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BY *[Signature]*

IN THE SUPREME COURT OF THE STATE OF ARIZONA

IN RE

Rules 16, 32, 32(a)(5), 39(b),)
(c), (f) and (h), 47(a) (1),)
(b)(2), (f) and (g), and 51(a))
and (b)(3), Rules of Civil)
Procedure, Rules 16.3, 18.5(b),)
(c), (d), (f) and (h), 18.6(c))
and (d), 19.1(a), 19.4, 21.3(d),)
22.2(b) and 22.4, Rules of)
Criminal Procedure, and Rule)
611, Rules of Evidence,)
Relating to Trials by Jury,)
and the Official Comments)
thereto, and Arizona Jury)
Management Standard 16(c)(i))
_____)

Petition for Amendment to
Court Rules under Rule 28,
Rules of the Supreme Court

Pursuant to Rule 28 of the Rules of the Supreme Court, the Administrative Office of the Courts, by and through George Logan III, Attorney and Project Manager, hereby petitions this Court to amend the within designated Rules of Civil Procedure, Criminal Procedure, Evidence, Official Comments thereto, and Arizona Jury Management Standard, all of which relate to conducting trials by jury. The proposed changes are contained in Attachment I of this petition.

GROUND FOR APPROVAL OF PETITION

On April 14, 1993 the Arizona Judicial Council established the Committee On More Effective Use Of Juries ("the Committee") by order of Chief Justice Stanley G. Feldman. It was mandated in part to:

1. Study and evaluate the utilization of juries and the conduct of jury trials in Arizona in light of available studies, reports and other published scholarship that bear on the issues referred to in this order.
2. Recommend specific ways to improve jury trials, the effectiveness of juries and the quality of jury verdicts.
3. Propose rule and other changes that would implement the recommended changes.

Superior Court Judge B. Michael Dann chaired the 26 member Committee, which was composed of a cross-section of former jurors, jury administrators, academicians, civil and criminal attorneys and trial and appellate judges. Approximately 20 subcommittees were established to examine particular subjects or issues and report back to the full Committee which met eleven times to consider and act upon the subcommittees' recommendations. Ultimately the Committee issued its report with 55 specific recommendations to improve jury trials, the effectiveness of juries and the quality of jury verdicts, including a Bill of Rights for Jurors. Sixteen of these recommendations are submitted herein as changes to the Rules of Civil and Criminal Procedure, Evidence and the Official Comments thereto. See, Jurors: The Power of 12, Report of: The Arizona Supreme Court Committee on More Effective use of Juries (hereinafter, "Jurors: The Power of 12").

The need to reform the practices and procedures of Arizona's jury system is insightfully discussed by Judge Dann in the introduction to the report:

The right to trial by jury remains one of our most valued liberties. In addition to serving as a needed buffer between government and the individual, juries put a human face

on the law, help legitimate case outcomes and contribute to the finality of criminal cases and civil disputes.

However hallowed the right and institution of trial by jury, increasing criticism is being leveled at jury decisions in many high profile cases. Jury trial procedures, which have not changed substantially over the past 200 years, and the role played by the jury during trial have recently come under increasing serious study by leading legal and social science institutions and authorities, all of whom call for major reforms in the way our legal system affects jurors. Principal among the concerns are the lack of jury representativeness in an increasingly diverse society, enforced juror passivity during trials and unacceptably low levels of juror comprehension of the evidence and of the court's instructions. See Jurors: The Power of 12, at 1-2.

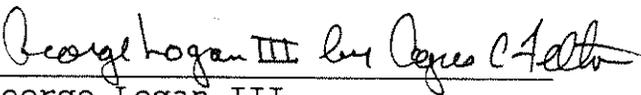
Judge Dann's words best sum up the thrust of this report:

The committee's report calls for trials that allow for a more democratic juror experience, ones that are more educational and less adversarial. Judges and trial attorneys are summoned to be open to doing some old things in new ways, to be more receptive to the jurors' needs to learn better and to actively participate to a greater degree in the fact-finding process.

Finally, we urge the Supreme Court to approve and publish a "Bill of Rights for Jurors," a document that enumerates the more important juror rights, ones that other trial participants are expected to honor. Id. at 3-4.

