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Trials&TRIBULATIONS

Mishandled jury note can cost you your case

There are few times that involve more anxiety for counsel and client than awaiting a jury's verdict in a criminal trial. Any jury note punctuates that tension with a moment of excitement and possibly dread, but if the note reveals that deliberations are not going smoothly, the anxiety may be felt almost equally by the trial judge.

Even in the somewhat routine case of a jury claiming to be deadlocked, there is just a fine line separating an instruction that presses the jury to deliberate and one that improperly pressures a holdout juror to abandon his convictions for the sake of unanimity.

And no judge wants the work of the trial wasted because she pushed too hard for unanimity, resulting in reversible error, or because she did not push hard enough, resulting in a mistrial. This makes the events underlying a recent decision by the Second Circuit both striking and somewhat understandable.

In 2009, an experienced federal trial judge in the Southern District of New York presided over the criminal trial of Joseph Collins for his role in the Refco scandal.

Refco, a large New York City-based financial services firm, had gone public in August 2005, but it collapsed just two months later when the company announced that its CEO and chairman had moved hundreds of millions of dollars in bad debts off Refco's balance sheets through a series of sham transactions. Collins, who was then a partner in a major New York City firm and outside counsel to Refco, was accused of conspiracy, wire fraud, securities fraud, and making false filings to the SEC. His trial extended over a month and a half, from mid-May through June, and the court submitted the case to the jury on July 1, 2009.

On the fifth day of deliberations, the judge began to receive signs that deliberations were not going well. A court security officer responded to a loud disruption in the jury room and was told that one juror had been physically threatened by another.

The next morning, the judge received a note from Juror no. 4

expressing concern that another juror had threatened to cut off his finger and to have her husband "take care of him." A second note from the jury foreman attributed much of the blame for the problems to Juror no. 4, who the foreman claimed was being disrespectful. Later that day, the court received another note from the foreman, this time accusing Juror no. 4 of attempting to barter his vote and refusing to deliberate.



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The trial court was undoubtedly in a difficult position. The notes indicated not only the risk of a mistrial or a tainted verdict, but the possibility of a melee in the jury room. There is little useful guidance on how to instruct a jury to refrain from threats of violence and attempted vote bartering. A pattern *Allen* charge, for example, is aimed to break a deadlock, not to prevent mafia-like tactics.

But if it is uncertain what the judge should have said to the jurors, it is clear that the process that he followed was incorrect.

The trial judge convened counsel and informed them that he had received another note from the foreman, but the judge declined to read it into the record or disclose its contents to counsel. Instead, the judge announced that he would be having an immediate, ex parte conference with Juror no. 4. Defense counsel objected, informing the court that he was "not consenting" to the court's plan, but the judge was undeterred.

In the Second Circuit's recitation of this ex parte conference, the judge appears to have pushed Juror no. 4 to be cooperative and respectful, defended the jury foreman's efforts to lead deliberations, and generally ignored Juror no. 4's complaints about feeling insulted and threatened by his peers.

After this conference, the judge read the note and the transcript of the conference into the record, and defense counsel moved, unsuccessfully, for a mistrial. The following day, the court took a partial verdict finding Collins guilty on five of the 14 counts. Collins was later sentenced to seven years imprison-

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ment.

The Second Circuit reversed the convictions, holding that the trial court's failure to disclose the note before responding and the ensuing *ex parte* conversation violated the defendant's constitutional rights to be present and to be represented by counsel throughout his criminal trial, see *United States v. Collins*, No. 10-1048-cr (2d Cir. Jan. 9), Slip. Op. at 11-12, 15-17.

The appeals court emphasized that *ex parte* conversations between the court and jurors are to be avoided, and that in almost every case, the proper course in response to a jury inquiry is to (1) receive the inquiry in written form; (2) have the note marked as an exhibit and read into the record in the presence of counsel and the defendant; (3) provide counsel with an opportunity to be heard and inform counsel of the court's proposed response; and (4) recall the jury and provide the jury with an opportunity to clarify or correct the inquiry before responding in the presence of counsel and the defendant, see *Id.* at 11-12.

In response to the government's argument that this was an exceptional case, requiring the judge to act swiftly to prevent a tainted verdict, the circuit noted that nothing indicated a verdict was imminent and that nothing prevented the court from having a staff member direct the jury to stop deliberations while he conferred with counsel, *Id.* at 16.

The appeals court further held that the error was not harmless because it could not say, with "fair assurance," that the errors did not affect the verdict, *Id.* at 18. In its view, singling out Juror no. 4 could have left the juror with the sense that he was expected to compromise to achieve a verdict, *Id.*

Moreover, the trial judge's support for the foreman and the failure to acknowledge the juror's concerns about threats and insults may have left the juror feeling that he had no backing from the court and no way of escaping those threats except by abandoning his views and voting for conviction, *Id.* at 20. Thus, the circuit vacated the conviction and remanded for a new trial.

It is well-established that the same procedures should be fol-

lowed in a criminal trial in New York state court. In addition to the federal constitutional protections, New York's Criminal Procedure Law § 310.30 provides an independent basis for requiring essentially the same procedure. The Court of Appeals has explained that section 310.30 requires that counsel and defendant be given "meaningful notice" of the contents of any jury note as well as an opportunity to be heard before the court responds, *People v. O'Rama*, 78 N.Y.2d 270, 276-78 (1991). The court has held that, in virtually every case, the trial judge should follow the same procedures that have been established by the Second Circuit. See *O'Rama*, 78 N.Y.2d at 278.

Similar procedures should be observed in civil trials as well. See *Garritano v. Garritano*, 62 A.D.3d 657, 658 (2d Dep't 2009). However, departure from these procedures warrants reversal in a civil trial only upon an affirmative showing of prejudice, *Id.* at 659.

While the procedures identified in the *Collins* case are not novel, the case is noteworthy because it provides a vivid reminder of the need for counsel on both sides to be vigilant in ensuring those procedures are followed. The Second Circuit's opinion shows that the defense asserted its client's rights and preserved its objections for appeal, but the opinion does not disclose whether the government took a position when the trial judge announced his plans to hold an *ex parte* conference without disclosing the contents of the note.

Prosecutors surely have an interest in ensuring a just result that can withstand appeal. Given the government resources that must have been expended in preparing for and conducting this lengthy trial, the *Collins* case should serve as a strong reminder for all parties to insist that the court give meaningful notice of the content of any jury note, an adequate opportunity to be heard regarding the court's planned response, and an opportunity to be present during the response.

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