§ 270.35 Trial jury; discharge of juror; replacement by alternate juror.

1. If at any time after the trial jury has been sworn and before the rendition of its verdict, a juror is unable to continue serving by reason of illness or other incapacity, or for any other reason is unavailable for continued service, or the court finds, from facts unknown at the time of the selection of the jury, that a juror is grossly unqualified to serve in the case or has engaged in misconduct of a substantial nature, but not warranting the declaration of a mistrial, the court must discharge such juror. If an alternate juror or jurors are available for service, the court must order that the discharged juror be replaced by the alternate juror whose name was first drawn and called, provided, however, that if the trial jury has begun its deliberations, the defendant must consent to such replacement. Such consent must be in writing and must be signed by the defendant in person in open court in the presence of the court. If the discharged juror was the foreperson, the court shall designate as the new foreperson the juror whose name was second drawn and called. If no alternate juror is available, the court must declare a mistrial pursuant to subdivision three of section 280.10.

2. (a) In determining pursuant to this section whether a juror is unable to continue serving by reason of illness or other incapacity, or is for any other reason unavailable for continued service, the court shall make a reasonably thorough inquiry concerning such illness, incapacity or unavailability, and shall attempt to ascertain when such juror will be appearing in court. If such juror fails to appear, or if the court determines that there is no reasonable likelihood such juror will be appearing, in court within two hours of the time set by the court for the trial to resume, the court may presume such juror is unavailable for continued service and may discharge such juror. Nothing contained in this paragraph shall affect the court's discretion, under this or any other provision of law, to discharge a juror who repeatedly fails to appear in court in a timely fashion.

(b) The court shall afford the parties an opportunity to be heard before discharging a juror. If the court discharges a juror pursuant to this subdivision, it shall place on the record the facts and reasons for its determination that such juror is ill, incapacitated or unavailable

for continued service.

(c) Nothing contained in this subdivision shall affect the requirements of subdivision one of this section pertaining to the discharge of a juror where the trial jury has begun its deliberations.