For the foregoing reasons the undersigned petitions the Court for the rule changes set forth in Attachment I.

Respectfully submitted this 23rd day of November, 1994.


George Logan III
Attorney and Project Manager
Administrative Office of the Courts

ATTACHMENT I.

PROPOSED RULE CHANGES

1. **Encourage Mini-Opening Statements Before Voir Dire.** Judges should be encouraged to have counsel give brief, non-argumentative factual statements about their case to the entire jury panel before voir dire examination. Examination of the panel following brief non-argumentative factual statements should result in a better test of juror bias, since the potential jurors would know more about the case, its facts and issues. The jurors would have a better frame of reference from which to respond. To effect this change the Committee recommends amending Civil Rule 47(b)(2) and Criminal Rule 18.5(c) by adding the following paragraph:

The parties may, with the court's consent, present brief opening statements to the entire jury panel, prior to voir dire. On its own motion the court may require counsel to do so. Following such statements, if any, the court shall conduct a thorough examination of prospective jurors.

2. **Allow Judges to Choose Between the "Struck" and the "Strike and Replace" Methods of Jury Selection.** The civil and criminal rules should be revised to permit trial judges to use either the "struck" or the "strike and replace" method of jury selection. Only the "strike and replace" method is currently allowed. Authorities on this subject cite several reasons for preferring the "struck" method, including (1) increasing juror participation, (2) producing a jury with less bias, (3) eliminating embarrassment to jurors when they are excused peremptorily or for cause, (4) avoiding repetitive questioning of replacement jurors, (5) allowing counsel to use peremptories freely, (6) identifying and remedying Batson¹ violations before any juror is

¹/ Batson v. Kentucky, 476 U.S. 79 (1986);

excused from a panel, (7) taking no more time than the "strike and replace" method. To effect this change the Committee recommends amending Civil Rule 47(a)1, Criminal Rule 18.5(b), (f) and (h), and adding an Official Comment, as follows:

47(a) Trial Jury; Procedure; List; Striking; Oath.

1. When an action is called for trial by jury, the clerk shall prepare and deposit in a box ballots containing the names of the jurors summoned who have appeared and have not been excused. The clerk shall then draw from the box as many names of jurors as the court directs ~~eight names, and in addition thereto as many more as equal the number of peremptory challenges to which the parties are entitled.~~ If the ballots are exhausted before the jury is completed, the court shall order to be forthwith drawn in the manner provided for other drawings of jurors, but without notice and without the attendance of officers other than the clerk, as many qualified persons as necessary to complete the jury.

18.5(b) Calling Jurors for Examination ~~a Full Jury Box.~~

The court or clerk shall then call to the jury box a number of jurors equal to the number to serve plus the number of alternates plus the number of peremptory challenges allowed the parties. Alternatively, and at the court's discretion, all prospective jurors may be examined by court and counsel.

(f) Challenge for Cause. At any time that cause for disqualifying a juror appears, the court shall excuse the juror and ~~call another member of the panel to take the before the parties are called upon to exercise their peremptory challenges.~~ Such a juror shall be excused and another member of the panel shall be called to take the excused juror's place in the jury box and on the clerk's list of jurors when fewer than all of the members of the jury panel have been examined. Challenges for cause shall ~~may~~ be made out of the hearing of the jurors, but shall be of record.

(h) Selection of Jury. The persons remaining in the jury box or on the list of the panel of prospective jurors shall constitute the jurors for the trial. Just before the jury retires to begin deliberations, the clerk shall, by lot, determine the juror or jurors to be designated as alternates.

Official Comment to Civil Rule 47(a)(1) and Criminal Rule 18.5(b): Prior to the 1995 amendment, Rule 47(a)(1) [Rule 18.5(b)] was read to require trial judges to use the traditional "strike and replace" method of jury selection, where only a portion of the jury panel is examined, the remaining jurors being called upon to participate in jury

selection only upon excusal for cause of a juror in the initial group. Challenges for cause are heard and decided with the jurors being examined in the box. A juror excused for cause leaves the courtroom in the presence and view of the other panel members, after which the excused juror's position is filled by a panel member who responds to all previous and future questions of the potential jurors.

