically condemned. It is incumbent upon the court to protect jurors from it." *Commonwealth v. Fidler*, 377 Mass. 192, 202-204, 385 N.E.2d 513, 519-520 (1979), quoting from *Rakes v. United States*, 169 F.2d 739, 745-746 (4th Cir.), cert. denied, 335 U.S. 826 (1948).

The model instruction is based in part upon a traditional instruction utilized for jury pools and cited favorably by the Supreme Judicial Court, *Fidler*, 377 Mass. at 201 n.9 & 204 n.12, 385 N.E.2d at 519 n.9 & 520 n.12; see *Jury Trial Manual for Criminal Offenses Tried in the District Court* § 2.88, in part upon R. L. McBride, *The Art of Instructing the Jury* §§ 3.69-3.71 (1969), and also upon L.B. Sand, J.S. Siffert, W.P. Loughlin & S.A. Reiss, 1 *Modern Federal Jury Instructions* 9-13 (Nov. 1990 supp.).

NOTES:

1. **Judge privately conferring with jury before sentencing.** It is “imprudent” for the judge to confer privately with the jury prior to discharging them, unless the judge has already imposed sentence. *Commonwealth v. Leavey*, 60 Mass. App. Ct. 249, 253, 800 N.E.2d 1073, 1076 (2004).
2. **Recommendation for leniency.** Federal judges may not accept a verdict accompanied by a jury recommendation for leniency. They are instead to admonish the jury that it has no sentencing function. *Rogers v. United States*, 422 U.S. 35, 40, 95 S.Ct. 2091, 2095 (1975).