

DISMISSAL OF JURORS DURING DELIBERATIONS

By

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Summary

This 5,000 word article explores a subject on which little has been written, but which arises during jury trials in unusual and unexpected ways. The dismissal of a juror during deliberations can occur for a variety of reasons. Sometimes jurors exhibit mental or physical incapacity during deliberations, which was not apparent during pre-trial voir dire. Occasionally a majority of jurors will complain to the court that one particular juror is not adequately participating in deliberations, or is expressing an opinion that they believe ignores the law and the evidence. This latter situation -- which amounts to an allegation of juror nullification -- raises the very controversial subject of whether the jury's complaint should be a ground for dismissing a juror, or whether the complaint reflects nothing more than good faith disagreement over the evidence.

The article discusses these subjects, advising counsel on how to react when juror issues arise, particularly when complaints are made by a deliberating jury about a fellow juror. Relevant cases are discussed and critiqued, including recent appellate decisions in 1997 and 1998 which reached opposite conclusions about whether it was error to dismiss a juror during deliberations when such disagreements arose. A range of cases involving juror dismissals during deliberations are discussed, in order that counsel become familiar with them and are prepared to respond quickly when these issues arise in the heat of trial.

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Introduction

No matter how much preparation a trial lawyer can undertake, no amount of preparation can anticipate every twist and turn that a trial can take. Even when the jury is deliberating, unanticipated developments can occur. This article discusses one of the most unexpected developments that can arise -- the court's dismissal of a deliberating juror. The issue has arisen recently in several high-profile cases. (See sidebar). The courts of appeal which have grappled with this issue have reached different results, ranging from affirmance in deference to the trial court's discretion, to reversal and adoption of strict standards to guard against the possibility that a jury complaint about an individual juror's performance during deliberations may really reflect a disagreement over the evidence -- clearly an improper ground for dismissal.

The dismissal of a deliberating juror raises several significant issues, including the defendant's Sixth Amendment right to a fair and impartial jury; the "just cause" standard for dismissal of a juror under Rule 23 of the Federal Rules of Criminal Procedure; as well as difficult questions involving possible juror nullification; the extent of permissible inquiry of the jury in light of Fed. R. Evid. 606(b)'s limitation on inquiries into jury verdicts; and the recall of alternate jurors who have already been sent home. Little has been written about this subject, yet the issue of whether a juror should be dismissed during deliberations arises in unusual and unexpected ways, often leaving counsel and the court little time to react.

In discussing this subject, let us assume a hypothetical case in which a lengthy trial took place and the jury deliberated for several days before there was any indication of a "problem" with a juror. Then the jury sent a note complaining about one juror's participation in deliberations. The complaint was somewhat vague, but it appeared to question either the juror's competence or willingness to continue in deliberations, or perhaps whether the juror was following the law. Such a

note is particularly disturbing if it focuses on a juror who you, as trial counsel, thought was one of “yours.” All your hard work in trying to select a good jury now stands at risk. What is likely to happen upon receipt of such a note?

The First Step: Individual Voir Dire

Many judges prefer to respond to notes from a deliberating jury by providing a written response in return, often just referring to a particular jury instruction. However, the issue raised by the jury’s note here does not lend itself to such a simple solution. Questioning of the jury foreperson who signed the note is likely to be the first step taken by the court to ascertain the precise nature of the jury’s complaint. This should be followed by separate questioning of each juror, starting with the juror who is the subject of the note.

Questioning jurors who are in the midst of deliberations is a very tricky business. Care must be taken to avoid probing into areas that would reveal how the jury stands on the substantive questions of guilt or innocence which it is deciding. Yet the inquiry must be specific enough to understand the nature of the problem which prompted the note in the first place. Fed. R. Evid. 606(b) prohibits inquiry into the “validity of a verdict.” At this point in deliberations, however, no verdict has been returned. Nevertheless, being mindful of the rule, the court will undoubtedly limit the inquiry which will take place. Indeed, the court will likely pose the questions to the jurors, with suggestions and input from counsel.

