

522 POLLING THE JURY [SUGGESTED FORM]¹

ASK THE PRESIDING JUROR:

Has the jury reached a verdict?

IF THE ANSWER IS YES, READ THE VERDICT OR VERDICTS. AFTER EACH VERDICT, ASK THE JURY:²

Members of the jury, [as to this count] is this your verdict?

If it is, say yes. If it is not, say no.

IF ALL JURORS ANSWER YES,³ ASK THE [DEFENDANT] [DEFENSE COUNSEL]:⁴

Would you like me to poll the jury?

IF THE ANSWER IS YES, ADDRESS THE JURY AS FOLLOWS:⁵

Members of the jury, I ask each one of you individually. Is this your verdict? If it is, say yes. If it is not, say no. Please begin with juror in seat number one.⁶

IF A JUROR ANSWERS NO, DO NOT INQUIRE FURTHER AND INSTRUCT THE JURY AS FOLLOWS:⁷

In a criminal case, the verdict must be reached unanimously. Please retire again to the jury room and continue with your deliberations.

IF ALL JURORS AGREE ON THE VERDICT, ASK THE [DEFENDANT] [DEFENSE COUNSEL]:

Are you satisfied with the poll?

ACCEPT THE VERDICT AND DISCHARGE THE JURORS.

COMMENT

Wis JI-Criminal 522 was originally published in 1995 and revised in 2000. This revision was approved by the Committee in February 2007 and involved adding the material at footnote 7.

The defendant's right to poll the jury is closely related to the right to have counsel present at the time the verdict is received. The receipt of the verdict is a "critical stage" of the proceedings to which the right to counsel applies. This stage is "critical" in part because the defendant has the right to request a poll of the jury. See State v. Behnke, 155 Wis.2d 796, 801, 456 N.W.2d 610 (1990). This principle goes back to Smith v. State, 51 Wis. 615, 8 N.W. 410 (1881), which "despite its age, . . . remains the law today." State v. Wojtalewicz, 127 Wis.2d 344, 347-48, 379 N.W.2d 338 (Ct. App. 1985).

Polling the jury can be viewed as having two stages. A question to the jury as a whole, asking whether all agree on the verdict, has been referred to as "collective" polling. State v. Wojtalewicz, supra at 348-49. See note 2, below. "Individual" polling requires each juror to answer. See note 5, below.

"A defendant has the right, when timely asserted, to have the jurors individually polled on their verdict." State v. Coulthard, 171 Wis.2d 573, 581, 492 N.W.2d 329 (Ct. App. 1992). In Coulthard, the trial court reconvened the jury 50 days after the trial had concluded to conduct the individual poll. The court of appeals held this was an effective remedy.

"The right to poll the jury at the return of the verdict is a corollary to the defendant's right to a unanimous verdict. Polling is a means by which the uncoerced unanimity of the verdict can be tested. Each juror must take individual responsibility and state publicly that he or she agrees with the announced verdict." State v. Behnke, supra at 801. Also see State v. Wiese, 162 Wis.2d 507, 469 N.W.2d 908 (Ct. App. 1991); State v. Wojtalewicz, supra. A juror may dissent at any time before a verdict is received and properly recorded. State v. Cartagena, 140 Wis.2d 59, 409 N.W.2d 386 (Ct. App. 1987). Polling the jury can cure what would otherwise be error in failing to give an instruction requiring unanimity. State v. Kircher, 189 Wis.2d 392, 525 N.W.2d 788 (Ct. App. 1994).

In State v. Wiese, supra, the court held that the "American Bar Association Standards are consistent with Wisconsin law." 162 W.2d 507, 518. The decision referred to sec. 15-4.5 of the second edition of the ABA Standards (1980).

1. The procedure and statements suggested here are intended to illustrate a complete jury polling procedure. It is expected that it will be used only as a general guide, with selection of those parts that seem helpful and modification of others as appropriate to local practice and the case at hand.

2. This question to the entire jury has been referred to as "collective" polling. State v. Wojtalewicz, supra at 348-49. Each juror has the opportunity to indicate that he or she does not agree with the verdict. Where an individual polling of the jury is requested, this "collective" poll is not sufficient.

3. If the poll indicates that jurors do not unanimously agree on a verdict, they should be asked to continue deliberations. See note 7, below.

4. In State v. Jackson, 188 Wis.2d 537, 525 N.W.2d 165 (Ct. App. 1994), the court held that an indication by defense counsel that an individual poll is not requested is sufficient – obtaining an individual waiver from the defendant is not required. The concurring opinion recommended conducting an individual

poll in every case, to "forestall a claim of ineffective assistance of counsel."

The decision whether to request an individual polling is one delegated to counsel. State v. Yang, 201 Wis.2d 721, 740, 549 N.W.2d 769 (Ct. App. 1996). Whether failure to request an individual poll constitutes deficient performance by counsel depends on all the circumstances. Id. at 741. Cited in State v. Eckert, 203 Wis.2d 497, 553 N.W.2d 539 (Ct. App. 1996). Also see State v. Brunton, 203 Wis.2d 195, 552 N.W.2d 452 (Ct. App. 1995).

Compare State v. Behnke, supra, where a conviction was reversed because the trial court failed to poll the jury in a case where counsel was absent at the time the verdict was returned. The court held that in those circumstances, it was error to fail to obtain the defendant's "knowing, voluntary, and unequivocal waiver" of both the right to poll the jury and the right to counsel.

5. This question pursues the "individual" polling of the jurors. "The practice requires each juror to answer for himself. . . . The 'confrontational' element is important. A defendant in a criminal case has the right to require each member of the jury when face to face with the accused to state whether or not the verdict is his verdict." State v. Wojtalewicz, supra at 349 (citations omitted).

6. The Committee recommends identifying the jurors by their seat number. It is also common practice to identify the jurors by name. See, for example, State v. Wiese, supra.

7. When a juror responds with an unambiguous "no," the trial court has two options: grant a mistrial or return the jury for further deliberations. The court should not continue to question the individual juror. State v. Raye, 2005 WI 68, 281 Wis.2d 339, 697 N.W.2d 407, ¶38.

"If there is a dissent, or if it is stated by the juror that the assent is merely an accommodation and against the juror's conscience, it is the duty of the court, upon its own motion, to direct the jury to retire and reconsider its verdict." State v. Wiese, supra at 518.

If the court decides to send the jury back for further deliberation, the Committee recommends a simple statement directing them to do so, as provided in the instruction. If additional instruction is believed to be necessary, see Wis JI-Criminal 520, Supplemental Instruction On Agreement.

While a clear statement that a juror does not agree on the verdict requires that the jury be asked to resume deliberations, the court should be alert for less unequivocal indications of lack of agreement. "[T]he court should interrogate a juror who, during the poll, creates some doubt as to his vote. . . . Doubt may result from the juror's demeanor or tone of voice as well as the language he uses. Prior to further questioning, however, the court should make a determination that the juror's answer was ambiguous or ambivalent." State v. Cartagena, 140 Wis.2d 59, 62, 409 N.W.2d 386 (Ct. App. 1987). However, there is no right to "cross-examine the jurors on their verdict." Ibid., citing State v. Ritchie, 46 Wis.2d 47, 56, 174 N.W.2d 504 (1970).