The purpose of this amendment is to allow the trial judge to use the "struck" method of selection if the judge chooses. This procedure which is of more recent vintage and is thought by some to offer more advantages than the "strike and replace" method. See T. Munsterman, R. Strand and J. Hart, The Best Method of Selecting Jurors, The Judges Journal 9 (Summer 1990); A.B.A. Standards Relating to Juror Use and Management, Standard 7, at 68-74 (1983); and "The Jury Project," Report to the Chief Judge of the State of New York 58-60 (1994).

The "struck" method calls for all of the jury panel members to participate in voir dire examination by the judge and counsel. Although the judge may excuse jurors for cause in the presence of the panel, challenges for cause are usually reserved until the examination of the panel has been completed and a recess taken. Following disposition of the for cause challenges, the juror list is given to counsel for the exercise of their peremptory strikes. When all the peremptory strikes have been taken and all Batson issues resolved, the clerk calls the first eight names remaining on the list, plus the number of additional [alternate] jurors thought necessary by the judge, who shall be the trial jury.

3. **Assure Lawyers the Right to Voir Dire in All Cases.** The Committee is convinced that lawyer participation in the voir dire process is more likely to result in fair and impartial juries than if conducted by the judge alone. In 1991 Civil Rule 47(b)(2) was amended to assure lawyers the right to voir dire in civil cases. Lawyers should have this same right in criminal cases. To assure voir dire is meaningful the rules should be amended to direct judges to conduct a "thorough" rather than a "preliminary" initial examination. To effect this change the Committee recommends amending Civil Rule 47(b)(2) as follows and substituting the same for Criminal Rule 18.5(d):

The court shall conduct a preliminary thorough oral examination of prospective jurors. Upon the request of any party, the court shall permit that party a reasonable time to conduct a further oral examination of the prospective jurors. The court may impose reasonable limitations with respect to questions allowed during a party's examination of the prospective jurors, giving due regard to the purpose of such examination. Nothing in this Rule shall preclude the use of written questionnaires to be completed by the prospective jurors, in addition to oral examination.

4. **Set and Enforce Time Limits for Trials.** In the interest of using judicial resources efficiently, and having evidence presented effectively, the Rules of Civil and Criminal Procedure and Evidence authorize trial judges to place time limits on entire trials and portions thereof. To encourage judges to exercise this authority to better manage trials, the Committee recommends adding more explicit language to Civil Rule 16, Criminal Rule 16.3, and Evidence Rule 611 as follows:

The court may impose reasonable time limits on the trial proceedings or portions thereof.

5. **Juror Notebooks Should be Provided in Some Cases.** To encourage the use of juror notebooks, the Committee recommends adding the following language to Civil Rule 47(g), Criminal Rule 18.6(c), and accompanying Comments:

In its discretion, the court may authorize the jurors' use of notebooks, containing basic trial documents selected in the court's discretion by jurors during trials to aid the jurors in performing their duties.

Comment

In trials of unusual duration or involving complex issues, juror notebooks are a significant aid to juror comprehension and recall of evidence. At a minimum notebooks should contain: (1) a copy of the preliminary jury instructions, (2) jurors' notes, (3) witnesses' names, photographs and/or biographies, (4) copies of

key documents and an index of all exhibits, (5) a glossary of technical terms, and (6) a copy of the court's final instructions.

6. **Expand Use of Preliminary Jury Instructions.** Research shows that jurors who are more informed about the issues in a case are better able to understand and organize the evidence as it is presented and have improved recall of it. By using expanded preliminary jury instructions jurors can be informed of the substantive issues at bar, which at a minimum ought to state what the parties must prove in a civil case, or what the State must prove in a criminal case. Also, elements of the offenses or claims, anticipated defenses and definitions of technical terms should be included. The civil rules are silent as to giving expanded substantive preliminary instructions. Therefore the Committee recommends borrowing the following language from Criminal Rule 18.6(c) to amend Civil Rules 39(b) and 51(a):

Preliminary Instructions. Immediately after the jury is sworn, the court shall instruct the jury concerning its duties, its conduct, the order of proceedings and the elementary legal principles that will govern the proceeding.