Based on their experience as trial judges who routinely deal with juries and jury issues, most judges view decisions about the care and handling of jurors as matters which they alone are uniquely qualified to handle. When juror issues arise during deliberations, the judge will undoubtedly have strong opinions about the proper course of action to follow. When the issue involves a complaint of possible misconduct by a juror during deliberations, the potential responses from the court range from (1) doing nothing; to (2) instructing the juror, or the jury as a whole, as to how to proceed; to (3) the more drastic step of dismissing the juror in question, and either proceeding with 11 jurors, or recalling an alternate juror. See Rules 23(b) and 24(c), Federal Rules of Criminal Procedure; United

States v. McFarland, 34 F.3d 1508, 1513 (9th Cir. 1994)(alternate juror may be added to jury panel during deliberations with the express consent of the defendant).

Having a seemingly favorable juror dismissed from the panel during deliberations is a frightening development. Because there is often little time to react when these crises erupt during deliberations, counsel should be familiar with the law governing jury deliberations and dismissal of jurors during deliberations, in case he or she is ever faced with such a situation.

What Does It Mean For A Juror To Deliberate?

The job of a juror is to decide the facts, apply the law to the facts, and then make the ultimate decision of whether or not the accused is guilty or not guilty of the offense charged. Jurors accomplish this by engaging in “deliberations” -- a process conducted behind closed doors with only the court’s instructions as guidance. These instructions usually provide only the barest of details as to how the jury is to proceed. Jurors are advised to find the facts and then apply the law given by the court. As far as how to go about doing this, they are typically instructed as follows:

It is your duty as jurors to consult with one another and to deliberate with one another with a view towards reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for himself and herself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and to change your opinion if convinced it is erroneous. Do not surrender your honest conviction, however, solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Devitt and Blackmar, *Federal Jury Practice and Instructions*, § 20.01 (1992)(listing similar model jury instructions from various federal circuits).

Thus, jurors are instructed to (1) consider the evidence, and (2) consult with the other jurors about it. But they are also instructed not to change their opinion solely because it differs from those of other jurors or merely to reach a verdict. Beyond this general guidance, jurors are free to approach the job of “deliberating” in whatever manner they choose.

What if, in our hypothetical case, a majority of jurors complain to the judge that one particular juror is not participating in deliberations to their satisfaction, e.g., although the juror expresses an

opinion on the evidence, the basis for this opinion is not satisfactorily explained to the other jurors. Is the juror now incompetent to remain on the jury? May the court dismiss the juror? On what grounds? To answer these questions, it is helpful first to get an overview of the range of situations in which the issue of juror dismissals during deliberations has arisen.

Dismissals Based On Juror Incompetence

There is no commonly accepted definition of juror competence. Voir dire at the start of trial is usually only sufficient to screen for obvious grounds for disqualification, such as physical incapacity (e.g., hearing difficulties). However, even they may not be manifest at that time. See, e.g., United States v. Leahy, 82 F.3d 624 (5th Cir. 1996)(affirming dismissal of juror during deliberations due to hearing impediment, previously unnoticed, which prevented juror from hearing significant amounts of testimony and participating in deliberations). But see United States v. Patterson, 26 F.3d 1127 (D.C. Cir. 1994)(no just cause in dismissing juror who had gone to doctor for severe chest pains).

Jurors who exhibit mental incapacity may also be excused during deliberations. Juror dismissals on this ground have involved relatively minor instability, as well as more extreme cases. Compare United States v. Walsh, 75 F.3d 1 (1st Cir. 1996)(juror described as “mentally unstable” with a self-described “nervous problem”; court’s dismissal of juror based on finding that juror was not capable of engaging in “rational discussion” was affirmed), with United States v. Huntress, 956 F.2d 1309 (5th Cir. 1992)(on night of deliberations, juror checked himself into hospital threatening to ingest fire ant killer if refused admission; juror diagnosed by doctor as distraught, suicidal, suffering from paranoia stemming from a history of drug abuse; doctor opined that juror could not make a decision in the case in his present condition; juror dismissal affirmed).

In order to be competent, a juror must at a minimum be willing and available to serve on the jury during the time period required. While this will often be addressed during voir dire, schedule complications can arise during deliberations. Juror dismissals based on temporary absences often lead to reversal. See, e.g., United States v. Tabacca, 924 F.2d 906 (9th Cir. 1991)(abuse of discretion to dismiss a juror who was absent due to transportation difficulties, as the juror would have been available the next day); United States v. Araujo, 62 F.3d 930 (7th Cir. 1995)(abuse of

discretion in dismissing juror who was absent due to weather-related problems). On the other hand, dismissals of jurors with pre-scheduled vacation plans which conflict with continued deliberations have been affirmed. See United States v. McFarland, 34 F.3d 1508 (9th Cir. 1994), cert. denied, 115 S. Ct. 2257 (1995).

