

# CHAPTER 3

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## *District Court Trials*

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### § 3.1 OVERVIEW OF THE DISTRICT COURT<sup>1</sup>

Prior to 1994, district court trials were conducted pursuant to a de novo, two-trial system, under which the defendant had the right to “two bites at the apple”: if she chose to be tried before a judge and was convicted, she had the right to vacate the conviction and receive a “de novo” trial by a six-person jury. But in 1987, this de novo system was abolished in Hampden and Essex Counties as an experiment, and in 1993 de novo was abolished throughout Massachusetts for all cases commencing on or after January 1, 1994. Since that reform, district-court defendants charged with offenses as to which the district court has final jurisdiction have a right to a single trial, much like that in superior court,<sup>2</sup> with appeal solely to the appeals court regarding errors of law. As developed below, the legislation that abolished the old de novo system provided for a modest expansion of discovery for defendants<sup>3</sup> and preserved certain defense rights in tendering a guilty plea,<sup>4</sup> both unavailable to defendants in superior court. However, the reform legislation left intact an important limitation on the sentencing authority of district-court judges, prohibiting imposition of a sentence to state prison.<sup>5</sup> That by itself counsels, where possible, resolving in district court those cases as to which the district court has final jurisdiction.

Although the reform provides for a single trial, jury or jury-waived at the defendant’s election, not every district court has the resources to operate a jury session. There thus may be instances in which preliminary proceedings and jury-waived trials are conducted in one court but jury trials are conducted in another, specially designated by the Chief Justice of the District Court for jury trials in that county.<sup>6</sup> In such a case, if the defendant's disposition includes probation, supervision will be conducted by a probation officer in the originating court without regard to where the conviction was issued, unless the trial justice or probation commissioner provides otherwise.<sup>7</sup>

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<sup>1</sup> As used in this chapter, the District Court includes the Boston Municipal Court (BMC) unless otherwise indicated. Although there are some differences in the pretrial procedures of these two courts, which this chapter will note, they share common jurisdiction and general attributes, the Boston Municipal Court in effect serving as the district court in Suffolk County. *See, e.g.*, G.L. ch. 218, § 26, providing that the “district courts and the divisions of the Boston municipal court department” have identical original jurisdiction in criminal matters; G.L. ch. 218, § 26A, providing that criminal trials in both the district court and Boston municipal court departments shall be by a jury of six persons; Mass. R. Crim. P. 2(a)(7), providing that for purposes of the Rules of Criminal Procedure, “District Court” includes “the Boston Municipal Court Department of the Trial Court”. The two courts also share a supplemental set of rules of criminal procedure that “govern procedure in all criminal cases commenced in the District Court and in the Boston Municipal Court on or after January 1, 1996. Dist./Mun. Cts. R. Crim. P. 1.

<sup>2</sup> *See* G.L. ch. 218, § 26A, providing that a district-court or Boston-municipal-court judge sitting in a jury-waived trial “shall have and exercise all of the powers and duties which a justice sitting in the superior court department has. . . .”; Dist./Mun. Cts. R. Crim. P. 7, **Trials**, providing that “[j]ury-waived trials and jury trials shall proceed in accordance with the provisions of law applicable to such trials in Superior Court . . . .”

<sup>3</sup> *See* §§ 3.2, 3.4, *infra*.

<sup>4</sup> *See* § 3.6, *infra*.

<sup>5</sup> G.L. ch. 218, §§ 26A, 27.

<sup>6</sup> G.L. ch. 218, § 27A(b).

<sup>7</sup> G.L. c. 218, § 27A(i); § 26A.

As noted, under the reform legislation, the subject-matter jurisdiction of the district court and the sentencing power of district court judges remain unchanged.

As a practical matter, it by now is virtually impossible for a current case to be tried under the defunct *de novo* system. Except for Hampden and Essex Counties, covered in the next paragraph, the *de novo* system was replaced by the single-trial system for all cases “commencing” on or after January 1, 1994. Under the statute, a case “commences” when the defendant is arrested, or in nonarrest cases when the complaint issues.<sup>8</sup> Thus, the old *de novo* system could not be utilized unless the case is one involving a pre-1994 arrest (or complaint) that is revived for trial.<sup>9</sup>

The likelihood of a trial under the *de novo* system is even more remote in Hampden and Essex Counties, which abolished the *de novo* system on an experimental basis on July 1, 1987.<sup>10</sup> The original two-year experiment was extended twice, but the second extension<sup>11</sup> left a gap between July 1 and 10, 1991; defendants arrested (or if summonsed, charged) during this period should have been tried under the *de novo* system. Other cases originating between July 1, 1987, and December 31, 1993, are governed by the temporary legislation, which differed only in minor respects from the subsequent statewide reform.<sup>12</sup>

Despite the considerable procedural changes wrought by the reform legislation, the *right to a jury trial* still extends to anyone charged with delinquency<sup>13</sup> or with any crime,<sup>14</sup> even minor criminal traffic offenses.<sup>15</sup>

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<sup>8</sup> St. 1992, c. 379, §226 (and for Essex and Hampden Counties, §207).

<sup>9</sup> *See* *Stafford v. Commonwealth*, 419 Mass. 1012 (1995) (defendant, who was not arrested and against whom a complaint did not issue until 1994, was not entitled under due process principles to proceed under the *de novo* system even though offense allegedly occurred on October 11, 1993, and a citation issued on November 22, 1993; nor was change to one-trial system violative of protections against *ex post facto* laws).

<sup>10</sup> St. 1986, c. 537. *See also* Dist. Ct. Supp. Crim. R. 10 (Special Procedures for Criminal Cases in Essex and Hampden Counties); Special Rules of Criminal Procedure for District Court Criminal Cases in Essex and Hampden Counties. For criminal actions commenced on or after January 1, 1996, *see* District/Municipal Courts Rules of Criminal Procedure, promulgated on November 3, 1995. *See infra* chs. 14, 15, 16.

<sup>11</sup> St. 1991, c. 138, § 42.

<sup>12</sup> *See supra* note 11.

<sup>13</sup> G.L. c. 119, § 55A (first-instance jury trial). The juvenile jury trial is guaranteed by G.L. c. 119, § 56, which grants a 12- or six-person jury depending on whether the delinquency would require an indictment if committed by an adult. *See also* *Commonwealth v. Juvenile*, 384 Mass. 390, 391 (1981) (reversed because statute requires jury of 12, not six); *Commonwealth v. Thomas*, 359 Mass. 386 (1971) (error to deny jury trial to juvenile).

