Chapter 9.00

SUPPLEMENTAL INSTRUCTIONS

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Instruction

9.01 SUPPLEMENTAL INSTRUCTIONS IN RESPONSE TO JUROR QUESTIONS

(1) Members of the jury, I have received a note from you that says _____.

(2) Let me respond by instructing you as follows: _____.

(3) Keep in mind that you should consider what I have just said together with all the other instructions that I gave you earlier. All these instructions are important, and you should consider them together as a whole.

(4) I would ask that you now return to the jury room and resume your deliberations.

Use Note

This instruction should be used when the court gives supplemental instructions in response to juror questions.

Committee Commentary 9.01
(current through December 31, 2007)

The Committee made no change in the instruction.

In United States v. Combs, 33 F.3d 667 (6th Cir. 1994), the Sixth Circuit held that the trial court's supplemental instructions were inadequate but did not rise to the level of plain error. The court identified two problems with the content of the supplemental instructions: they answered jurors' questions with a categorical yes or no, and they referred jurors to the previous instructions without elaborating on them. The Sixth Circuit stated that generally, standards regarding supplemental instructions were "well-settled." The court explained, "In United States v. Giacalone, we made clear that a supplemental instruction is one that goes beyond reciting what has previously been given; it is not merely repetitive. Reiterating the rule ... that a trial court has a duty 'to clear up uncertainties which the jury brings to the court's attention,' we stated that the propriety of a supplemental instruction must be measured 'by whether it fairly responds to the jury's inquiry without creating ... prejudice.'" *Combs*, 33 F.3d at 669-70 (citations omitted), *quoting* United States v. Giacalone, 588 F.2d 1158, 1166 (6th Cir. 1978) and United States v. Nunez, 889 F.2d 1564, 1568 (6th Cir. 1989).

The Sixth Circuit also stated that ordinarily, a categorical yes or no in response to a jury question does not discharge the court's duty: "Upon receipt of questions from a deliberating jury, it is incumbent upon the district court to assume that at least some jurors are harboring confusion, which the original instructions either created or failed to clarify. Therefore, the trial judge must be meticulous in preparing supplemental instructions, taking pains adequately to explain the point that obviously is troubling the jury. To be sure, the court must ensure that, in responding, it does not stray beyond the purpose of jury instructions, but the jury's questions here did not seek collateral or inappropriate advice." *Combs,* 33 F.3d at 670.

Finally, the *Combs* court also explained the procedures to be used for supplemental instructions: "The district court is required to follow the same procedure in giving supplemental instructions as in giving original instructions. (Citation omitted.) '[I]t [i]s error for the trial judge to respond to the jury's question other than in open court and in the presence of counsel for both sides.' (Citation omitted)." *Id.* *See also* Fed. R. Crim. P. 43(a), which provides that "The defendant must be present at ... every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule." The exceptions are listed in Rule 43(b) and (c).

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This instruction is patterned after Devitt and Blackmar Instruction 18.13. It is designed to provide a standardized response to juror questions which includes a reminder that all the instructions should be considered together as a whole.

For a summary of when supplemental instructions should be given, see United States v. Nunez, 889 F.2d 1564, 1568 (6th Cir.1989). See also United States v. Brown, 915 F.2d 219, 223 (6th Cir.1990).

9.02 REREADING OF TESTIMONY

(1) Members of the jury, the court reporter will now read _____'s testimony.

(2) Keep in mind that you should consider this testimony together with all the other evidence. Do not consider it by itself, out of context. Consider all the evidence together as a whole.

Use Note

This instruction must be used when testimony is reread to the jury.

Committee Commentary 9.02
(current through December 31, 2007)

The Committee made no change in the text of the instruction.

The Committee changed the Use Note from providing that this instruction "should" be used to providing that this instruction "must" be used. The change responds to United States v. Rodgers, 109 F.3d 1138 (6th Cir. 1997), in which the Sixth Circuit stated, "[W]e hold that if a district court chooses to give a deliberating jury transcribed testimony, or chooses to reread testimony to a deliberating jury, the district court must give an instruction cautioning the jury on the proper use of that testimony." *Id.* at 1145. The court noted that although it had not explicitly held a cautionary instruction was required in the past, in numerous cases where the court found no abuse of discretion, it had relied on the affirmative steps the district courts took to avoid the dangers of the situation. The Sixth Circuit explained, "This holding makes explicit a rule we have consistently applied in the past." *Id.* Thus, if testimony is reread or a transcript provided to the jury, a cautionary instruction is no longer within the trial court's discretion but rather is required.