The “Just Cause” Standard For Dismissal Of A Deliberating Juror

The above-cited cases illustrate the governing principle that juror dismissals must satisfy the “just cause” standard of Rule 23(b) of the Federal Rules of Criminal Procedure. This rule provides that “if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.” The “just cause” standard of Rule 23(b) is not defined in the rule nor in the advisory committee’s notes; “consequently, courts have given that term meaning on a case by case basis.” United States v. Araujo, *supra*.

One of the most controversial areas involving juror dismissals for “just cause” involves jury complaints amounting to an allegation of nullification by a member of the jury. Deliberating jurors will sometimes complain that a fellow juror is refusing to follow the law, and has pre-conceived notions of the defendant’s guilt or innocence (the opinion at issue is typically that the defendant is innocent). Such a complaint raises the complex question of whether the jury’s complaint really disguises nothing more than good faith disagreement over the strength of the government’s case.

Juror Nullification

Juror nullification is defined as “a violation of a juror’s oath to apply the law as instructed by the court - in the words of the standard oath administered to jurors in the federal courts, to ‘render a true verdict according to the law and the evidence.’” United States v. Thomas, 116 F.3d 606, 614 (2nd Cir. 1997)(emphasis in original). In a ruling typical of courts which have addressed the issue, the Second Circuit in Thomas “categorically reject[ed] the idea that, in a society committed to the rule of law, jury nullification is desirable or that courts may permit it to occur when it is within their authority to prevent.” Id. Thus a juror who intends to nullify the applicable law is subject to dismissal

during deliberations under Rule 23(b) “no less . . . than is a juror who disregards the court’s instructions due to an event or relationship that renders him biased or otherwise unable to render a fair and impartial verdict.” Id.

Having said this, courts recognize that -- by virtue of the general verdict used in criminal cases, and the various rules protecting the unassailability of acquittal verdicts -- jurors have the power to nullify, or what is sometimes referred to as the “power of lenity.” Thomas, 116 F.3d at 615. But as the Second Circuit stated, the power to nullify “is by no means a right or something that a judge should encourage or permit if it is within his authority to prevent.” Id.

Now suppose our hypothetical jury’s complaint is that their fellow juror is refusing to apply the law to the facts and has a predisposed view of the case. As previously stated, the court will probably question the jurors individually about the complaint while delicately walking the fine line that is necessary to protect the secrecy of ongoing deliberations. The inquiry is likely to reveal disagreement among the jurors -- after all, there would likely be no complaint at all if all the jurors agreed on everything. Discerning whether this disagreement reflects improper nullification on the part of the lone juror, or rather a belief that the evidence is insufficient to convict, poses a difficult task for the court.

Opposite Conclusions In Recent Cases

Because of the danger that the jurors’ complaint could actually be rooted in disagreements over the evidence, some courts have adopted a strict standard against dismissal in such situations. In Thomas, the Second Circuit held that a juror cannot be removed if there is “any possibility” that his fellow jurors’ complaints about him were rooted in his view of the merits of the case. In that case, jurors complained that they could not reach a verdict because a juror was unduly disruptive (e.g., yelling at other jurors and almost striking one) and had made up his mind to acquit the defendant. Jurors were divided as to whether the juror’s position on acquittal was based on a form of juror nullification or on the insufficiency of the evidence. 116 F.3d at 611. The Second Circuit held that the district court erred in dismissing the juror based on the grounds of juror nullification because there was a “possibility” that the jury’s request to discharge the juror stemmed from the juror’s view

of the sufficiency of the government's evidence. See also United States v. Brown, 823 F.2d 591 (D.C. Cir. 1987)(reversing conviction after 13 weeks of trial and eight weeks of deliberations because of the possibility that the juror's discharge stemmed from the juror's view of the sufficiency of the evidence).

While the court in Thomas stated that the above rule applied "in any case where the juror allegedly refuses to follow the law," the court expressly stated that it "did not intend to confine" its holding:

The courts must in all cases guard against the removal of a juror -- who aims to follow the court's instructions -- based on his view of the merits of a case. See Hernandez v. United States, 862 F.2d 17, 23 (2d Cir. 1988)(That a juror may not be removed because he or she disagrees with the other jurors as to the merits of the case requires no citation'). Accordingly, if the record raises any possibility that the juror's views on the merits of the case, rather than a purposeful intent to disregard the court's instructions, underlay the request that he be discharged, the juror must not be dismissed.