<sup>14</sup> The right to a jury trial is broader in Massachusetts than federally, because *any* criminal charge triggers the right regardless of penalty. Mass. Const., Declaration of Rights art. 12; C.L. c. 278, § 18; Mass. R. Crim. P. 19(a); *Jones v. Robbins*, 74 Mass. (8 Gray) 329 (1857). *Contrast* *Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989) (Federal Constitution does not require jury trial in DUI case as maximum sentence was six months). *See also* *Frizado v. Frizado*, 420 Mass. 592 (1995) (holding no constitutional right to a jury trial preceding the issuance of an order under G.L. c. 209A so long as the order does not confiscate property as punishment for crime); *In re Sheridan*, 422 Mass. 776 (1996) (reaffirming that there is no constitutional right to a jury trial in sexually dangerous person discharge hearings under G.L. c. 123A).

<sup>15</sup> In 1986, many minor motor vehicle violations were made entirely noncriminal. These civil offenses (mostly violations where the penalty does not exceed a \$100 fine) are tried

## § 3.2 CHRONOLOGY OF PROCEEDINGS:

### *Preliminary Proceedings:*

1. Arraignment<sup>16</sup>

The court should issue an automatic discovery order at arraignment.<sup>17</sup>

2. Pretrial Conference (between the parties).<sup>18</sup>

3. Pretrial Conference Report Hearing.

In addition to the normal agenda in non-district court cases, events on this day may include:

a. Guilty Plea or Admission at this hearing or later.

Right to submit agreed or unilaterally requested disposition, with option of withdrawing plea if judge would exceed.<sup>19</sup>

b. Motions heard at this Hearing (or later).

Unfulfilled discovery obligations should be discussed and resolved.<sup>20</sup>

Under G.L. c. 278, § 18 as well as the Rules of Criminal Procedure,<sup>21</sup>

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by the clerk, subject to a de novo hearing before a judge without a jury. *See, e.g.*, Commonwealth v. Mongardi, 26 Mass. App. Ct. 5 (1988) (speeding and following too closely).

Other Chapter 90 offenses, however, are still subject to adjudication by a six-person jury, either in the first instance or on appeal. Commonwealth v. Curtin, 386 Mass. 587 (1982); Commonwealth v. Germano, 379 Mass. 268, 270–76 (1979); Commonwealth v. Hesser, 1 Mass. App. Ct. 877 (1974) (rescript). Under G.L. c. 90, § 20F (since replaced by G.L. c. 90C), an alleged offender may obtain a noncriminal disposition of minor motor vehicle violations by mailing a fine to the magistrate or appearing personally and confessing. However, by contesting the charge the defendant constructively “elects” to have the matter handled as a criminal case. He may apply within four days of the citation for a preliminary hearing at which he can contest the issuance of a complaint; if the complaint is issued, “traffic violations follow the procedure for misdemeanors generally,” and the normal rules apply. *Curtin, supra*, at 589–92.

<sup>16</sup> *See also infra* ch. 7, Arraignment.

<sup>17</sup> The defendant is entitled to receive a “police statement” and a copy of his or her criminal record as part of the arraignment. Dist./Mun. Cts. R. Crim. P. 3(a). In cases commenced by a warrantless arrest, the police-statement requirement may be satisfied by providing the defendant with a copy of the arrest report; in cases commenced by complaint on application by the police or a civilian, a police report or information from the application, as the case may be, may constitute the required report. Dist./Mun. Cts. R. Crim. P. 2. Counsel should ensure that the police statement, in whatever form, sets out the facts underlying the complaint and is not just a recitation of the complainant’s conclusions regarding the charged offense(s).

The arraignment judge must issue an order requiring the parties in cases within the court’s final jurisdiction to confer and to appear at a pretrial hearing under Mass. R. Crim. P. 11, and requiring the parties to “provide, permit and obtain discovery” as mandated by Mass. R. Crim. P. 14 prior to the pretrial hearing. Dist./Mun. Cts. R. Crim. P. 3(c). In cases involving offenses not within the court’s final jurisdiction, the arraignment judge will instead schedule the matter for a probable cause hearing under Rule 7.

<sup>18</sup> *See infra* § 3.3; ch. 14. *See also* Dist./Mun. Cts. R. Crim. P. 4.

<sup>19</sup> *See infra* § 3.6; ch. 37.7.

<sup>20</sup> *See infra* § 3.4, ch. 16.

<sup>21</sup> *See infra* § 3.3; Mass. R. Crim. P. 13(d); Dist./Mun. Cts. R. Crim. P. 6.

the defendant may also file additional motions no later than twenty-one days following her decision whether to waive a jury trial.

c. Possible election of jury or bench trial.

4. Election: A defendant who does not plead guilty or admit to sufficient facts at the pretrial hearing must elect trial in the jury or jury-waived session before the case can be scheduled for trial.<sup>22</sup> He or she can only be required to make that election after discovery motions have been decided and any ordered (or agreed) discovery delivered.<sup>23</sup>

5. If the defendant does not plead guilty, admit to sufficient facts, or elect to waive a jury trial at the pretrial hearing, the case is transferred to the appropriate jury session, which in the BMC is the assignment session.

*In the Jury Session:*

The defendant may file motions (either new motions or motions that were not resolved prior to transfer to the jury session) within twenty-one days of her decision not to waive a jury trial.<sup>24</sup>

The defendant again has the opportunities (1) to plead or admit under the same terms as before transfer to the jury session, as set forth above; or (2) to waive a jury and receive a bench trial in the jury session. Otherwise, she receives a six-person jury trial, conducted as in superior court but with two peremptory challenges per defendant and with the sentencing power of the judge limited to incarceration in the house of corrections.