In addition Arizona Jury Management Standard 16(c)(i) should be supplemented as follows:

Preliminary jury instructions shall comply with applicable rules and should inform the jury of the legal rules applicable to any charge, claim and anticipated defense. Where necessary or helpful, a glossary of terms should also be provided.

7. **Ensure Note Taking by Jurors in All Cases.** As a result of Criminal Rule 18.6(d), note taking by jurors during criminal trial is widely accepted and commonplace. In civil cases however, juror note taking is left up to the discretion of the judge and therefore is not universally permitted. Experience shows that jurors are greatly benefitted by note

taking in many aspects of their performance, including their increased attention, improved memory and recall, higher morale and satisfaction. The Committee proposes amending Civil Rule 39 by adding a new paragraph (o), entitled Note Taking by Jurors, to read as follows:

The court shall instruct the jurors that they may take notes regarding the evidence and keep the notes for the purpose of refreshing their memory when they retire for deliberation. The court shall provide materials suitable for this purpose. During recesses of the trial the jurors shall be permitted to have access to their notes in the jury room. After the jury has rendered its verdict, the notes shall be collected by the bailiff or clerk who shall promptly destroy them.

The Committee also recommends that Criminal Rule 18.6(d) (Note Taking) be amended as follows to allow jurors the right to review their notes in the jury room during recesses:

The court shall instruct the jurors that they may take notes regarding the evidence and keep the notes for the purpose of refreshing their memory when they retire for deliberation. The court shall provide materials suitable for this purpose. During recesses of the trial the jurors shall be permitted to have access to their notes in the jury room. After the jury has rendered its verdict, the notes shall be collected by the bailiff or clerk who shall promptly destroy them.

8. **Improve Management of Trial Exhibits.** Jurors complain and the researchers confirm that trials frequently involve an excessive number of exhibits which too often confuse jurors and interfere with their comprehension.

The trial judge should control the number of exhibits, have relevant portions of documents that are admitted highlighted for the jury and provide copies of key documents to the jurors. In document-intensive cases, the judge should provide an index or retrieval system for the jury's use during deliberations. For the control and safeguarding of documents in an especially paper-intensive trial, a document depository should be considered. "Jurors: The Power of 12," p. 85.

The Committee recommends adding the following as a Comment to Evidence Rule 611:

Document Control:

- a. The trial judge should become involved as soon as possible, and no later than the pretrial conference, in controlling the number of documents to be used at trial.
- b. For purposes of trial, only one number should be applied to a document whenever referred to.
- c. Copies of key trial exhibits should be provided to the jurors for temporary viewing or for keeping in juror notebooks.
- d. Exhibits with text should and, on order of the court, shall be highlighted to direct jurors' attention to important language. Where important to an understanding of the document, that language should be explained.
- e. At the close of evidence in a trial involving numerous exhibits, the trial judge shall ensure that a simple and clear retrieval system, e.g., an index, is provided to the jurors to assist them in finding exhibits during deliberations.

9. **Deposition Summaries Should be Used.** The Committee concluded from its own experience that verbatim reading of depositions unduly prolongs trials and negatively impacts juror concentration and comprehension.

To reduce the tedium of reading the contents of a deposition to the jury, and in order to improve juror comprehension of the relevant deposition testimony, counsel should be encouraged and, in some cases, required to prepare concise written summaries of depositions for reading at trial. Copies of the summaries should be provided to the jurors before they are read. Ibid, p. 88.

The Committee recommends adding a new paragraph(5) to Civil Rule 32(a), to read as follows:

In its discretion, and in lieu of a reading of a deposition's text or a portion thereof, the court may require the reading of a concise written summary of a deposition sought to be used at any hearing or trial.

In addition the following language should be added as an Official Comment to Civil Rule 32 and Evidence Rule 611:

Deposition summaries. In order to improve jury attention to and comprehension of the contents of depositions used at trial pursuant to this rule, this addition to the rule sanctions the use of concise written summaries of depositions in lieu of reading the text or portions thereof. The trial judge is given the power to compel the use of summaries when thought necessary.