As the Sixth Circuit stated, it had consistently relied on the giving of a cautionary instruction like Pattern Instruction 9.02 in finding that rereading testimony was not error. *See, e.g.*, United States v. Epley, 52 F.3d 571, 579 (6th Cir. 1995), where the court held that it was not error for the trial court to reread one witness's testimony upon request of jury, in part because the trial court gave a cautionary instruction both before and after the reading to consider the testimony as a whole and not to emphasize this piece of evidence over the others. In addition, the jury heard the entire testimony of the witness, so it was not taken out of context, and the testimony turned out to be cumulative.

On rereading testimony generally, the Sixth Circuit relies on guidelines established in United States v. Padin, 787 F.2d 1071, 1076-77 (6th Cir. 1986). *See, e.g.*, United States v. Rodgers, *supra* at 1142; United States v. Epley, *supra* at 579 (6th Cir. 1995). In *Padin*, the Sixth Circuit identified two inherent dangers in reading testimony to a jury during deliberations. First, undue emphasis may be accorded the testimony. Second, the limited testimony that is reviewed may be taken out of context. These concerns escalate after a jury reports it is unable to reach a

verdict. *Padin*, 787 F.2d at 1077, *citing* Henry v. United States, 204 F.2d 817 (6th Cir. 1953); *see also* United States v. Rodgers, 109 F.3d 1138, 1143-44 (6th Cir. 1997); United States v. Epley, 52 F.3d 571, 579 (6th Cir. 1995) .

In United States v. Rodgers, supra, the Sixth Circuit stated that in addition to the inherent dangers identified in *Padin*, more general concerns also exist in allowing a jury to read a transcript of testimony. These concerns are that "(1) any transcript provided to a jury should be accurate; (2) transcription of side bar conferences, and any other matters not meant for jury consumption, must be redacted; and (3) as a purely practical matter, a district court should take into consideration the reasonableness of the jury's request and the difficulty of complying therewith." *Rodgers*, 109 F.3d at 1143 (internal quotations omitted).

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The purpose of this instruction is to caution the jury not to give undue emphasis to selected testimony. See generally United States v. Osterbrock, 891 F.2d 1216, 1219 (6th Cir.1989) (affirming defendant's conviction in part on the ground that a similar cautionary instruction was given). See also Instruction 9.01, which cautions the jury not to give undue emphasis to selected instructions.

The decision whether selected testimony should be reread to the jury at all is left to the trial court's sound discretion. E.g., United States v. Thomas, 875 F.2d 559, 562 (6th Cir.), cert. denied, ___ U.S. ___, 110 S.Ct. 189, 107 L.Ed.2d 144 (1989).

9.03 PARTIAL VERDICTS

(1) Members of the jury, you do not have to reach unanimous agreement on all the charges before returning a verdict on some of them. If you have reached unanimous agreement on some of the charges, you may return a verdict on those charges, and then continue deliberating on the others. You do not have to do this, but you can if you wish.

(2) If you do choose to return a verdict on some of the charges now, that verdict will be final. You will not be able to change your minds about it later on.

(3) Your other option is to wait until the end of your deliberations, and return all your verdicts then. The choice is yours.

(4) I would ask that you now return to the jury room and resume your deliberation.

Use Note

This instruction should be used if the jurors ask about, attempt to return or otherwise indicate that they may have reached a partial verdict. It may also be appropriate if the jury has deliberated for an extensive period of time.

Committee Commentary 9.03

(current through December 31, 2007

The Committee made no change in the instruction.

The Sixth Circuit held it was not an abuse of discretion to refuse a supplemental instruction on partial verdicts under the circumstances in United States v. Ford, 987 F.2d 334 (6th Cir. 1992). The trial court had given a partial verdict instruction in its initial instructions, and the verdict forms examined by the district judge during deliberations at the request of all the defendants showed that the jury had not reached unanimous verdicts on any defendants or any charges. The court stated, “Before declaring a mistrial and dismissing a hung jury, a trial judge may inquire whether the jury has reached a partial verdict with respect to any of the defendants or any of the charges, but such an inquiry is not required where the trial judge has already given clear instructions on the point.” *Ford*, 987 F.2d at 340, *citing* United States v. MacQueen, 596 F.2d 76, 82 (2d Cir. 1979).

