

To: Judge Tracy Christopher and the Texas Supreme Court Advisory Committee
From: Julie Kirkendall
Date: November 4, 2009
Re: Pattern Jury Instruction

I. Introduction: *Ford Motor Co. v. Castillo*.

The Texas Supreme Court recently considered a case in which a juror's misleading question during deliberations compelled the defendant to settle. *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 659 (Tex. 2009). In *Ford Motor Co.*, the presiding juror sent an unsigned note to the judge to inquire about the maximum amount of damages that could be awarded to the plaintiff. *Id* at 659. Ford assumed that the jury had already determined the preceding question of liability and entered into a settlement agreement with the plaintiff. *Id* at 668. After the judge released the jurors, the other jurors revealed that they had not completed deliberations on the question of liability when the presiding juror sent the note. *Id* at 659. Ford requested the right to conduct post-settlement discovery, which the trial court denied. *Id* at 660.

While the Texas Supreme Court's opinion primarily discussed Ford's right to conduct discovery, Justice Wainwright wrote a concurrence criticizing the procedure for juror questions during deliberations. The note in this case came from a single juror, and there was evidence that the other jurors either objected to or did not know about the note. *Id* at 668. However, requiring the foreman to sign the jury question would not have changed the outcome in *Ford*, because the question in that case came from the presiding juror. Justice Wainwright believes that a single juror should not be allowed to send a note to the judge without at least informing the rest of the jury. *Id* at 669.

II. Current Texas law on communications between the judge and jury during deliberations.

Rule 285 of the Texas Rules of Civil Procedure states that: “The jury may communicate with the court by making their wish known to the officer in charge, who shall inform the court, and they may then in open court, and through their presiding juror, communicate with the court, either verbally or in writing. If the communication is to request further instructions, Rule 286 shall be followed.”

Rule 286 of the Texas Rules of Civil Procedure states that: “After having retired, the jury may receive further instructions from the court touching any matter of law, either at their request or upon the court's own motion. For this purpose they shall appear before the judge in open court in a body, and if the instruction is being given at their request, they shall through their presiding juror state to the court, in writing, the particular question of law upon which they desire further instruction. The court shall give such instruction in writing, but no instruction shall be given except in conformity with the rules relating to the charge. Additional argument may be allowed in the discretion of the court.”

The current version of Texas Pattern Jury Charge 40.3 provides that it is the duty of the presiding juror to write down juror questions and give them to the bailiff, who will deliver the question to the judge. The instruction does not require that a minimum number of jurors support the question or sign the note.

III. Case law since 1984.

Ford was a case of first impression in the Texas Supreme Court. After an exhaustive search, it seems that there is no controlling case law on this particular topic since the pattern instruction was last amended in 1984.

IV. Pattern jury charges from states other than Texas.

See the attached document for the pattern jury charges of other states. Of the 29 states that have a relevant jury instruction that could be located, all but one requires that the instruction be in writing. 8 of the 29 states require that the question be signed by the juror that is sending it. 9 of the 29 states require that the question be sent by the foreman of the jury. None of the states require that the note indicate the number of jurors that join in the question.