116 F.3d at 622 (emphasis added).

Because the jury's complaint about a fellow juror can, perhaps unknowingly or unintentionally, be based on disagreements over the evidence, it is appropriate to adopt such a strict standard, because a lower standard "could lead to the removal of jurors on the basis of their view of the sufficiency of the prosecution's evidence," Id. at 622, thus denying the defendant "his right to a unanimous verdict." Id. at 621. As the Second Circuit explained:

Consider a case where, for example, a strong majority of the jury favors conviction, but a small set of jurors - perhaps just one - disagrees. The group of jurors favoring conviction may well come to view the "holdout" or "holdouts" not only as unreasonable, but as unwilling to follow the court's instructions on the law. The evidentiary standard that we endorse today -- that "if the record evidence discloses any possibility that" a complaint about a juror's conduct "stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request" -- serves to protect these holdouts from fellow jurors who have come to the conclusion that the holdouts are acting lawlessly.

116 F.3d at 622 (emphasis added)(following the D.C. Circuit holding in Brown, supra).

In our hypothetical case, if the questioning of the individual jurors reveals that the source of the complaint has any connection with the way the juror in question has evaluated the evidence, then the juror should not be dismissed. This is true even if the complaint is couched in terms of

dissatisfaction with the juror's participation in deliberations. For example, a complaint that the juror is not participating because she is "stuck" on a certain view of an element of the offense and is not adequately explaining the reason why, is a disagreement rooted in the evidence, reflecting dissatisfaction with the expressed basis for this juror's position. Because of the need to protect the confidentiality of jury deliberations, the court simply is in no position to evaluate the sufficiency of a juror's explanation of her view of the evidence. In these situations, a juror should not be found "unwilling" to deliberate and dismissed from the jury. As Thomas held, the trial court must guard against complaints which in reality reflect juror disagreement rooted in differing views of the evidence.

The strict standard set in Thomas and Brown has not been uniformly followed. In People v. Metters, 72 Cal. Rptr. 2d 294 (Cal. Ct. App. 1st Dist. 1998), the court affirmed the dismissal of a juror during deliberations, distinguishing Thomas and Brown and rejecting their reasoning. In Metters, jurors complained that a particular juror was not following the law, was biased toward the defendant, and should be removed from the jury. During the court's questioning of this juror, the juror stated that she believed the jury had reached a verdict but it was not unanimous because she had come to a different conclusion. She denied being influenced by sympathy for the defendant and stated that she was willing to follow the court's instructions. However, she also stated that the other jurors could not accept that she had reached a different conclusion than they have, and she repeatedly expressed an unwillingness to continue deliberations and "subject [herself] to another seven hours of what [she] went through yesterday." 72 Cal. Rptr. 2d at 306.

The trial court's dismissal of this juror was affirmed on appeal. The appellate court focused on the fact that the juror had expressed an unwillingness to continue deliberating. To be sure, the court recognized that such a refusal might be warranted "where a juror is being mistreated or coerced by the other jurors," but noted that the trial court rejected any such claims of intimidation. The court also noted that the record showed that some jurors expressed the view that the juror in question was participating and acknowledged that different conclusions could be drawn about the

level of her participation. The court considered the Thomas and Brown decisions and rejected the standard announced there as not required under the Sixth Amendment.

This holding in Metters is troubling. It appears obvious from reading the opinion that the juror had a different view of the evidence than did the rest of the jury. This disagreement was the source of the conflict between her and the rest of the panel, ultimately escalating to the point where the juror became emotional and stated that she did not wish to continue participating in deliberations. This final statement of unwillingness gave the court a sustainable basis for her dismissal. However, the court overlooked the basis of the disagreement — different views of the evidence. Since there was no indication that the juror was engaged in nullification, but was instead attempting to apply the law to the facts, it is disturbing that the juror could be dismissed when the root cause of the problem was disagreement over the evidence.

