

**520 SUPPLEMENTAL INSTRUCTION ON AGREEMENT**

You jurors are as competent to decide the disputed issues of fact in this case as the next jury that may be called to determine such issues.

You are not going to be made to agree, nor are you going to be kept out until you do agree. It is your duty to make an honest and sincere attempt to arrive at a verdict. Jurors should not be obstinate; they should be open-minded; they should listen to the arguments of others, and talk matters over freely and fairly, and make an honest effort to come to a conclusion on all of the issues presented to them.

You will please retire again to the jury room.

**COMMENT**

Wis JI-Criminal 520 was originally published in 1962 and revised in 1985 and 1993. This revision was approved by the Committee in October 2000 and involved adoption of a new format and updating the comment.

Subsection 805.13(5) provides the general rule relating to reinstruction of the jury and applies to criminal cases (See § 972.11(1)).

805.13(5) Reinstruction. After the jury retires, the court may reinstruct the jury as to all or any part of the instructions previously given, or may give supplementary instructions as it deems appropriate.

This subsection replaced former § 270.23, which allowed reinstruction to take place only once, unless the jury consented to further reinstruction. (Cf. § 270.23, 1975 Wis. Stat.)

Wis JI-Criminal 520 goes beyond simple reinstruction, of course, as it speaks to the continuation of deliberations by a jury that has expressed its inability to reach agreement. Care must be taken to assure that the instruction is given only if the jury actually is unable to reach agreement, Quarles v. State, 70 Wis.2d 87, 233 N.W.2d 401 (1975).

Wis JI-Criminal 520 (© 1962) had been approved by the Wisconsin Supreme Court on several occasions: Ziegler v. State, 65 Wis.2d 703, 223 N.W.2d 442 (1974); Madison v. State, 61 Wis.2d 333, 212 N.W.2d 150 (1973); and Kelly v. State, 51 Wis.2d 641, 187 N.W.2d 810 (1971). Only minor changes were made in the 1985 revision.

One issue commonly raised in connection with instructions like Wis JI-Criminal 520 is the reference to "the next jury" that may be called upon to decide the same case. The objection is to the implication that another trial will be necessary. In Kelly, supra, the court held that this reference is not prejudicial error. The present version of the instruction partially addresses this objection by referring to the next jury that "may" be called upon.

Another objection raised has related to the claim of undue pressure on minority jurors. Wis JI-Criminal 520 has been distinguished from those used elsewhere on the ground that it makes no reference to minority or majority jurors but rather urges all jurors to make an honest effort to agree, see Kelly, supra. Minority jurors should not be urged to change their views, but all jurors may be asked to make a reasonable effort to reach agreement. Meade v. Richland Center, 237 Wis. 537, 297 N.W. 419 (1941).

The other major criticism of this type of instruction is that some refer to the expense and effort already expended in the trial or the duplication of that expense and effort that a deadlocked jury would require. Such references should be avoided. See Secor v. State, 118 Wis. 621, 95 N.W. 942 (1903); Hodges v. O'Brien, 113 Wis. 97, 99 N.W. 901 (102); and McDonald v. State, 193 Wis. 204, 212 N.W. 635 (1927).

The text of Wis JI-Criminal 520 is believed to be consistent with § 15-4.4 of the ABA Standards for Criminal Justice (Trial by Jury) (2d ed. 1978). This standard is emerging as a preferred response to the "deadlocked jury" problem. See, for example, State v. Weidul, 628 A.2d 135 (Maine Supreme Court, July 13, 1993). Standard 15-4.4 provides as follows:

**15-4.4. Length of deliberations; deadlocked jury.**

(a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:

- (i) that in order to return a verdict, each juror must agree thereto;
- (ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
- (iii) that each juror must decide the case for himself or herself but only after an impartial consideration of the evidence with the other jurors;
- (iv) that in the course of deliberations, a juror should not hesitate to reexamine his or her own views and change an opinion if the juror is convinced it is erroneous; and
- (v) that no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.

(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in paragraph (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.