

**SM-9 WHEN A JURY REQUESTS TO HEAR/SEE AUDIO/VISUAL EVIDENCE DURING DELIBERATIONS**

This Special Material outlines the procedure that a trial judge should follow when an audio/visual recording has been received into evidence and played at trial and a jury requests to listen to or watch the recording during deliberations. Discussed below are the two Wisconsin cases that have addressed this issue.

**Deciding whether to replay the recording**

The decision to replay an audio/visual recording is within the trial court's discretion.<sup>1</sup>

Factors the court should consider in deciding whether to replay the exhibit include:

- whether the recording will aid the jury in proper consideration of the case;
- whether a party will be unduly prejudiced by replaying the exhibit;
- whether the exhibit could be improperly used by the jury, and;
- whether granting a replay request will unfairly over emphasize a particular piece of evidence.<sup>2</sup>

Before responding to a jury request for a replay, the court shall advise the parties of the request and solicit comment, ideally with the defendant present.<sup>3</sup> Only the portions of the recording played during trial may be played during deliberations.<sup>4</sup> Allowing jurors to take notes during the replay is within the discretion of the trial judge.<sup>5</sup>

**Recommended procedure for replaying a recording**

If the court decides to replay the recording, the best practice is for the trial judge to bring the jury back to the courtroom and replay the recording with all parties present in open court. In Franklin v. State, the defendant's audio-recorded confession was played for the jury during trial. 74 Wis. 2d 717, 720, 247 N.W.2d 721 (1976). During deliberations, the jury requested to hear it again. Over defense counsel's objection, the trial judge sent the tape back into the jury room with a tape player. The Wisconsin Supreme Court held, "[w]e cannot approve of this practice which entails the risk of breakage or accidental erasure of the tape while it is beyond the trial court's supervision and which presents the danger of overemphasis of the confession relative to testimony given from the witness stand." Id. at 724. The Court held that the proper procedure was that the trial court retain control of the jury's exposure to confessions. Id. at 724-25. Thus, if the court decides to replay a recorded confession, the jury should return to the courtroom where the confession is replayed or reread. Id. at 725.

Thirty years after Franklin, the Court addressed this issue again in State v. Anderson, this time in the context of a video recorded forensic interview of a child victim. 2006 WI 77, 291 Wis. 2d 673, 717 N.W.2d 74.<sup>6</sup> The forensic interview was received into evidence and played in its entirety at trial. Id. ¶7. During deliberations, the jury requested that the "victim's videotaped interview, be sent to the jury room and that a television and VCR be provided so that the jurors could watch the victim's videotaped interview." Id. ¶10. The

trial court granted the request over defense counsel's objection. Id. ¶11. The Court concluded that the circuit court properly exercised its discretion in allowing the jury to hear and see the victim's videotaped interview but failed to apply the correct legal standard when it allowed the jury to view the videotape in the jury room. Id. at ¶29. The trial court should have followed the procedure outlined in Franklin and brought the jury back into the courtroom to view the victim's interview in open court. Id. at ¶30. This procedure "minimizes the risk of breakage or erasure of the recording and, more importantly, allows a circuit court to guide the jury, with the assistance of all counsel, so that no part of the recording is overemphasized relative to the testimony given from the witness stand." Id.

While the case law only addresses recorded statements, the Committee has concluded that the above-described procedure applies to any recorded evidence. When only a portion of the recording was played during trial, the court must take special care to ensure that only that section is played during deliberations. The court or the parties should make a record of exactly what was played during deliberations by noting the beginning and end times from the exhibit.

#### COMMENT

SM-9 was approved by the Committee in June 2022.

1. See State v. Anderson, 2006 WI 77, ¶27, 291 Wis. 2d 673, 717 N.W.2d 74. (Overruled in part on other grounds. See State v. Alexander, 2013 WI 70, ¶¶26-28, 349 Wis. 2d 327, 833 N.W.2d 126).
2. Id. at ¶105.
3. See State v. Bjerkaas, 163 Wis. 2d 949, 957, 472 N.W.2d 615 (Ct. App. 1991) and State v. Alexander, 2013 WI 70, ¶29, 349 Wis. 2d 327, 833 N.W.2d 126.
4. See State v. Hines, 173 Wis. 2d 850, 861, 496 N.W.2d 720 (Ct. App. 1993).
5. Wis. Stat. § 972.10(1)(a)1.
6. State v. Anderson, 2006 WI 77, 291 Wis. 2d 673, 717 N.W.2d 74 was overruled in part on other grounds. See State v. Alexander, 2013 WI 70, ¶¶26-28, 349 Wis. 2d 327, 833 N.W.2d 126).