Without even mentioning Metters, another division of the same California Court of Appeals that decided that case held in People v. Rodriguez, (No. A077543, Cal Ct. App. 1st Dist. 1998) that the dismissal of a juror during deliberations was reversible error. In Rodriguez, the court received several notes from jurors raising various complaints about juror no. 2. The Court spoke to this juror in chambers and learned that the juror found the evidence insufficient to convict. The court then spoke to other jurors who complained that juror no. 2 was not following the law. After detailed questioning of the jurors, the Court dismissed juror no. 2. On appeal, the court of appeals reversed, finding that the court's questioning had impermissibly intruded into the secrecy of the jury's deliberations. This time the appellate court followed the Second Circuit decision in Thomas, including the limitations on inquiry into the jury's deliberations that were expressed in that decision, and the Second Circuit standard that a juror should not be dismissed if there is "any possibility" that the jury's complaint stems from the juror's view of the sufficiency of the evidence, a conclusion that the court found was satisfied in Rodriguez. The court of appeals concluded that the dismissal of juror no. 2 violated the defendant's Sixth Amendment right to a unanimous verdict.

The California appellate court's willingness to follow Thomas in deciding Rodriguez, and its rejection of it in Metters, illustrates the unpredictability in this area even at the appellate level.

Dismissal Of A Holdout Juror

Once the court begins questioning individual jurors about a complaint they have made regarding one of their own, it is difficult not to develop some sense of where the jury stands on the question of guilt or innocence. While the court will undoubtedly advise the jurors not to reveal this information, the disagreement manifested in their complaint will probably become much clearer after the individual questioning is conducted.

What if the questioning reveals that the juror at issue is the sole holdout for acquittal? Does that fact create any special considerations to be taken into account in deciding whether or not to dismiss the juror? The Ninth Circuit addressed the issue of the dismissal of a holdout juror in Perez v. Marshall, 119 F.3d 1422 (9th Cir. 1997), cert. denied, 118 S. Ct. 893 (1998). In Perez, a habeas corpus review of a state court conviction, a deliberating juror informed the court of disagreement among the jury, stating that everybody was “mad at each other” and “stressing out.” During this discussion the juror “blurted out” the jury’s deadlocked position, with her as the sole juror voting for acquittal. The juror asked several times to be dismissed from jury service because she could not handle the stress. She was described by the court as “completely distraught” and an “emotional wreck” who did not want the responsibility of deciding the defendant’s guilt. After instructing the juror to resume deliberations, the problem continued. The next day, the trial court granted the juror’s request to be dismissed. An alternate juror was added and the jury ultimately reached guilty verdicts on five counts.

The Ninth Circuit found that there was “good cause” for the juror’s dismissal because her emotional instability prevented her from functioning as a juror. Furthermore, the fact that the trial court knew that she was the sole holdout for acquittal “does not invalidate [the] decision to excuse her” because nothing in the record indicated that “the trial court’s discretion was clouded by the desire to have a unanimous guilty verdict.”

The Perez decision is troubling because the dismissal of the lone dissenting juror when the court knows how the jury stands (and when the remaining jurors know the court knows) sends a message to the remaining 11 jurors that the court “sides” with them in their disagreement. The root

cause of the disagreement in Perez was differing views of the evidence. Indeed, the juror only became distraught when she found herself the sole dissenting juror, under fire to explain her views to the remaining 11 members. Her desire to be excused was a natural reaction to this situation. As long as the juror did not refuse to continue deliberating (as the Perez dissent pointed out, she never indicated such a refusal), she should not have been dismissed. As the known holdout, her dismissal sent a signal that the court endorsed the view of the evidence held by the majority of 11 jurors, thus violating the defendant's Sixth Amendment right to a fair trial.

In some situations, a court receiving a jury note containing a complaint about one of the jurors will elect to take the least action possible, in the hope that the problem will fix itself and the jury will soon return a verdict. This reaction is understandable since judges correctly prefer not to inject themselves into the middle of jury deliberations. However, adopting a "wait and see" approach can backfire if the court later determines to dismiss the juror who is the subject of the complaint. The danger in this approach is in creating the appearance that the court only dismissed the juror when a unanimous verdict could not be reached -- in other words, the dismissal was to avoid a hung jury.

In United States v. Hernandez, 862 F.2d 17 (2d Cir. 1988), the trial judge received several complaints from the jury about a juror's competence to participate in deliberations. While the court was troubled, it decided not to voir dire the juror but instead to "wait and [see] what I am going to do if there is a hung jury. I won't cross the bridge now." 862 F.2d at 21. When the jury later complained that the juror was changing his mind, rescinding a previous vote, and refusing to sign the verdict ballot, the court addressed the jury and commended them for their efforts in trying "to persuade Juror No. 4." The court then dismissed Juror No. 4 and permitted the jury to resume deliberations with 11 members, pursuant to Rule 23(b), Fed. R. Crim. P. The jury quickly returned guilty verdicts.