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Fed.R.Crim.P. 31(b) states that at any time during the deliberations in a multi-defendant case, the jury "may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed." In a series of cases, other circuits have recognized that partial verdicts may be accepted not only as to less than all defendants, but also as to less than all counts. E.g., United States v. Levasseur, 816 F.2d 37, 45 (2d Cir.1987); United States v. Ross, 626 F.2d 77,

81 (9th Cir.1980).

In United States v. DiLapi, 651 F.2d 140, 147 (2d Cir.1981), cert. denied, 455 U.S. 938, 102 S.Ct. 1427, 71 L.Ed.2d 648 (1982), and United States v. Burke, 700 F.2d 70, 78-80 (2d Cir.), cert. denied, 464 U.S. 816, 104 S.Ct. 72, 78 L.Ed.2d 85 (1983), the Second Circuit indicated that when the jury asks about or attempts to return a partial verdict, the district court should neutrally explain the jury's options of either returning the verdicts reached, or deferring any verdicts until the deliberations are concluded. Such an instruction should not encourage or discourage a partial verdict, and should advise the jury that any verdict it does return is not subject to later revision. See United States v. Hockridge, 573 F.2d 752, 756-760 (2d Cir.) (once a partial verdict is returned, it may not later be impeached), cert. denied, 439 U.S. 821, 99 S.Ct. 85, 58 L.Ed.2d 112 (1978).

If a partial verdict is returned, the district court may require the jury to continue its deliberations on the remaining counts. United States v. Delaughter, 453 F.2d 908, 910 (5th Cir.), cert. denied, 406 U.S. 932, 92 S.Ct. 1769, 32 L.Ed.2d 135 (1972); United States v. Barash, 412 F.2d 26, 32 (2d Cir.), cert. denied, 396 U.S. 832, 90 S.Ct. 86, 24 L.Ed.2d 82 (1969).

None of the circuits that have drafted pattern instructions include an instruction on partial verdicts. But all five of the other sources surveyed do in one form or another. See Federal Judicial Center Instruction 58, D.C. Bar Instruction 2.92, Devitt and Blackmar Instructions 18.08 and 18.16, Saltzburg and Perlman Instruction 3.68 and Sand and Siffert Instruction 9-8.

Two of these five (Federal Judicial Center Instruction 58 and Saltzburg and Perlman Instruction 3.68) include this subject in their general instruction on verdict forms which is given before the jury retires to deliberate. The other three include it in a special instruction to be given only after the jury has indicated that it wants to return a partial verdict, or after the jury has deliberated for an extensive period of time.

The Committee believes that the latter approach is preferable. Initially, at least, the jury should be encouraged to try and reach unanimous agreement on all counts.

Even if the jury has not specifically asked about or attempted to return a partial verdict, an instruction like this may be appropriate if the jury has deliberated for an extensive period of time. What constitutes an extensive period of time will depend on the nature and complexity of the particular case.

9.04 DEADLOCKED JURY

(1) Members of the jury, I am going to ask that you return to the jury room and deliberate further. I realize that you are having some difficulty reaching unanimous agreement, but that is not unusual. And sometimes after further discussion, jurors are able to work out their differences and agree.

(2) Please keep in mind how very important it is for you to reach unanimous agreement. If you cannot agree, and if this case is tried again, there is no reason to believe that any new evidence will be presented, or that the next twelve jurors will be any more conscientious and impartial than you are.

(3) Let me remind you that it is your duty as jurors to talk with each other about the case; to listen carefully and respectfully to each other's views; and to keep an open mind as you listen to what your fellow jurors have to say. And let me remind you that it is your duty to make every reasonable effort you can to reach unanimous agreement. Each of you, whether you are in the majority or the minority, ought to seriously reconsider your position in light of the fact that other jurors, who are just as conscientious and impartial as you are, have come to a different conclusion.

(4) Those of you who believe that the government has proved the defendant guilty beyond a reasonable doubt should stop and ask yourselves if the evidence is really convincing enough, given that other members of the jury are not convinced. And those of you who believe that the government has not proved the defendant guilty beyond a reasonable doubt should stop and ask yourselves if the doubt you have is a reasonable one, given that other members of the jury do not share your doubt. None of you should hesitate to change your mind if, after reconsidering things, you are convinced that other jurors are right and that your original position was wrong.

