

HELPING TROUBLED DELIBERATING JURIES

Module #3: Responding to Deliberating Juries Having Questions Or Reporting an Impasse [1.5 hours]

Learning Objectives:

After this session, the participants will be able to:

1. State the proper role of trial counsel and the judge in fashioning a proper response to juror questions;
2. List pre-deliberation trial practices that can minimize juror questions during deliberations;
3. Create a checklist of factors relevant to determining whether juror questions should be answered;
4. List several methods, in addition to the classic *Allen* charge, for responding to juries claiming to be at impasse or deadlocked;
5. Describe the common reasons for jury impasse and deadlock;
6. Describe the merits and demerits of the hung jury phenomenon; and
7. Create a checklist of factors relevant to ruling on a motion for a mistrial due to jury deadlock.

Learning Activities:

1. **Opening and mini-lecture:** The lead instructor begins by stating the current jurisprudence to guide a trial judge when responding to a deliberating jury note raising a question about the law, the evidence, or a mixture of both. The instructor explains the goals and format for an upcoming role-play exercise using a sampling of notes from deliberating jurors who pose questions to their trial judge. The role-play exercises will demonstrate a range of possible judicial responses to jury questions. (10 minutes)
2. **Role-play exercise (re: Jury Questions):** Two or more instructors take turns playing the roles of lawyers and trial judge responding to deliberating jury notes. These jury communications raise a variety of issues including: (1) problems with a legal concept, (2) trouble with an evidentiary question, and (3) a dilemma with respect to a mixed issue of law and fact.

One judicial role-player seeks the advice of trial counsel and then resorts to a more traditional approach to such jury notes. Specifically, if the question concerns only a legal issue or concept, the judge prefers to refer the jury to the previous pattern jury instruction on the subject legal point; if the question implicates an evidentiary question, the judge prefers not to answer the question, reminds the jury that all the evidence is in and no additional evidence will be presented, and encourages the jury to keep on trying to reach consensus.

In a contrasting second role-play, the judicial role-player is not averse to responding to questions that implicate factual issues. She/he, also seeking the

- advice of the trial lawyers, is willing to respond to questions that implicate evidentiary facts by authorizing limited reopening of evidence, additional closing arguments by counsel, and bringing relevant exhibits into the deliberation room – all with appropriate legal instructions. (10 minutes).
3. **Group discussion:** The lead instructor asks the participants to divide into smaller discussion groups to address and report on the following issues: (1) what are the legal and practical challenges facing a trial judge when responding to deliberating-jury questions, (2) to what degree, if any, should a trial judge be an educator to a deliberating jury, (3) what courtroom practices instituted during the evidence-presentation portion of a trial might have a preventive affect of jury confusion during deliberations, and (4) which judicial methods does the group favor or disfavor – with explanation. (25 minutes)
 4. **Interim mini-lecture:** The lead instructor begins by stating the current, core orthodoxies describing the role of the trial judge when responding to a jury note claiming that the jury is at an impasse in its deliberations. The instructor then reads a variety of typical jury notes claiming deadlock. These notes will serve as laboratory models for undertaking role-play exercises demonstrating a range of possible judicial responses to juries at impasse. (5 minutes)
 5. **Role-play exercise (re: Jury at impasse):** Two or more instructors, playing the role of trial judge, take turns responding to jury notes that indicate an impasse. One judicial role-player seeks the advice of trial counsel and then consistently resorts to a more traditional approach to such jury notes. In the face of a jury claiming deadlock, she/he encourages the jury to keep on trying to reach consensus and, after additional notes claiming impasse, giving an *Allen*-type charge to the jury. The other judicial role-player, after seeking the advice of the trial lawyers and assessing relevant factors, eventually suggests utilizing the Arizona model of responding to juries at impasse by asking jury members whether they would like to elaborate on what divides them and, if so, asking them to suggest how the court and counsel might assist them in overcoming the source of their impasse. With respect to the note seeking advice about how to deliberate, the judicial role-players again diverge in their responses – one taking a “hands off” approach, the other acting like a coach who suggests to the jury several examples of deliberative methods which empirical studies have shown have a tendency to enhance group cooperation. (15 minutes).
 6. **Group discussion:** The lead instructor asks the participants to divide into smaller discussion groups to address and report on the following issues: (1) what are the legal and practical challenges facing a trial judge when using each of the responsive methods, (2) to what degree, if any, should a trial judge be an educator to a deliberating jury, (3) to what degree, if any, should a trial judge and counsel participate in communications with deliberating juries, (4) to what degree, if any, should a judge take steps to avoid a hung jury, and (5) which responsive methodology does the group favor or disfavor – with explanation. (20 minutes)
 7. **Closing:** The instructor states the latest jurisprudence, best practice suggestions, and top resources on this subject, including Principles 15D & 16 of the ABA

Principles for Juries & Jury Trials and the American Judicature Society's *Behind Closed Doors: A Guide for Jury Deliberations*. (5 minutes)

Materials:

1. For use during class: hypothetical jury notes; Principles 15D & 16 of the ABA *Principles for Juries & Jury Trials*; Arizona Rule of Civil Procedure 39(h), and Arizona Rule of Criminal Procedure 22.4; and the American Judicature Society's *Behind Closed Doors: A Guide for Jury Deliberations*.
2. Reference materials
 - a. Annotated bibliography. Local instructor will add any state-specific reference materials that would be helpful for the participants (e.g., bench books, case law, statutes, court rules, pattern jury instructions, etc.)
 - b. Sample jury instructions on how to communicate to the judge by means of a signed note from the deliberations room, offer-of-assistance in response to jury questions or report of deadlock, proper use of trial exhibits, proper consideration of re-opened evidence, role of closing arguments, etc.

