

Chapter 9.00

SUPPLEMENTAL INSTRUCTIONS

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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 August 1, 2016)

This instruction provides 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).

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).

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 August 1, 2016)

In *United States v. Rodgers*, 109 F.3d 1138 (6th Cir. 1997), the court 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. Thus, if testimony is reread or a transcript provided to the jury, a cautionary instruction is required.

As the Sixth Circuit stated in *Rodgers*, it had consistently relied on the giving of a cautionary instruction like Pattern Instruction 9.02 in finding that rereading testimony was not error. *Rodgers, supra*. See, e.g., *United States v. Harvey*, 653 F.3d 388, 397-98 (6th Cir. 2011). In *United States v. Epley*, 52 F.3d 571, 579 (6th Cir. 1995), 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 encouraging jurors 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., *Harvey, supra*; *Rodgers, supra* at 1142; *Epley, supra*. 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 *Rodgers, supra* at 1143-44; *United States v. Epley, supra*.

In *Rodgers*, 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, supra* at 1143 (internal

quotations omitted).

The decision whether selected testimony should be reread to the jury at all depends on the nature of the questions. *United States v. Harvey*, 653 F.3d 388, 397-98 (6th Cir. 2011). If the jury has questions of law, the court should resolve them “with concrete accuracy.” *United States v. Nunez*, 889 F.2d 1564, 1568 (6th Cir. 1989); *see also* *United States v. McClendon*, 362 F. App’x 475, 483 (6th Cir. 2010) (unpublished). If the jury has questions of fact, the court has cautioned that rereading testimony “is not always the better response.” *Harvey*, *supra* at 397. If the questions of fact are phrased in very general terms, involve disputed facts, or are obviously related to a credibility determination, the concern that the trial judge might usurp the jury’s factfinding role is most acute, and “it will often be preferable to respond by instructing the jury to rely on its collective recollection” *Harvey*, *supra* at 397-98 (*citing McClendon*, *supra*). In contrast, if the questions of fact are very specific and definitive answers can be easily located in the record, rereading the testimony facilitates rather than usurps the jury’s role. *Id.* In *Harvey*, the trial court did not err by rereading portions of the testimony because the court gave a cautionary instruction (consisting of Inst. 1.07(1) and a paragraph similar but not identical to Inst. 9.02) which refocused the jury on its recollection of the evidence as a whole, and the trial court read only the portions of the record responsive to specific factual questions. *Id.* at 397 (*citing* *United States v. Davis*, 490 F.3d 541, 548 (6th Cir. 2007)).

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 August 1, 2016)

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 ... as to any defendant about whom it has agreed."

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).

An instruction on partial verdicts can be included in the general instructions given before the jury retires to deliberate, or it can be included 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 August 1, 2016)

This instruction is 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. *See, e.g.*, *United States v. Sawyers*, 902 F.2d 1217, 1220 (6th Cir.1990).

The Sixth Circuit 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.

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 (1896). The *Allen* decision and its progeny are analyzed in the Committee Commentary to Instruction 8.04.

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 August 1, 2016)

This instruction is patterned after 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 Duty to Deliberate and 9.04 Deadlocked Jury.