(5) But remember this. Do not ever change your mind just because other jurors see things differently, or just to get the case over with. As I told you before, in the end, your vote must be exactly that--your own vote. As important as it is for you to reach unanimous agreement, it is just as important that you do so honestly and in good conscience.

(6) What I have just said is not meant to rush or pressure you into agreeing on a verdict. Take as much time as you need to discuss things. There is no hurry.

(7) I would ask that you now return to the jury room and resume your deliberations.

Use Note

This instruction is designed for use when the court concludes that the jury has reached an impasse and that an Allen charge is appropriate.

A stronger, more explicit reminder regarding the government's burden of proof than the implicit one contained in paragraph (4) may be appropriate in unusual cases.

Committee Commentary 9.04
(current through December 31, 2007)

The Committee made no change in the instruction.

The Sixth Circuit has endorsed the wording of this instruction in United States v. Clinton, 338 F.3d 483, 487-88 (6th Cir. 2003), quoting the instruction in full and stating:

> In this circuit, while we have generally approved use of the Sixth Circuit Pattern Instruction, we have never explicitly mandated the use of that or any instruction to the exclusion of others. We decline to do so now, although we take the occasion to express a strong preference for the pattern instruction and to point out that its use will, in most instances, insulate a resulting verdict from the type of appellate challenge that we now face in this case.

See also United States v. Reed, 167 F.3d 984, 991 (6th Cir. 1999); United States v. Frost, 125 F.3d 346, 374-75 (6th Cir. 1997); United States v. Tines, 70 F.3d 891, 896-97 (6th Cir. 1995).

A related issue is whether giving this instruction is error even when the content is correct because it is coercive under the circumstances of the case. Although the Sixth Circuit has stated that it is possible that giving Instruction 9.04 can be error as coercive even though the content is correct, the Sixth Circuit has never reached that conclusion in the cases decided since the promulgation of Instruction 9.04. Rather, it has concluded that giving Instruction 9.04 was not coercive and was not error. *See* United States v. Reed, *supra* (instruction given on twelfth day of deliberations); United States v. Frost, *supra*; United States v. Tines, *supra*. As the Sixth Circuit explained, "Although circumstances alone can render an Allen charge coercive, we traditionally have found an Allen charge coercive when the instructions themselves contained errors or omissions, not when a defendant alleges that the circumstances surrounding an otherwise correct charge created coercion." *Frost*, 125 F.3d at 375.

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As its name implies, this instruction is designed for use when the court concludes that the jury has reached an impasse and that an Allen charge is appropriate. When such an instruction should be given is left to the trial court's sound discretion. E.g., United States v. Sawyers, 902 F.2d 1217, 1220 (6th Cir.1990).

Instruction 9.04 is a modified version of the instruction approved by the United States Supreme Court in Allen v. United States, 164 U.S. 492, 501-502, 17 S.Ct. 154, 157, 41 L.Ed. 528 (1896). The Allen decision and its progeny are thoroughly analyzed in the Committee Commentary to Instruction 8.04.

Paragraph (1) is patterned after parts of the first paragraph of Fifth Circuit Instruction 1.41, Eleventh Circuit Trial Instruction 6 and the third paragraph of Sand and Siffert Instruction

9-11. It is an introductory, transitional paragraph designed to advise the jurors in a non-threatening way that further deliberations will be required.

Paragraph (2) is a plain English restatement of certain concepts found in Fifth Circuit Instruction 1.41, Eleventh Circuit Trial Instruction 6, D.C. Bar Instruction 2.91 (Alternative B) and Devitt and Blackmar Instruction 18.14. It emphasizes the importance of trying to reach unanimous agreement, and explains that no subsequent jury is likely to be in any better position to decide the case. It does not explicitly include any admonition about the burden and expense of trial. Although such language does not necessarily constitute reversible error in the Sixth Circuit, see United States v. Giacalone, 588 F.2d 1158, 1167 (6th Cir.1978) (not reversible error, at least in the absence of any specific objection), cert. denied, 441 U.S. 944, 99 S.Ct. 2162, 60 L.Ed.2d 1045 (1979), it has been criticized as a "questionable extension" of Allen. See United States v. Harris, 391 F.2d 348, 354 (6th Cir.), cert. denied, 393 U.S. 874, 89 S.Ct. 169, 21 L.Ed.2d 145 (1968).

Paragraph (3) reminds the jurors of their duty to consult with each other, using the same language used in Instruction 8.04.