*Appeal:*

Solely on errors of law, in the appeals court.<sup>25</sup>

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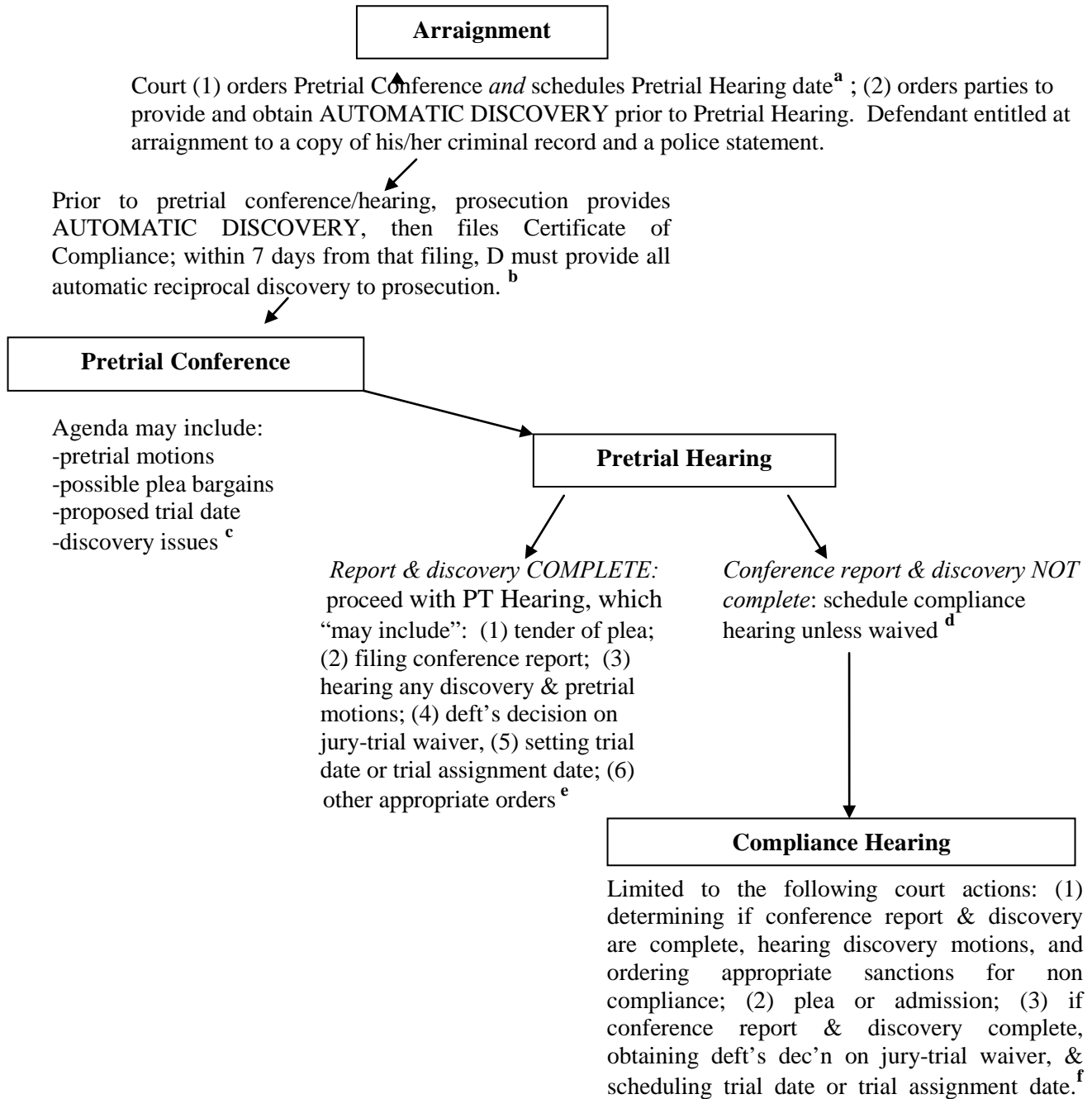
<sup>22</sup> See *infra* § 3.5.

<sup>23</sup> See *infra* chs. 14, 15. See also Dist./Mun. Cts. R. Crim. P. 4, 5, and 6.

<sup>24</sup> See *infra* § 3.3, ch. 15. See also Dist./Mun. Cts. R. Crim. P. 6.

<sup>25</sup> G.L. c. 211A, § 10; G.L. c. 218, § 27A(g) (jury trial), § 26A, ¶ 3 (jury-waived trial).

**DISTRICT COURT/BMC SEQUENCE OF EVENTS:**



<sup>a</sup> Mass. R. Crim. P. 11(a). *See* ch.7 on arraignment. In the BMC, arraignment judge orders parties to appear for the Pretrial Conference before an assistant clerk-magistrate on a date certain in a designated courtroom. Dist./Mun. Ct. Crim. R. 3(c).

<sup>b</sup> Mass. R. Crim. P. 14(a)(1), (3); 14(a)(1)(B). *See* ch. 16 on discovery. Discovery compliance not required until Pretrial Hearing, but full discovery prior to Pretrial Conference permits full discussion of motions, possible plea, etc.

<sup>c</sup> Mass. R. Crim. P. 11(b).

<sup>d</sup> Mass. R. Crim. P. 11(b)(2)(iii); Dist./Mun. Ct. Crim. R. 4(e).

<sup>e</sup> Mass. R. Crim. P. 11(b); Dist./Mun. Ct. Crim. R. 4.

<sup>f</sup> Mass. R. Crim. P. 11(c); Dist./Mun. Ct. Crim. R. 5.

### § 3.3 PRETRIAL CONFERENCES, PRETRIAL HEARINGS, AND PRETRIAL MOTIONS

*The Pretrial Conference, Report, and Hearing (Overview):* The pretrial conference is fully addressed *infra* at ch. 14. In brief, the rules mandate a three-step process that must be completed before a case is transferred to a trial session. The first step is the pretrial conference, which is intended “to promote the speedy and orderly disposition of cases at a time certain which is most convenient to all parties.”<sup>26</sup> The aim is to focus the case without the need of boilerplate motions, bringing the parties together to discuss and reach agreement on uncontested issues and to identify areas of disagreement for the court’s resolution, through either a pretrial motion or trial. The second step is reducing the results of the pretrial conference to writing, using a pretrial-conference-report (PCR) form promulgated by the District Court or BMC. The final step is appearing before the court at the Pretrial Hearing at which the judge reviews the tendered PCR, takes a plea or admission if one is tendered, and if there is no plea or admission, considers and if possible resolves the parties’ disagreements. Once the case is ready for trial – at a minimum discovery must be complete – the judge elicits the defendant’s election of jury or non-jury trial and transmits the matter to the appropriate trial session, jury or non-jury. What follows is a more detailed outline of this three-step process.

