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Memo to the Supreme Court Advisory Committee

Re: Instructions to the jury about communicating with the court during deliberations

The Supreme Court asked the SCAC to review the rules and instructions to the jury about communicating with the court during deliberations in light of Justice Wainwright's concerns in his concurring opinion in *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 668-671 (Tex. 2009). At our meeting in June of 2009, we discussed the issue and voted 16-3 not to change our instruction to the jury in the updated version of 226a that was approved by the committee. At the September meeting, the Chair informed the committee that the Supreme Court wanted us to re-visit the issue, and I was appointed to review the issue again.

**Materials Reviewed and Actions Taken**

In connection with the review, I did the following[1]:

1. Identified Justice Wainwright's concern;
2. Reviewed prior cases to see if there have been other cases where jury notes created similar issues to the *Castillo* case;
3. Reviewed the Feb. 19, 2009 draft of 226a approved by the Supreme Court but not yet published for review;
4. Reviewed other states' instructions to the jury about communicating with the court;
5. Gathered other articles and anecdotes; and
6. Discussed the issue with the Pattern Jury Charge Oversight Committee.

**Recommendation and Potential Suggestions**

1. Re-insert the deleted contempt instruction in 226a. (recommended)

[1] My law clerk, Julie Kirkendall, was instrumental in assisting me with this task. Julie graduated from University of Houston in May 2009 and recently passed the Texas Bar

The PJC Oversight Committee voted first to respectfully point out to the Supreme Court that the committee had previously recommended to the Court that jurors should be told that their failure to follow the court's instructions could result in a charge of contempt against the juror. We had previously recommended that instruction be placed in two places in the 226a instructions—once before trial began and then again in the jury charge. The instruction is: "It is possible that you may be held in contempt or punished in some other way." The SCAC voted to remove one of the two instructions but to keep the one that would be in the charge to the jury. In the last draft presented by the Supreme Court, that instruction was deleted from 226a (page 7 of the Feb. 19, 2009 draft from the Supreme Court). The Committee respectfully asks the Supreme Court to reconsider that deletion. It appears from the re-trial of the *Castillo* case that there was juror misconduct and perhaps collusion with the plaintiffs or their agents.[2]

2. Signature (neutral)

To cure one issue raised by Justice Wainwright, signature by a juror, we can make the following change to page 8 of the Feb. 19, 2009 draft of the revised 226a under duties of the presiding juror:

> 2.c. Give written questions or comments, signed by one or more jurors, (alternate: signed by the presiding juror) to the bailiff who will give them to the judge.

3. Entire Jury Should Know (not recommended)

A second issue raised by Justice Wainwright was his statement that: "At a minimum, the entire jury should know that a question about deliberations is being sent to the judge." *Id.* at 669. The Oversight Committee does not recommend any change to address this issue. Any changes would not address the apparent misconduct in the *Castillo* case and could create more problems. But to address Justice Wainwright's concerns, we offer the following potential instruction to page 8 of the Feb. 19, 2009 draft of the revised 226a under duties of presiding juror:

> 2.c. Give written questions and comments about this case to the bailiff after you read them aloud to the jury. The bailiff will give them to the judge.

[2] I make that assumption based on the Rick Casey newspaper article about the re-trial.

**Discussion**

We were unable to find any other cases where misleading jury questions that caused a settlement resulted in further litigation. *Ford Motor Co. v. Castillo*, 279 S.W.3d 656 (Tex. 2009) is a case of first impression on this issue. We were also unable to find any cases where any question was raised about the fact that a note was or was not signed, nor did we find any cases where the rest of the jury appeared to be unaware of a jury note.

There are cases where the answers given by the court in response to a question from the jury were issues on appeal. *See Faulk v. Bluitt,* 211 S.W.3d 418 (Tex. App.—Waco 2006, pet. denied) (jury asked the following question during deliberations: "If we find neither party negligent both equally @ fault do we have to access [sic] damage? (money)." The judge properly instructed the jury to refer back to his original instructions. The jury then returned a verdict and answered "No" as to negligence for both parties but then answered 50% in the comparative question and answered damages which were not predicated. The judge sent them back for further deliberations pointing out the conflict. The jury then came back with a verdict of negligence on one party and blanks on the comparative issue and increased the damages. The court of appeals held there was no error in the supplemental instructions about the conflict.) *Golden v. First City Nat'l Bank in Grand Prairie*, 751 S.W. 2d 639 (Tex. App.—Dallas 1988, no writ) (no error in judge's instruction to the jury after jury sent a note indicating it was deadlocked.)

And there are cases where the questions themselves were grounds for appeal. *See Lincoln v. Clark Freight Lines, Inc.,* 285 S.W.3d 79 (Tex. App.—Houston [1st Dist.] 2009, no pet. h.) (Several jury notes were sent out on how to answer the verdict and on how to sign the verdict certificate. The original verdict was signed by the presiding juror, yet when polled, two jurors dissented to the verdict. The judge sent them back to correct the error. The appellate court found no juror confusion that would warrant a new trial.); *Formosa Plastics Corp., USA v. Kajima Int'l*, 216 S.W.3d 436 (Tex. App.—Corpus Christi 2006, pet. denied) (On appeal, Formosa claimed the jurors were confused about damages due to the following question received during deliberations: "Judge, in question number two, are we to base our answer on the amount that is owed, 25.3 million, or how much they deserve." The appellate court found no error.); *Bellino v. Comm'n for Lawyer Discipline*, 124 S.W.3d 380 (Tex. App.—Dallas 2003, pet. denied) (The jury asked to see an exhibit that had been displayed in court to the jury but not admitted into

evidence. The trial court instructed the jury that the exhibit was not admitted into evidence and to refer to the court's charge and continue deliberating. The appellate court concluded that the fact that the jury may have been considering that evidence did not rise to reversible error.)