Paragraph (4) admonishes all the jurors, whether they are in the majority or the minority, to reconsider their position in light of the contrary position taken by other jurors, and concludes by telling the jurors that they should not hesitate to change their minds if they decide that their original position should be abandoned.

Admonishing the majority to reconsider their position represents a significant departure from the instructions approved by the Supreme Court in Allen. The instructions in Allen focused exclusively on the jurors who were in the minority, and directed them to reconsider their position in light of the fact that the majority had come to a different conclusion. Although the Supreme Court recently reaffirmed the continuing validity of Allen in Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), the Court noted that there is even less doubt about the validity of Allen charges that omit the language focusing exclusively on minority jurors. Id. at 238, 108 S.Ct. at 551.

Focusing exclusively on the minority jurors has been criticized by the American Bar Association Standards for Criminal Justice, Trial by Jury Standard 15-4.4, Commentary at page 15-140, as unduly coercive of minority jurors. See also Williams v. Parke, 741 F.2d 847, 850 (6th Cir.1984) ("A major criticism of the Allen charge focuses on 'its potentially coercive effect on minority jurors'."), cert. denied, 470 U.S. 1029, 105 S.Ct. 1399, 84 L.Ed.2d 787 (1985). Such language has been omitted entirely from the pattern instructions promulgated by the Seventh and Ninth Circuits and the Federal Judicial Center. The Fifth and Eleventh Circuits retain this language, although in slightly modified form. See Fifth Circuit Instruction 1.41 and Eleventh Circuit Trial Instruction 6.

The language in paragraph (4) admonishing all the jurors to reconsider their position is a plain English restatement of language found in D.C. Bar Instruction 2.91 (Alternative B). Although it does not go as far as Allen would allow, it still encourages jurors to reconsider their positions in light of the fact that other jurors disagree, and does so in a more evenhanded way

that should be much less susceptible to successful appellate attack. It is based on the philosophy that the purpose of a supplemental charge should not be to coerce minority jurors into joining the majority. Instead, such a charge should be aimed at breaking down the barriers to communication that have developed and rekindling reasoned discussion.

Paragraph (5) is a plain English restatement of the required admonition that jurors should never surrender a conscientious belief merely for the purpose of reaching agreement. See for example United States v. Scott, 547 F.2d 334, 337 (6th Cir.1977) (referring to this admonition as "one of the most important parts of the Allen charge"). The language used is patterned after the language used in Instruction 8.04.

Some Allen charges include language telling the jurors that if, after further deliberation, they cannot conscientiously agree, the court will discharge them. See Hyde v. United States, 225 U.S. 347, 383, 32 S.Ct. 793, 808, 56 L.Ed. 1114 (1912), and United States v. Barnhill, 305 F.2d 164, 165 (6th Cir.), cert. denied, 371 U.S. 865, 83 S.Ct. 126, 9 L.Ed.2d 102 (1962). See also Williams v. Parke, supra, 741 F.2d at 850 (trial court's instructions implicitly advised jurors of their right to continue disagreeing by alluding to the possibility that a new jury might be necessary, and by telling them to return to court if they could not agree). The Committee believes that such language is not necessary given the other language in the instruction minimizing its coercive effect. See also United States v. Arpan, 887 F.2d 873, 876 (8th Cir.1989) (specific instruction on "hung jury" alternative is not required where the district court's original instructions advised the jurors that they should try to reach agreement if they could do so without violence to individual judgment, and that they should not surrender their honest convictions for the mere purpose of returning a verdict).

Paragraph (6) is patterned after language included in Fifth Circuit Instruction 1.41 and Eleventh Circuit Trial Instruction 6. It is designed to blunt the potential coercive effect of a supplemental charge by explicitly telling the jurors that they should take as much time as they need, and that nothing said by the court in the supplemental charge was meant to try and rush or pressure them into reaching a verdict. As indicated by the Sixth Circuit in United States v. Markey, 693 F.2d 594, 597 (6th Cir.1982), supplemental instructions should convey the impression that it is more important to be thoughtful than it is to be quick.