10. **Allow Jurors to Ask Questions.** The Committee agrees with many authorities that having jurors actively participate in civil and criminal trials by asking questions enhances the fact-finding process and juror comprehension. Some commonly recognized advantages of juror questioning are helping jurors to clarify information and avoid confusion, and keeping jurors more alert and better focused. The Committee recommends amending the rules as follows to assure jurors the right to ask questions:

Civil Rule 39(b) Order of Trial by Jury

* * *

(9) Juror Questions. The jurors shall be permitted to submit written questions of witnesses or the court.

Criminal Rule 18.6 (c) Preliminary Instructions.

* * *

c. Preliminary Instructions. Immediately after the jury is sworn, the court shall instruct the jury concerning its duties, its conduct, the order of proceedings, and the elementary legal principles that will govern the proceedings. The jurors shall be permitted to submit written questions of witnesses or the court.

To support implementation of this practice the following language should be added as an Official Comment to both rules:

The following procedures are suggested for juror questioning:

The jurors should be instructed about the procedures for juror questions in advance of the taking of evidence. Jurors' questions must be in writing and left unsigned. Jurors should be instructed to give their questions to the bailiff. If a juror has a question for a witness about to leave the witness stand, the juror should communicate that fact to the court. After receiving the question, the judge must allow counsel an opportunity to object to it out of the presence of the jury.

If found to call for admissible evidence, the question should be asked or answered by stipulation or other appropriate means. If a jury question calls for inadmissible evidence, the question shall not be read, and the jury should be told that trial rules do not permit some questions to be asked and that the jurors should not attach any significance to the failure of having their question asked.

11. Allow Jurors to Discuss the Evidence Among Themselves During the Trial.

Traditionally jurors are forbidden any discussion about the evidence or law in a case until it is closed and submitted to them for deliberation. The Committee concluded that asking jurors to refrain from discussions and impliedly suspend all judgment for the duration of a case is an unnatural, unrealistic and unwise limitation that is contrary to normal cognitive processes. Accordingly, the Committee recommends that jurors be allowed to discuss the evidence among themselves during the trial as long as they reserve final judgment until the entire case has been presented. The Committee recommends amending Civil Rule 39(f) and Criminal Rule 19.4 by adding the following language to authorize limited discussions of the evidence by jurors:

Trial jurors shall be instructed that they are permitted to discuss the evidence among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence.

12. **Give Jurors Copies of the Jury Instructions.** Allowing jurors to have written copies of the legal instructions with them during final deliberations has obvious advantages, i.e., increasing understanding of the instructions, facilitating deliberations, reducing the number of clarifying questions, and increasing jurors' confidence in their verdict. To assure that all judges furnish a copy of the instructions to each juror, the Committee recommends the following amendments:

Civil Rule 51, Instructions to Juries, etc.:

(b) Instructions to Jury; etc.

* * *

(3) The court's preliminary and final instructions on the law shall be in written form and a copy of the instructions shall be furnished to each juror before being read by the court. Upon retiring for deliberations the jurors shall take with them all jurors' copies of final written instructions given by the court.

Criminal Rule 21.3, Rulings on Instructions, etc.:

d. Jurors' Copies. The court's preliminary and final instructions on the law shall be in written form and a copy of the instructions shall be furnished to each juror before being read by the court.

Criminal Rule 22.2, Materials Used During Deliberations:

Upon retiring for deliberations the jurors shall take with them:

* * *

b. All jurors' copies of written or recorded instructions given by the court.

13. **Read the Final Instructions Before Closing Arguments of Counsel, Not After.** Although the current civil and criminal rules do not dictate

when final instructions must be given, historically the practice has been to instruct the jury after closing arguments. The Committee believes it is most advantageous to instruct juries before argument so that jurors will be informed of the applicable law before counsel asks them to apply it to the facts of the particular case. To balance the influence of the last counsel's argument, the court should withhold giving the necessary procedural and housekeeping instructions until completion of arguments. In order to adopt this procedure, the Committee proposes the following rules changes:

Civil Rule 51(a), Instructions to Jury, etc.:

Amend third sentence as follows:

~~The court, at its election, may instruct the jury before or after argument, or both. The court shall instruct the jury regarding the applicable substantive law before final arguments of counsel. Following arguments the court shall designate the alternates, if any, and instruct the jury concerning its deliberations, questions during deliberations, and return of verdict, among other things.~~

Criminal Rule 19.1(a), Order of Proceedings:

The trial shall proceed in the following order unless otherwise directed by the court:

* * *

(7) The judge shall then instruct the jury regarding the applicable substantive law.

