

General Rules

- Open court with defense counsel and defendant; *Rogers v. United States*, 422 U.S. 35, 39 (1975) (“The jury’s message should have been answered in open court.”)
 - Objection: Violates Rule 43 (d’s right to be present at all stages of proceeding), *Rogers v. United States*, 422 U.S. 35 (1975), and 6th A assistance of counsel, *United States v. Martinez*, 850 F.3d 1097, 1100

Objections to Additional Instructions

- Object to decision to give instruction and any error in crafting of the instruction. *United States v. Martinez*, 850 F.3d 1097, 1106 (9th Cir. 2017) (“A court’s message to a deliberating jury inevitably influences the jury’s analysis. “Particularly in a criminal trial, the judge’s last word is apt to be the decisive word.” For that reason, when a court receives a jury note, how the court’s “reply ... [is] worded” can have just as much impact as the court’s decision, for example, whether or not to grant the jury’s request to see evidence.
- **Court should give additional instruction.** *McDowell v. Calderon*, 130 F.3d 833 (9th Cir. 1997) (en banc) (overruled on other grounds). (“Even where the relevant instructions are technically flawless, if it becomes clear that a jury has misinterpreted those instructions, the trial judge has a duty to respond to the jury’s request with sufficient specificity to clarify the jury’s problem.”) This means that the trial court has “a duty to respond to the jury’s request with sufficient specificity to clarify the jury’s problem.” *Id.*; “When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy.” *Bollenbach v. United States*, 326 U.S. 607, 612-13 (1946).
- **Court shouldn’t give additional instruction:** *United States v. McCall*, 592 F.2d 1066, 1068-69 (9th Cir. 1979) (where the court’s original instructions were a correct statement of the law and “generally addressed the jury’s question, without specifically providing a yes or no answer,” the court has discretion to point jury back to original instruction)
- **Object if proposed answer would;**
 - Misstate (or misleading) as to the law, *US v. Frega*, 179 F.3d 793, 810 (9th Cir. 1999).
 - Overemphasizes one instruction over others, *US v. Parent*, 954 F.2d 23 (1st Cir. 1992)
 - Ties evidence to counts/judge as prosecutor *US v. Miller*, 738 F.3d 361 (D.C. Cir. 2013)
 - “Favor one party’s position”, *Arizona v. Johnson*, 351 F.3d 988 (9th Cir. 2003)
 - “Place undue weight on certain evidence,” *id.* or
 - “Indicate that the trial judge believes certain facts to be true when such matters should properly be determined by the jury.” *Id.*
 - Introduces new evidence to the jury. *United States v. Santana*, 175 G.3f 57 (1st Cir. 1999)
 - Suggest divided factfinding responsibility between court and jury or lessen weightiness of jury’s decision. *Rogers v. United States*, 422 U.S. 35 (1975) (error where district court told jurors that it would consider mercy in sentencing)
 - Water down burden of proof *United States v. Martinez*, 850 F.3d 1097 (9th Cir. 2017) (you must “consider” element, erroneous because not find BRD)
 - Pressure jury to reach a verdict (coercive) *United States v. Rosales-Rodriguez*, 289 F.3d 1106, 1109 (9th Cir. 2002) (instructed jury that, if they did not reach a verdict that day, they would have to start deliberations anew with an alternate juror, error, but harmless)
 - Supplies assumptions
 - Allow jury to convict on theory not charged in indictment or that varied from proof at trial (Be inclusive: due process, unfair surprise, variance, constructive amendment)
- Court has discretion to allow additional argument if supplemental jury instruction introduces a new theory into the case. *United States v. Fontenot*, 14 F.3d 1364, 1368 (9th Cir. 1994)

Allen charge

- Only where truly deadlocked: *United States v. Williams*, 547 F.3d 1187 (9th Cir. 2008)
- Where district court (intentionally or inadvertently) knows the number and identity of hold out(s), the coercive effect greater because it would give the impression that the Allen charge leveled at minority. *United States v. Sae-Chua*, 725 F.2d 530, 532 (9th Cir. 1984) (reversible error to give Allen charge where court knew only 1 holdout).