*The Pretrial Conference.* As noted, in cases involving offenses within the court’s final jurisdiction,<sup>27</sup> the arraignment judge orders the parties to participate in a pretrial conference and then to appear at a pretrial hearing, at which they are to address matters unresolved at the pretrial conference and to file with the court a pretrial conference report. In the District Court, the conference is informal, the prosecutor and defense counsel meeting at a mutually convenient time and place prior to the scheduled pretrial hearing. In the BMC, the arraignment judge orders the prosecutor and defense counsel to appear for a conference at a particular time and place, and the conference is supervised by a designated assistant clerk-magistrate.<sup>28</sup> In either event, the purpose of the conference is the same. Among the matters for discussion are (1) the status of discovery, (2) any other pretrial matters which absent agreement would require a pretrial motion, (3) the possibility of disposing of the case without trial, (4) possible trial dates, (5) probable length of trial, (6) availability of witnesses, (7) possible stipulations, if any, as well as any other matters that would promote a fair and efficient disposition of the case.<sup>29</sup>

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<sup>26</sup> Reporter’s Notes, Mass. R. Crim. P 11 (revised 2004).

<sup>27</sup> See G.L. ch. 218, § 26, setting out those matters in which the district court and Boston municipal court have original jurisdiction, concurrent with the superior court. The offenses which the district court can see through to final resolution include violations of town and city by-laws and ordinances, all misdemeanors except libels, all felonies punishable by imprisonment in state prisons for up to five years, and a number of designated felonies, including most narcotics offenses. However, as noted above, even in offenses punishable by a state-prison sentence, the district court may not impose such a sentence. G.L. ch. 218, § 27. The most serious sentence that a district court judge generally may impose for any single offense is the maximum misdemeanor sentence, two and one half years to the house of corrections. *Id.*; G.L. ch. 279, § 23.

<sup>28</sup> Dist./Mun. Cts. R. Crim. P. 3(c).

<sup>29</sup> Mass. R. Crim. P. 11(a)(1). This is intended as a non-exclusive list.

*The Pretrial Conference Report (PCR).* The parties must prepare a report of the conference using a pretrial-conference-report form promulgated by the District Court or BMC, as the case may be. The two forms differ slightly in format, but each records the status of discovery, identifying unresolved discovery issues or incomplete discovery; each identifies anticipated pretrial motions addressing non-discovery issues as to which there is disagreement; each sets out any stipulations of fact; and each requires the signature of both the prosecutor and defense counsel certifying the accuracy and completeness of the information provided. If the report contains a stipulation of fact or defendant's waiver of a constitutional right, the defendant must also sign the PCR. This is not a mere formality, because once the executed form is reviewed and signed by the judge, the agreements that it contains have the force of a court order that governs the subsequent proceedings in the case.<sup>30</sup> Counsel should ensure that any waiver of a constitutional right or any fact stipulation that relieves the Commonwealth of its constitutionally imposed burden of proof is one that the defendant fully understands and, after full consultation, is one to which he knowingly and voluntarily agrees.

*The Pretrial Hearing.* The final step before the case proceeds to a trial session is the pretrial hearing. Often, if discovery and the defense investigation are completed to the defendant's and defense counsel's satisfaction, a case can be resolved at this stage by a guilty plea or admission to sufficient facts. *See* § 3.6, *infra*. However, if the matter is not resolved at this point by a plea or admission, the pretrial hearing is point at which preliminary matters are resolved, ensuring that discovery is complete and that the issues are narrowed for trial. Until discovery is formally certified to be complete, the court cannot require the defendant to elect trial in the jury session or the jury-waived session, which means that the case cannot be scheduled for trial. *See* § 3.5, *infra*.

On the pretrial hearing date, again set at arraignment, the parties must appear and submit a signed PCR to the court for its consideration. A party's failure to appear at the pretrial hearing or to submit the PCR creates a presumption that the missing party is ready for trial, and the case is scheduled for trial at the earliest possible date, with no continuance of that date or any pretrial motions permitted except for cause shown.<sup>31</sup> Assuming that the PCR is filed, the case is called for the hearing, an important part of which is the judge's consideration of any reported disagreements between the parties, particularly those concerning discovery. While the court has authority to impose sanctions if a party has failed to provide discovery ordered at arraignment, the court may instead order its production, that same day if possible.<sup>32</sup> Whether or not such production can be accomplished, by the conclusion of the pretrial hearing, all discovery disputes should be resolved and all discoverable materials should either be produced or subject to production by a date certain.

If at the time of the hearing either party contends that discoverable material has not been produced, that party may file a discovery motion, thus giving the judge the opportunity to resolve this dispute.<sup>33</sup> A defendant owed discovery that is ordered but not yet produced can either (1) agree to elect a jury or non-jury trial (relying on the trial

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<sup>30</sup> *See* Commonwealth v. Viriyahiranpaiboon, 412 Mass. 224, 228 (1992); Commonwealth v. Durning, 406 Mass. 485, 495 (1990). *See also* Reporter's Notes, Mass. R. Crim. P. 11 (revised 2004).

<sup>31</sup> Mass. R. Crim. P. 11(a)(2)(B).

<sup>32</sup> Dist./Mun. Cts. R. Crim. P. 4(b).