~~(8) The judge shall then charge the jury.~~

~~(7)-(8)~~ The parties may present arguments, the prosecutor having the opening and closing.

(9) Following argument the court shall designate the alternates, if any, and instruct the jury concerning its deliberations, questions during deliberations, and return of verdict, among other things.

14. **Alternate Jurors Should Not Be Released From Service in Criminal Cases Until a Verdict is Announced or the Jury is Discharged.** According to criminal rules and practice the jury begins its deliberations with only the minimum number required by law. If a juror is excused because of death, illness or serious personal or family emergency, a mistrial is declared because the size of the jury has fallen below that required by law. In order to avoid mistrials in these circumstances, the Committee recommends that alternate jurors be instructed to continue to observe all the admonitions until notified that a verdict has been returned or the jury is discharged. If a deliberating juror is lost, s/he may be replaced with an alternate. Implementation of this change can be effected with the following rule change:

Criminal Rule 18.5(h): Selection of Jury.

The persons remaining shall constitute the jurors for the trial. Just before the jury retires to begin deliberations, the clerk shall, by lot, determine the juror or jurors to be designated as alternates. The alternate, or alternates, upon being physically excused by the court, shall be instructed to continue to observe the admonitions to jurors until they are informed that a verdict has been returned or the jury discharged. In the event a deliberating juror is excused due to inability or disqualification to perform required duties, the court may substitute an alternate juror, choosing from among the alternates in the order previously designated, unless disqualified, to join in the deliberations. If an alternate joins the deliberations, the jury shall be instructed to being deliberations anew.

15. **Allow All Jurors Remaining at the End of a Civil Trial to Deliberate and Vote.** The civil rules currently provide that alternate jurors shall be discharged at the end of the trial without participating in the deliberation of the case. The Committee strongly endorses reforming this practice as indicated by the following quote:

No juror should be designated an alternate and excused at the end of civil cases. All jurors who remain at the close of arguments should deliberate upon and decide the case. The number of jurors needed for a verdict should be adjusted as necessary to assure that the requirement of three-fourths vote is met. "Jurors: The Power of 12," p. 114.

This change can be implemented by adopting the following revision to Civil Rule 47(f):

Alternate Additional Jurors. ~~The court may direct that not more than six jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. The court may qualify not more than six additional jurors as it deems necessary.~~ Alternate Additional jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. ~~An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.~~ Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate additional jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternate additional jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate additional jurors are to be impanelled. ~~The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by law shall not be used against an alternate juror.~~ Those jurors remaining when the panel retires to consider its vote shall render a verdict as provided in A.R.S. § 21-102(c).²

16. **Offer the Assistance of the Judge and Counsel to Deliberating Jurors who Report an Impasse.** Oftentimes when juries first report that they are at an impasse it would be appropriate for the judge and counsel to

^{2/} A simultaneous amendment to A.R.S. § 21-102(c), to prescribe the minimum number of jurors needed for a verdict, depending on the total number of jurors that deliberate, has been prepared.

assist the jury in resolving the issues that divide them and avoid a needless mistrial. In a non-coercive manner the judge should invite the jurors to engage in a "dialogue" with him and identify the unresolved issues. There are several approaches the judge may use to assist jurors in resolving the divisive issues, including re-instructing, give additional or clarifying instructions, ordering additional closing argument by counsel, or re-opening trial for additional evidence. To encourage judges to use these approaches the Committee proposes the following language to amend Civil Rule 39(h) [redesignate present 39(h) and subsequent paragraphs] and Criminal Rule 22.4 [renumber present Rule 22.4]:

Assisting Jurors at Impasse. If the jury advises the court that it has reached an impasse in its deliberations, the court may inquire of the jurors to determine whether and how court and counsel can assist them in their deliberative process. After receiving the jurors' response, if any, the judge may direct that further proceedings occur.