A strong argument can be made that a supplemental charge should explicitly remind the jurors that the government bears the burden of proof in a criminal case, and that if the government has failed to prove guilt beyond a reasonable doubt, then the defendant is entitled to a not guilty verdict. These concepts were included in the seminal version of the Allen charge. See Pugliano v. United States, 348 F.2d 902, 903-904 (1st Cir.), cert. denied, 382 U.S. 939, 86 S.Ct. 390, 15 L.Ed.2d 349 (1965), discussing Commonwealth v. Tuey, 62 Mass. (8 Cush) 1, 2-3 (1851). Sixth Circuit cases have said that such a reminder "may be desirable," United States v. LaRiche, 549 F.2d 1088, 1093 (6th Cir.), cert. denied, 430 U.S. 987, 97 S.Ct. 1687, 52 L.Ed.2d 383 (1977), or even required under particular circumstances. See United States v. Lewis, 651 F.2d 1163, 1165 (6th Cir.1981) (given the weakness of the evidence against the defendant and the jury's difficulty in weighing the evidence, it was improper not to reinstruct on the government's burden of proving guilt beyond a reasonable doubt). Fifth Circuit Instruction 1.41, Eleventh Circuit Trial Instruction 6 and Devitt and Blackmar Instruction 18.14 all include an

explicit reminder regarding these concepts.

The Committee rejected this approach in favor of an implicit reminder in paragraph (4). Language in that paragraph directs those jurors who believe that the government has proved the defendant guilty beyond a reasonable doubt to stop and ask themselves if the evidence is sufficiently convincing in light of the fact that other jurors are not convinced. Other language then directs those jurors who believe that the government has not proved the defendant guilty beyond a reasonable doubt to stop and ask themselves if their doubt is a reasonable one in light of the fact that other jurors do not share their doubt. This language works the reasonable doubt concept into the instruction in a neutral and evenhanded way that does not tip the scales towards a not guilty verdict. While an explicit reminder that is slanted toward a not guilty verdict may be appropriate in unusual cases, or in supplemental instructions like Fifth Circuit Instruction 1.41, Eleventh Circuit Trial Instruction 6, or Devitt and Blackmar Instruction 18.14, all of which single out and focus exclusively on minority jurors, such a reminder would upset the balanced nature of this instruction, which directs all the jurors to reconsider their views.

The Sixth Circuit has strongly condemned language that tells jurors the case must be "decided" at some time by some jury, on the ground that such language is coercive and misleading because it precludes the right of a defendant to rely on the possibility of continuing juror disagreement. United States v. Harris, supra, 391 F.2d at 355. In contrast, the Sixth Circuit has said that there is a clear distinction between language stating that the case must be "decided" and language stating that the case must be "disposed" of. Id. at 356. The latter "merely restates the obvious proposition that all cases must come to an end at some point, whether by verdict or otherwise." United States v. LaRiche, supra, 549 F.2d at 1092.

While this distinction may be clear to lawyers, lay jurors are unlikely to grasp or understand it without further explanation. For this reason, the proposed instruction omits any such language. It should be noted, however, that paragraph (2) emphasizes the related concept that no subsequent jury is likely to be in any better position to decide the case.

9.05 QUESTIONABLE UNANIMITY AFTER POLLING

(1) It appears from the poll we just took that your verdict may not be unanimous. So I am going to ask that you return to the jury room.

(2) If you are unanimous, tell the jury officer that you want to return to the courtroom, and we will poll you again. If you are not unanimous, please resume your deliberations. Talk to each other, and make every reasonable effort you can to reach unanimous agreement, if you can do so honestly and in good conscience.

Use Note

This instruction should be used when a poll of the jury indicates that a proffered verdict may not be unanimous.

Depending on the circumstances, the court may wish to expand on the concepts contained in the last sentence of paragraph (2).

Committee Commentary 9.05
(current through December 31, 2007)

The Committee made no change in the instruction. The Committee also decided that no change in or addition to the 1991 Committee Commentary is warranted.

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Most of the sources surveyed include an instruction to be used when a poll of the jury indicates that a proffered verdict may not be unanimous. See Seventh Circuit Instruction 7.07, Eighth Circuit Instruction 10.03, Ninth Circuit Instruction 7.06, Federal Judicial Center Instruction 59, D.C. Bar Instruction 2.93, Devitt and Blackmar Instruction 18.17, Saltzburg and Perlman Instruction 3.70 and Sand and Siffert Instruction 9-12.

This instruction is patterned after Saltzburg and Perlman Instruction 3.70 and Federal Judicial Center Instruction 59. Depending on the circumstances, the district court may wish to expand on the last sentence which briefly summarizes the concepts contained in Instructions 8.04 and 9.04.