In two cases, a jury question helped the appellate courts to conclude that the excluded evidence was material. In *Texas Dept. of Transp. v. Fontenot*, 151 S.W. 3d 753 (Tex. App.—Beaumont 2004, pet. denied), the police report, with a notation of non-seat belt use, was admitted into evidence and discussed during trial. The exhibit that went back to the jury had that portion redacted. There was no discussion in the opinion as to how that happened. During deliberations, the jury asked the court: "Can we have the information if he was wearing a seatbelt. The police report is not filled in on the spot." The appellate court concluded that the redaction of the police report was error and harmful noting that the jury obviously wanted the information. In *Navistar Int'l Transp. Corp. v. Crim Truck & Tractor Co*., 883 S.W.2d 687 (Tex. App.—Texarkana 1994, writ denied), the trial judge excluded an expert on damages. The appellate court concluded it was reversible error, noting in a footnote that the jury asked the precise question about damages that the excluded expert would have addressed.

In the interest of full disclosure, there are a number of cases involving juror questions and failure to preserve error. Often the discussion about the jury question is not on the record. Sometimes the answer that the trial judge gave the jury is not in the record. The attorneys do not properly object to the court's proposed answer and they often do not tender an instruction or answer "in conformity with the rules relating to the charge." Rule 286 seems to require the jury to return to the courtroom to receive the answers to their questions, but current practice is to send a written note back to the jury. And there are only a few cases where the failure to bring the jury into the courtroom to receive the answer is even discussed. In my opinion, the rule itself could be clarified. But there is no need to change 226a.

A current case about juror questions and conduct, about interviews by the trial judge, and a request for new trial is in a recent Texas Lawyer article and is provided for your review.

In *Ford Motor Co. v. Castillo*, 279 S.W.3d 656 (Tex. 2009), Ford Motor Company settled a case during jury deliberations, after an unsigned note from the presiding juror asked: "What is the maximum amount that can be awarded?" Ford talked to some of the jurors after they were dismissed due to the settlement. A few of the jurors indicated that the jury was finding in favor of Ford and did not know about the question from the presiding juror. Ford refused to pay the

settlement. Castillo sued to enforce the settlement and Ford sought discovery from the presiding juror on the note. The trial court refused to allow the deposition and enforced the settlement. The Court of Appeals affirmed and the Supreme Court reversed, concluding that Ford was entitled to depose the juror under these circumstances.

Justice Wainwright concurred and stated:

> The rules of procedure and the instructions to the jury should be amended to specify that only the jury can send questions about the deliberations to the judge during deliberations. At a minimum, the entire jury should know that a question about deliberations is being sent to the judge.

*Id*. at 669. Justice Wainwright noted that some federal instructions provide more guidance to the jurors. The Federal instructions inform the jury to submit notes to the bailiff "signed by one or more jurors."

Other states also include an instruction that a note from the jury be signed by the presiding juror or by the juror that sent it. We can certainly amend 226a to require that all notes be signed by "one or more jurors" or be signed by the presiding juror. Neither of those suggestions would have made a difference in the *Castillo* case, because the juror in question was the presiding juror. If we add the language "one or more jurors" rather than the presiding juror, we would probably need to amend Rule 285 which allows the jury to communicate with the court through their presiding juror.

The concept of requiring the note to be from "the jury" as opposed to being from one juror is a difficult one to implement. Should all notes be approved by a majority of the jurors or by a 10-2 vote? We rejected either of those concepts as micro-managing the jury and potentially leading to more problems. Justice Wainwright notes that some federal instructions specifically caution the jurors not to tell what their numerical vote is when they send a question. We agree that we should not know how many jurors agree to send a question. No state instructions are helpful on this issue.

Unfortunately jurors may send out questions that mislead lawyers, even without any misconduct. Jurors sometimes skip ahead and look at predicated questions without finding liability first and might send a note about damages. Jurors may send out notes that a majority already knows the answer to, but because one juror does not understand or believe the others, he sends a note.

The second concern of Justice Wainwright—that "at a minimum the entire jury should know that a question about deliberations is being sent to the judge" –can be cured by requiring the presiding juror to read any note to the entire jury before it is given to the bailiff. Of course, if it is true that the presiding juror in *Castillo* committed jury misconduct by sending the note at the request of an agent of the plaintiffs, then that juror would have simply ignored the requirement of reading the note. The Oversight Committee felt that this requirement was unnecessarily formal and could stifle notes that should be sent—for example a note from a juror complaining about the conduct of other jurors. Attempting to define which notes would need to be read to everyone versus which notes did not need to be read to everyone was also problematic. We settled on the words "about the case" for lack of any better way to put it.

Finally the formal reading of a question may cause more problems in the jury room by elevating the importance of the questions, creating debates among the jurors as to whether the note should be sent at all. What if the presiding juror in *Castillo* told the rest of the jurors about her note and read it to them. And said to them—I am just curious—when asked why she wanted to send it. Should the rest of the jury be allowed to prevent the question? Should we encourage a comment from the rest of the jurors that they did not agree to send this question? This leads us right back to the federal instructions that specifically tell the jury not to state their numerical division.

As Justice Wainwright noted, as long as there is not impermissible outside influence, a settlement based on an unintentionally misleading jury note will not be set aside. *Id*. at 670. Because that is the law, lawyers should know that reliance on juror notes can sometimes lead to bad settlements. In our opinion, neither signing the notes nor requiring that notes be read to the rest of the jurors will prevent potentially misleading juror notes.