Bibliography:

Core Documents

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Journals/Periodicals

Robert G. Boatright & Beth Murphy, How Judges Can Help Deliberating Jurors: Using
the Guide for Jury Deliberations, 36 COURT REVIEW (1999).

Charles M. Cork, III, *A Better Orientation for Jury Instructions*, 54 MERCER L. REV. 1
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B. Michael Dann, “*Learning Lessons*” and “*Speaking Rights*”: *Creating Educated and
Democratic Juries*, 68 IND.L.J. 1229 (1993).

Leo J. Flynn, *Does Justice Fail when the Jury is Deadlocked?* 61 JUDICATURE 129 (1977).

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Are Hung Juries a Problem?, NATIONAL CENTER FOR STATE COURTS (2002),
www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesProblemPub.pdf

Meyer & Rosenberg, *Questions Juries Ask: Untapped Springs of Insight*, 55 JUDICATURE
105 (1971).

Gregory E. Mize, *Thinking Outside the Jury Box: The D.C. Circuit Needs to Embrace
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Note, *Preserving the Value of Unanimous Criminal Verdicts in Anti-Deadlock Instructions*,
97 GEO.L.J. 251 (2008).

O’Neil, *Famous Last Words: Responding to Requests and Questions of Deliberating Jurors
in Criminal Cases*, 11 CRIM. JUS. J. 381 (1989).

Books and Other Works

G.Thomas Munsterman, Paula L. Hannaford-Agor & G.Marc Whitehead, **Jury Trial
Innovations, 2nd Edition**, 162-164, Appendix 3, NATIONAL CENTER FOR STATE
COURTS (2006).

Neil Vidmar & Valerie P. Hans, **American Juries**, Prometheus Books (2007).

RESPONDING-TO-JURY-QUESTIONS EXERCISE (For use in Module #3)

Introduction:

This exercise is designed to: (1) help us gain a better understanding of the different types of questions that deliberating juries send to the court for response, and (2) sharpen our judicial skills in responding effectively to questions raised in final deliberations.

Faculty will dramatize several possible responses to a variety of jury notes posing questions to the trial judge. Each dramatization is accompanied by a description of the nature of the case pending before the deliberating jury.

#1

In a possession-with-intent-to-distribute cocaine case against three co-defendants, Mr. X was the co-defendant arrested while being the sole rear passenger in a 4-door sedan. After the car was subjected to a routine traffic stop, a half-kilo package of powder cocaine was found in the console separating the front bucket seats. After 2 hours of deliberations, the jury sends a note saying, “We do not know what you meant in your instruction about ‘constructive possession,’ please clarify.”

#2

In the same case described in #1, the jury sends a note 30 minutes later, at 4:30 p.m. [the court recesses regularly at 5 p.m. each day], asking, “Is Mr. X left- or right-handed?”

#3

In the same case as #1, the jury sends a note at the beginning of the next morning’s deliberation, stating, “There were no fingerprints taken off of the glove compartment console. Can we still find Mr. X guilty of ‘constructive’ possession?”

#4

In the same case, the jury sends a note at noon of the second day of deliberations, “We are at a standstill with respect to a verdict on Mr. X. We have not been able to make any progress. What do we do next?”

#5

In a fraud and forgery prosecution trial, a veteran court-appointed criminal defense lawyer, Shola Ayeni, is accused of falsifying reimbursement vouchers to the court. The presentation of evidence in the case lasted 4 days. The jury sent this note after 6 hours of deliberations: “What is the lesser count against Mr. Ayeni? Why was the handwriting expert called to testify? Do the defense and prosecutor agree that Mr. Ayeni’s signatures in the witness voucher record books are authentic?”

JURY-AT-IMPASSE EXERCISE (For use in Module #3)

Introduction:

This exercise is designed to: (1) help us gain a better understanding of various factors that contribute to jury impasse or deadlock, and (2) sharpen our judicial skills in addressing juries that claim they are deadlocked in their final deliberations.

Faculty will dramatize several possible responses to a variety of possible jury notes claiming deadlock. Each dramatization is accompanied by a description of the nature of the case presented to the deliberating jury.

#1

In a garden-variety possession to distribute heroin case in a large urban court, the jury heard 1 day of testimony from 3 prosecution witnesses and 1 defense witness. After 2 hours of deliberations, the jury sends its first note to the judge saying, "We are deadlocked. There is no way this group is gonna budge. Can we go home now?" In response, the prosecutor urges the court to tell the jury, "Take more time. There is no hurry. Keep trying to do your best to reach agreement." Defense counsel moves for a mistrial. What should the judge do?

#2

In the same trial as #1 above, the jury deliberates for another 3 hours. The bailiff brings to the judge a note signed by the jury foreperson and one other juror stating, "We are shouting at each other. One of the other jurors will not change her mind. She just sits there pouting. It is hopeless. Please let us get out of here." What should the judge do?

#3

In a complex, 60-count, fraud prosecution of several mortgage originators and lenders, the jury hears evidence from the government and 6 co-defendants over the course of 7 weeks. Both the prosecution and defense present several days of testimony from accounting experts. The trial judge took 2 hours to deliver her final instructions to the jury. Closing arguments spanned 2 days. One hour after jury deliberations began, the court received this note from a juror, "Oh my, this is confusing. We don't know where to begin. We are stuck in mud. What should I do?"