<sup>33</sup> Dist./Mun. Cts. R. Crim. P. 4(e).



court to enforce any then-pending discovery orders), which would result in the scheduling of a trial or trial assignment date, or (2) request a compliance/election hearing to ensure compliance with the discovery order before electing a jury or non-jury trial.<sup>34</sup> Once the defendant makes his or her election, he or she loses the right to move for further discovery unless the item(s) sought could not reasonably have been sought prior to election or the court finds that other grounds reasonably justified the delayed filing.<sup>35</sup>

*Pretrial Motions.* As noted, the only discovery motions permitted after the defendant’s election of a trial session are defense motions seeking discovery that could not reasonably have been sought at the pretrial hearing, Commonwealth motions seeking reciprocal discovery not available at the time of the pretrial hearing, or other motions permitted for cause shown. Non-discovery pretrial motions, although a mandatory subject of discussion at the pretrial conference, are ordinarily heard in the trial session, after the defendant elects a jury or non-jury trial. As detailed *infra* in § 14.3, the PCR controls the scope of subsequent motions practice. Agreements contained in the PCR have the force of a court order, and a report of disagreement on a motion is generally required before the motion may be filed. Such motions can be filed up to 21 days after the defendant’s election, and if filed post-election, they will be heard in the trial session, often on the day of trial.<sup>36</sup> Such motions filed prior to election are ordinarily transmitted with the matter to the trial session, but in district courts in which the trial session is in a different court than that of the pretrial hearing, the presiding justice of the original court has discretion to require such motions to be filed and heard in that court prior to transfer to the trial session.<sup>37</sup> Rulings on such motions prior to transmission to the trial session are final,<sup>38</sup> but this obviously should not restrict re-filing of previously denied motions when newly discovered evidence or changed circumstances might warrant a different ruling.

### § 3.4 DISCOVERY

(*See also infra* ch. 16, Discovery.)

Although the legislation providing for the one-trial system in the District Court and the BMC mandates certain discovery that Rule 14 did not then provide, the 2004 revision of Rule 14 expanded the scope of mandatory discovery to include that which the statute requires.<sup>39</sup> As noted above, because the court cannot require the defendant to elect trial in the jury or non-jury session until all discovery orders are complied with the defendant cannot be forced to trial prior to the prosecution’s delivery of all ordered discovery. (Counsel should guard against discovery answers that “reserve the right” to file later supplementation and insist that the prosecutor deliver *all* discovery prior to the defendant’s election of jury or bench trial.) Counsel should also be on guard and assert

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<sup>34</sup> Dist./Mun. Cts. R. Crim. P. 4(e), 5.

<sup>35</sup> Dist./Mun. Cts. R. Crim. P. 6(a)(1). *See* Mass. R. Crim. P. 13(d)(1).

<sup>36</sup> Dist./Mun. Cts. R. Crim. P. 6(a)(2),(b)(2). *See* Mass. R. Crim. P. 13(e)(2) (providing that non-discovery pretrial motions filed at or after the pretrial hearing “shall be heard at the next scheduled court date unless otherwise ordered”).

<sup>37</sup> Dist./Mun. Cts. R. Crim. P. 6(a)(2).

<sup>38</sup> *Id.*; G.L. ch. 278, § 18.

<sup>39</sup> *Compare* Mass. R. Crim. P. 14(a)(1)(A), Mandatory Discovery for the Defendant, with G.L. ch. 218, §26A. *See infra* ch. 16.

speedy trial rights<sup>40</sup> if this provision is used by the prosecution to delay trial or keep the defendant in custody through its failure to comply expeditiously with defense discovery.

Dist./Mun. Cts. R. Crim. P. 3 mandates that at or before arraignment, the court shall ensure that the prosecution provides to the defense a copy of the defendant's record and a copy of the police statement required by Dist./Mun. Cts. R. Crim. P. 2 (“a written statement describing the facts constituting the basis for the arrest,” or, if there was no arrest, “the police report, if any, relating to the alleged crime”). As noted above, the rule further provides that at arraignment the judge shall issue a written order to the parties to engage in a pretrial conference and to “provide, permit, and obtain discovery in accordance with G.L. c. 276, § 26A and Mass. R. Crim. P. 14,” in advance of the scheduled pretrial hearing.

In addition to the requirements of the reform legislation, counsel should be aware of the extensive rules, statutes, and case law governing discovery, some providing broader discovery, addressed in detail *infra* in ch. 16.

## § 3.5 WAIVER OF JURY

(Jury waivers are addressed generally *infra* at §§ 22.8 and 34.1. Aspects relating to district court jury waivers are detailed in this section.)

### § 3.5A. TIMING OF ELECTION

The defendant may waive her right to a six-person jury trial at either of two stages: at or following the pretrial hearing or, once transferred to the jury session, at that session. But the pretrial hearing judge cannot require a defendant to elect a jury or jury-waived trial until after (1) the pretrial conference and hearing are held, and (2) all discovery motions have been heard and discovery orders complied with.<sup>41</sup> Once these events have occurred, the defendant may be asked if she wishes to waive a jury; at that point if she does not, the case is to be transferred “forthwith” to the jury session,<sup>42</sup> which would then have jurisdiction over re-filed and newly filed pretrial motions as well as trial. As noted, the defendant retains the right to waive a jury following transfer of the case to the jury session, although that session must “consent” to the waiver.<sup>43</sup>

If the defendant plans to submit either an agreed disposition or a defense request for disposition (*see infra* § 3.6), he should do so prior to the waiver decision. The reform legislation requires a judge who declines a disposition request to permit withdrawal of the guilty plea or admission but does not require her to permit

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<sup>40</sup> *See infra* ch. 23.

<sup>41</sup> G.L. c. 218, § 26A; Dist./Mun. Cts. R. Crim. P. 4(e). As noted above, counsel should beware of dilatory prosecutorial compliance with discovery that has the effect of denying the defendant a speedy trial. *See also* Dist./Mun. Cts. R. Crim. P. 4, 5, and 6.

<sup>42</sup> G.L. c. 218, § 27A(c). In District Court, this ordinarily means that the judge before whom the election occurred schedules the case for trial on a date certain in the jury session. In the BMC, the judge schedules the case for trial assignment on a date certain, and at that session, the court would schedule the matter for trial. Dist./Mun. Cts. R. Crim. P. 4(e).

<sup>43</sup> G.L. c. 263, § 6.

withdrawal of a jury waiver.<sup>44</sup> Submitting the dispositional request prior to waiver not only preserves the right to a jury trial, but also provides the defendant a chance to submit the dispositional request to a judge in the jury session.

### § 3.5B. RIGHT TO WAIVE A JURY

The right to a jury trial extends to anyone charged with delinquency or with any crime, even minor criminal traffic offenses.<sup>45</sup> But this right may be waived in most, but not all, circumstances.