Readbacks

- Judge has discretion not to.
- *United States v. Newhoff*, 627 F.3d 1163 (9th Cir. 2010) Must be in open court, with defendant, defense counsel and judge present, entire testimony (unless parties agree to less), with the following admonition:
 - because they requested a readback, it is being provided to them, but all readbacks run the risk of distorting the trial because of overemphasis of one portion of the testimony;
 - the jury will be required to hear all the witness's testimony (except where an excerpt was selected because of excessive length), on direct and cross-examination, to avoid the risk that they might miss a portion bearing on their judgment of what testimony to accept as credible;
 - the transcript is not evidence, just a record of what the testimony was, and since nothing is perfect and the transcript could possibly contain errors, their recollections and understandings of the testimony itself rather than the transcript is the evidence on which they must make their decision;
 - the transcript cannot reflect matters of demeanor, tone of voice, and other aspects of the live testimony the jurors heard, which may affect what they judge to be credible; and
 - the testimony read cannot be considered in isolation, but must be considered in the context of all the evidence presented, both testimony and exhibits, in the jurors' exercise of their judgment.

Partial Verdict: Rule 31(b)(2)

- If you want: Court has discretion to take a partial verdict *United States v. Ross*, 626 F.2d 77 (9th Cir. 1980)
- If don't want: Better course generally to continue deliberations: "Continuing deliberations might well [] shake[] views on counts previously considered[.]" *United States v. Nelson*, 692 F.2d 83, 85 (9th Cir. 1982); *United States v. Benedict*, 95 F.3d 17 (8th Cir. 1996) (distinguishing *Ross*; "The danger inherent in taking a partial verdict is the premature conversion of a tentative jury vote into an irrevocable one. It is improper for a trial court to intrude on the jury's deliberative process in such a way as to cut short its opportunity to fully consider the evidence. Such an intrusion would deprive the defendant of the very real benefit of reconsideration and change of mind or heart.)

Removing a Juror Rule 24(c)

- Court can replace "any jurors who are unable to perform or who are disqualified from performing their duties."
- For absence: "whether a juror's absence is sufficiently disruptive to warrant removal is a function of the managerial complexity of the case, the flexibility of the court's and parties' schedules, and the availability of witnesses and other evidence." *United States v. Alexander*, 48 F.3d 1477, 1485 (9th Cir. 1995)
- For failure to deliberate, etc: where the record discloses "any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror." *US v. Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999); violates right to unanimous verdict

Juror Misconduct/Extrinsic Information

- Extrinsic information in the jury room violates the Sixth Amendment right to confront witnesses.
 - Should mistrial be declared? *Sassounian v. Roe*, 230 F.3d 1097 (9th Cir. 2000) (whether the material was actually received, and if so, how; the length of time it was available to the jury; the extent to which the juror discussed and considered it; whether the material was introduced before a verdict was reached, and if so at what point in the deliberations; and any other matters which may bear on the issue of the reasonable possibility of whether the extrinsic material affected the verdict.)
- Hearing? *United States v. Hendrix*, 549 F.2d 1225, 1227-28 (9th Cir. 1977) (court's discretion); *Hard v. Burlington N. R.R.*, 812 F.2d 482, 483 (9th Cir. 1987) (In determining whether juror misconduct allegations mandate an evidentiary hearing, the district court must consider: (1) the content of the allegations; (2) the seriousness of the alleged misconduct or bias; and (3) the credibility of the source.)

Proceeding with 11 jurors Rule 23

- By stipulation (23(b)(2), or for good cause (b)(3)
- May be appropriate where the trial is lengthy and waiting for the juror will result in a substantial or potentially uncertain delay; where jury has been deliberating for a long time and forcing them to start over impracticable.
- Otherwise can be error. *United States v. Tabacca*, 924 F.2d at 913-15 (abuse of discretion where twelfth juror was only unable for one day, losing one day of deliberation, or restarting a two day trial feasible)
- Court also has discretion to declare mistrial instead