If there are co-defendants and a codefendant wants a jury trial, the defendant will not be afforded the opportunity to have a separate bench trial and the waiver will be rejected.<sup>46</sup> Otherwise, the standard for ruling on a jury waiver varies depending on whether the waiver was made under the required election or subsequent to that election, in the jury session. Barring a contrary decision by a co-defendant, a defendant has a statutory right to waive a jury under the election procedure that follows the pretrial hearing and certificate of discovery compliance, thus remaining in the non-jury session.<sup>47</sup> Failure to provide a bench trial upon waiver deprives the jury session of jurisdiction.<sup>48</sup> Once transferred to the jury session, however, a jury waiver can be rejected in the discretion of the court for “any good and sufficient reason,” provided the rejection is given in open court and on the record.<sup>49</sup>

### § 3.5C. REQUIREMENTS FOR A JURY WAIVER

Jury waivers are governed by G.L. c. 263, § 6, Mass. R. Crim. P. 19(a), Dist./Mun. Cts. R. Crim. P. 4 and 5, and the colloquy requirements enunciated by the Supreme Judicial Court in *Ciummei v. Commonwealth*.<sup>50</sup> These requirements, common to superior court and district court, are addressed *infra* at § 34.1.

There are specific statutory requirements for district court jury waivers, which are reflected in the District/Municipal Courts’ Rules of Criminal Procedure. The timing requirements are detailed *supra* in § 3.5A. Additionally, the waiver must be accompanied by a certificate of defense counsel on a form prescribed by the District Court or BMC Chief Justice, indicating that counsel has made the necessary explanations and determinations regarding waiver.<sup>51</sup> (Counsel should note that a defendant who is convicted after waiving a jury may well regard counsel’s “explanation and determination” as deficient and attackable. Indeed, the certificate procedure that requires counsel to “find” that a client’s waiver was knowing, intelligent, and rational appears to require counsel to convey confidential client communications to the court,

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<sup>44</sup> *Cf.* *Commonwealth v. Armand*, 411 Mass. 167, 174–75 (1991) (no right to withdraw jury waiver under Essex and Hampden experimental legislation).

<sup>45</sup> *See supra* § 3.1, notes 13-15.

<sup>46</sup> G.L. c. 263, § 6.

<sup>47</sup> G.L. ch. 218, § 26A; G.L. c. 263, § 6 (for waivers filed before transfer to the jury session, “consent to said waiver shall not be denied”).

<sup>48</sup> *Commonwealth v. Greene*, 400 Mass. 144, 148 (1987).

<sup>49</sup> Mass. R. Crim. P. 19(a). *See also* *Singer v. United States*, 380 U.S. 24 (1965); G.L. c. 263, § 6.

<sup>50</sup> 378 Mass. 504 (1979).

<sup>51</sup> Dist./Mun. Cts. R. Crim. P. 4(e).

and to make findings that are properly the responsibility of the court. The certificate of defense counsel, in short, in no way supplants the need for a full colloquy.<sup>52</sup> The colloquy provides a check that defense counsel has done her duty in discussing the choice with the defendant and that the defendant has participated in and comprehends the decision to waive the jury.<sup>53</sup> Indeed, the colloquy must be conducted “contemporaneously with and before accepting any waiver.”<sup>54</sup> If the defendant is unrepresented, her jury waiver may not be received unless there has been a written waiver of counsel.<sup>55</sup>

### § 3.6 ADMISSIONS, PLEAS, AND DEFENSE “DISPOSITIONAL REQUESTS” IN DISTRICT COURT

It is incumbent on defense counsel to have witnesses and documentation present at the sentencing hearing and to seek presentence investigations or submit presentence memoranda in appropriate cases because, subject to a Rule 29 motion to revise and revoke,<sup>56</sup> once imposed, the sentence is final.

#### § 3.6A. CONTINGENT PLEAS AND ADMISSIONS

In district court, the defense may tender a guilty plea (or admission to sufficient facts) contingent on the court's acceptance of defendant's requested disposition, whether or not the proposal is recommended jointly with the prosecution.<sup>57</sup> In considering such a dispositional request, sometimes called a “defense-capped” plea, the judge must either (1) accept the defendant's dispositional request (or joint recommendation), imposing the requested sentence or a lesser sentence, or (2) inform the defendant that he will not be bound by the request and allow the defendant to withdraw her plea.<sup>58</sup> If the court informs the defendant that it will not be bound by the dispositional request, the court has discretion to inform the defendant what sentence it would impose.<sup>59</sup> The “requested disposition” may be any that the court has authority to impose, including a non-conviction disposition such as pretrial probation under G.L. c. 276, § 87, or a continuance without a finding, among others.<sup>60</sup>

G.L. c. 278, § 18 does not indicate any time limits on the tendering of a contingent plea or dispositional request. Neither does the statute limit the procedure to the non-jury session; it is equally available to the defendant after transfer to the jury session. So, under Dist./Mun. Cts. R. Crim. P. 4(c), the defendant may tender a plea at the pretrial hearing prior to deciding whether to waive the jury. If the court rejects the

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<sup>52</sup> See Dist./Mun. Cts. R. Crim. P. 4(e).

<sup>53</sup> Commonwealth v. Pavao, 423 Mass. 798, 804 (1996).

<sup>54</sup> Pavao, *supra* note 53; see also Commonwealth v. Hernandez, 42 Mass. App. Ct. 780 (1997).

<sup>55</sup> G.L. c. 218, § 26A.

<sup>56</sup> Mass. R. Crim. P. 29(a).

<sup>57</sup> See Mass. R. Crim. P. 12(c)(2)(B); Dist./Mun. Cts. R. Crim. P. 4(c).

<sup>58</sup> G.L. ch. 278, § 18; Mass. R. Crim. P. 12(c)(2)(B) & (c)(6); Dist./Mun. Cts. R. Crim. P. 4(c).

<sup>59</sup> Mass. R. Crim. P. 12(c)(6); Dist./Mun. Cts. R. Crim. P. 4(c).

<sup>60</sup> G.L. ch. 278, § 18.

dispositional request, the defendant may elect trial in either the jury or non-jury session, where he or she can again tender a plea or admission contingent on a dispositional request. Finally, the defendant in a jury-waived trial has a right not to be tried by a judge who has previously rejected a dispositional request.<sup>61</sup>

### § 3.6B. PROCEDURE FOR CHANGE OF PLEA OR ADMISSION

*Guilty pleas:* The procedures and requirements for tendering a guilty plea are detailed *infra* in ch. 37.

*Admissions:* In district court, a defendant may waive trial and “admit to sufficient facts to warrant a finding of guilty.”<sup>62</sup> The plea remains not guilty, but in effect, the defendant stipulates to the evidence.<sup>63</sup> Although originally a feature of the *de novo* system, permitting a district-court defendant to resolve his case without trial in the first tier while preserving his right to a trial *de novo* if he did not like the sentence imposed, admissions to sufficient facts continue to be utilized in the district court. However, because G.L. c. 278, § 18 abolished the trial-*de-novo* system while preserving admissions to sufficient facts, such an admission is treated as a tender of a guilty plea “for the purposes of this section.” As a result, every admission requires a full colloquy, advising the defendant of all safeguards required of a guilty plea.<sup>64</sup> Moreover, under this statute, a guilty plea does not preclude the judge from entering a continuance without a finding, and if the defendant makes his guilty plea contingent on a request for a “CWOFF,” he must be permitted to withdraw it if the judge would decline the request and enter a conviction.

Nevertheless, the admission option remains preferable for a defendant who asserts his innocence but wishes to obtain “plea bargaining” benefits without the uncertainties attending the *Alford* type of guilty plea.<sup>65</sup> Case law regarding the colloquy requirements for guilty pleas (which also apply to admissions in the single-trial system) are detailed *infra* at § 37.7B.

A *continuance without a finding* permits the judge to continue the case for a period of time, with or without conditions and with or without probation,<sup>66</sup> after which time the case is ordinarily dismissed.<sup>67</sup> This permits the defendant to avoid a record and

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<sup>61</sup> G.L. c. 218, § 26A, ¶ 3.

<sup>62</sup> Mass. R. Crim. P. 12(a)(2). The practice has been used in superior court as well, although Rule 12 does not contemplate it. In any event, the power of the parties in superior court to stipulate away a trial serves the same purpose.

<sup>63</sup> In the district court’s Standards of Judicial Practice: Trials and Probable Cause Hearings, Standard 2:01 (Nov. 1981), the admission proceeding is deemed to constitute an “unopposed trial,” where guilt must still be proved beyond a reasonable doubt through minimal evidence including hearsay.

<sup>64</sup> Mass. R. Crim. P. 12(c)(3).

<sup>65</sup> *North Carolina v. Alford*, 400 U.S. 25 (1970). *Alford* permits but does not require a judge to accept a guilty plea from a defendant asserting his innocence. *See infra* § 37.10A.

<sup>66</sup> G.L. c. 276, § 87, permits probation during the continuance period. The first-tier court supervises probation even if the “*cwof*” was granted at the jury session. G.L. c. 218, § 27A(i). *See also* In the Matter of Boston Mun. Ct. Dep’t of the Trial Ct., No. S.J.C.-OE-085 (Feb. 14, 1991) (referral by S.J.C. to Judicial Conduct Comm’n of judge’s alleged intentional failure to conduct required colloquies, as possible violations of S.J.C. Rule 3:09, Canons 1, 2(A) and 3(A)).

<sup>67</sup> In *Commonwealth v. Eaton*, 11 Mass. App. Ct. 732 (1981), the court refused to

the court to maintain a period of control over the defendant. If a defendant violates the conditions, the court may convict (unless by prior agreement the defendant retained the right to present witnesses).<sup>68</sup> Counsel and defendants should also be aware that a CWOFF may have collateral consequences,<sup>69</sup> including severe consequences for immigration purposes<sup>70</sup> and under federal sentencing guidelines.<sup>71</sup> It is also important to recognize that an admission, even by a defendant asserting his innocence, may have issue-preclusion effects in subsequent litigation, as discussed *infra* ch. 43.

*CWOFF over Commonwealth objection:*

In a pair of cases decided in 1996, the Supreme Judicial Court held that the Commonwealth may block the court from ordering a continuance without a finding after trial, but may not do so pretrial. In one, *Commonwealth v. Norrell*,<sup>72</sup> the Court found no statutory authorization for a CWOFF after trial, noting that Mass. R. Crim. P. 28(a) specifically requires a finding of either guilty or not guilty following trial.<sup>73</sup> However, in the second, *Commonwealth v. Pyles*,<sup>74</sup> the Court held that G.L. c. 278, § 18 specifically permits a continuance without a finding so long as it is before trial, regardless of the Commonwealth's objection and even when the defendant has pleaded guilty.<sup>75</sup> In so holding, the Court instructed judges to record their reasons for issuing a CWOFF, so that an appellate court may consider whether the trial court "properly exercised discretion in the interests of justice."<sup>76</sup>

*Note regarding probation revocation cases:*

Convictions obtained without the full colloquies and waivers are subject to challenge in the probation revocation context in which a defect in the underlying conviction provides a defense.<sup>77</sup>

### **§ 3.6C. ADMISSION'S UTILITY IN ENSURING DISTRICT COURT JURISDICTION**

Jeopardy attaches to an admission when the court swears a witness.<sup>78</sup> This can be very important in a concurrent jurisdiction crime if, for example, defense counsel

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require a dismissal following a "cwof," finding (a) no prejudice, since the "cwof" followed a trial and not a plea bargain, and (b) no definite agreement to dismiss appeared on the record.

<sup>68</sup> *Commonwealth v. Duquette*, 386 Mass. 834, 844 (1982).

<sup>69</sup> The S.J.C. has noted that different collateral consequences may flow from an admission followed by a continuance without a finding, even though the case is ultimately dismissed, depending on the statute or regulation involved. *Burns v. Commonwealth*, 430 Mass. 444, 452 n. 16 (1999).

<sup>70</sup> *See infra* ch. 42.

<sup>71</sup> *See United States v. Morillo*, 178 F.3d 18 (1st Cir. 1999) (affirming federal district court's decision to count CWOFF as a prior sentence under federal sentencing guidelines).

<sup>72</sup> 423 Mass. 725 (1996).

<sup>73</sup> *Id.* at 727.

<sup>74</sup> 423 Mass. 717 (1996).

<sup>75</sup> *Id.* at 721-23.

<sup>76</sup> *Id.* at 724; *see also Commonwealth v. Jackson*, 45 Mass. App. Ct. 666, 669-670 (1998) (defendant may submit plea of guilty in District Court conditioned on receipt of continuance without finding under G.L. c. 278, § 18).

<sup>77</sup> *See Commonwealth v. Mele*, 20 Mass. App. Ct. 958 (1985); *Commonwealth v. Duquette*, 386 Mass. 834 (1982); *infra* ch. 41, addressing probation revocation.

believes that there is a risk of a state prison sentence through bind-over or direct indictment, but the district court judge is willing to accept an admission (1) over the objection of the prosecution<sup>79</sup> or (2) because the prosecution either fails to recognize the full seriousness of the situation or has not had an opportunity to let the grand jury hear the matter. An admission in this context will expeditiously settle the jurisdictional question and eliminate the risk of a state prison sentence. Moreover, an admission to a lesser-included offense precludes subsequent charging of the greater offense, even if beyond the district court's jurisdiction, under principles of double jeopardy.<sup>80</sup>

### § 3.7 STENOGRAPHIC OR TAPED RECORD OF THE PROCEEDINGS

(See also *infra* ch. 29.)

Under the parallel provisions of G.L. c. 218, § 26A (governing bench trials) and § 27A (governing jury trials), the defendant may request the appointment of a stenographer, subject to the following terms:

1. The request must be made in writing, and *filed at least forty-eight hours* prior to the hearing at which the stenographer is needed.

2. If the defendant is indigent, the request must be accompanied by an affidavit of indigency, and the court must hold a hearing. Before the court appoints a stenographer, it must find the appointment “reasonably necessary” pursuant to G.L. c. 261's provision for extra costs.<sup>81</sup> Any affidavit claiming that a stenographer is necessary should cite such problems as the inaudibility of district court tape recordings and the long delays that have been involved in obtaining written transcripts from tape recordings.

3. If the defendant is not indigent, the court will appoint a stenographer at the defendant's request. The stenographer is compensated by the Commonwealth, except for fees involved in producing a transcript. These fees are paid by the party requesting the transcript, at a rate fixed by the Chief Justice of the Boston Municipal Court or District Court, which cannot exceed the rate provided by G.L. c. 221, § 88.

4. *Tape recording as a substitute*: “If the court is unable, for any reason, to provide a stenographer, the proceedings may be recorded by electronic means.”<sup>82</sup> The tape recording then serves as the official record for appeal or other purposes. The original tape recording, a copy, or a transcript certified as accurate by the preparer of

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<sup>78</sup> Commonwealth v. Crosby, 6 Mass. App. Ct. 679, 681–83 (1978). See also Commonwealth v. DeFuria, 400 Mass. 485, 487–89 (1987) (judge declined jurisdiction after admission to sufficient facts, hearing unsworn DA read summary of agreed facts, and receiving defendant's record; held, no jeopardy until first witness sworn).

<sup>79</sup> Assuming the matter is one within the court's final jurisdiction, the judge may accept jurisdiction over the prosecutor's objection, Commonwealth v. Clemmons, 370 Mass. 288, 291 (1976); Commonwealth v. Rice, 216 Mass. 480, 481 (1914), but the prosecutor must be permitted to present argument against taking jurisdiction and is entitled to a nonarbitrary decision, Commonwealth v. Zannino, 17 Mass. App. Ct. 73, 77–79 (1983). If the prosecutor wishes to preserve the possibility of bind-over to the Superior Court, he or she could move to dismiss. See Commonwealth v. Love, 452 Mass. 498, 506 (2008).

<sup>80</sup> Commonwealth v. Norman, 27 Mass. App. 82, *aff'd*, 406 Mass. 1001 (1989).

<sup>81</sup> See *infra* §§ 8.4, 29.5, regarding indigent defense funding under G.L. c. 261, §§ 27A–27G.

<sup>82</sup> G.L. ch. 218, §26A., ¶ 6; G.L. ch. 218, § 27A(h).

the transcript (or the court, or by stipulation) shall be admissible as evidence of the testimony therein.

### § 3.8 RECUSAL OF THE JUDGE

(See also *infra* ch. 25, Judicial Disqualification: The Motion to Recuse.)

*Jury trial*: No judge is permitted to preside over a jury trial who has previously been involved in the case.<sup>83</sup>

*Bench trial*: The defendant may insist that the trial be before a judge who has not rejected a joint recommendation or a dispositional request by the defendant previously.<sup>84</sup>

### § 3.9 PEREMPTORY CHALLENGES

(See also *infra* ch. 30, Juror Examination and Selection.)

The jury is composed of six persons. Each defendant has two peremptory challenges; the Commonwealth has the same number of challenges as all defendants combined.<sup>85</sup>

### § 3.10 ADOPTION OF SUPERIOR COURT PROCEDURES GENERALLY

The single-trial legislation declares that the judge presiding over the trial has all the powers of a superior court judge, including the power to report questions of law to the appeals court, except that he may not sentence to state prison.<sup>86</sup> Whether the defendant receives a *bench trial* in the non-jury or the jury session depends on where the waiver occurred, but in either case, the bench trial is supposed to “proceed in accordance with the provisions of law applicable to jury-waived trials in superior court.”<sup>87</sup> Similarly, a *jury trial* proceeds according to superior court procedure, except that the trial is before a six-person jury and each defendant is limited to two peremptory challenges.<sup>88</sup> All appellate procedures available to a superior court defendant (including interlocutory appeals) are also available to a district court defendant.<sup>89</sup>

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<sup>83</sup> G.L. c. 218, § 27A(d) prohibits a judge presiding over a jury session to act in a case in which “he has sat or held an inquest or otherwise taken part in any proceeding therein.”

<sup>84</sup> G.L. c. 218, § 26A, ¶ 3. See also Dist./Mun. Cts. R. Crim. P. 4(e).

<sup>85</sup> G.L. c. 218, § 27A(e).

<sup>86</sup> G.L. c. 218, § 26A, ¶ 4 (jury waived), § 27A(d); Commonwealth v. Villalobos, 52 Mass. App. Ct. 903 (2001), *aff'd*, 437 Mass. 797 (2002) (district court judge may report question of law to Appeals Court after defendant admits to sufficient facts).

<sup>87</sup> G.L. c. 218, § 26A, ¶ 3.

<sup>88</sup> G.L. c. 218, § 27A(e). See also Mass. R. Crim. P. 20.

<sup>89</sup> G.L. c. 218, § 27A(g) (jury trial), § 26A, ¶ 3 (jury-waived trial).