The Second Circuit in Hernandez reversed the conviction, finding that the "removal of the sole holdout for acquittal is an issue at the heart of the trial process and must be meticulously scrutinized." 862 F.2d at 23. The court of appeals disagreed with the trial court's wait-and-see approach and found that if the juror was excusable for mental incompetence, the removal should

have taken place much earlier than it did. By waiting to dismiss the juror until it was clear that no verdict would be reached, an appearance was created that the dismissal was really to avoid a hung jury. Furthermore, the appellate court was troubled by the “lavish praise” which the court offered to the 11 jurors for trying “to persuade” the sole holdout, a highly inappropriate comment to make to a jury about to resume deliberations upon the holdout’s dismissal. The trial court’s handling of this juror issue effectively sent a message that the court endorsed the majority’s view of the evidence and the lone holdout should either be “persuaded” to agree or dismissed.

Conclusion

After all the hard work that goes into preparing for, and trying, a complicated, lengthy jury trial, it is very discouraging when the conduct of a seemingly favorable juror is challenged by the rest of the panel during deliberations. Counsel should be prepared to react quickly in such situations, lest the court make a hasty decision to dismiss the juror due to “inadequate participation” in deliberations. On appeal, such dismissals might only be reviewed under the narrow “abuse of discretion” standard.

One of defense counsel’s best arguments to avoid dismissal of a juror is to point out as many grounds as possible why the jury’s complaint is really based on a disagreement over the evidence, whether it be in how the juror is explaining her view of it, or in what that view actually is. In the latter situation, if the questioning of the juror inadvertently reveals that he or she is the sole holdout, one persuasive argument is that dismissal will create the impression that the court endorses the majority’s view. A defendant has a right to the views of all the jurors, even if those differing views create a hung jury and mistrial. The court should not do anything to create an appearance favoring one view over the other. Finally, if the juror expresses an unwillingness to continue deliberations — even if that unwillingness is the natural product of stress resulting from being the lone juror holding a particular view -- a dismissal of such a juror is likely not to be reversed as an abuse of discretion.

There is no easy solution for prosecutors in this situation either. Obviously, the prosecutor will try to build a record showing that the juror is attempting to nullify the law or is otherwise incompetent to continue to serve. If alternate jurors have not yet been dismissed, the prosecutor may argue that the substitution of a qualified alternate cures any error caused by an improper

dismissal. Of course, the defendant will disagree and argue that he is entitled to a verdict that reflects the views of all the jurors -- including the dismissed one -- which cannot be cured by adding an alternate.

In short, a jury note complaining about the conduct of a fellow juror during deliberations can often be the start of a complicated series of events with no happy ending. It is far better if the jury's notes focus on less problematic subjects, such as the day's lunch menu.

Sidebar

The dismissal of a juror during deliberations occurred in the recent trial of former Arizona Governor Fife Symington (United States v. Symington (D. Arizona)), in which Symington was charged with filing false financial statements to lenders when he was a real estate developer. On the eighth day of deliberations, the jury complained about a juror's participation in deliberations. The court conducted a hearing and questioned each juror, ultimately dismissing the juror in question, and concluding that she was either "unable or unwilling" to deliberate. The juror later submitted an affidavit stating that she would have voted to acquit if she had remained on the panel. On appeal, now pending before the Ninth Circuit, the defense is contending that the court erred in that there was no "just cause" for the juror's dismissal. The defense also argues that the standard announced by the Second Circuit in United States v. Thomas (see text) should be applied and the juror should not have been dismissed because there was a possibility that the jury's complaint was based on disagreement over the evidence. The government contends that the abuse of discretion standard should apply and that the trial court did not abuse its discretion in ordering the dismissal. The author served as co-counsel for Symington at trial and on appeal.

The issue also arose recently in the RICO trial of former Justice Department attorney Michael Abbell and attorney William Moran. United States v. Abbell, (S.D. Fla.). During deliberations in that case, a jury note was received complaining that one juror was not following the law and had expressed the view that the RICO law, as stated in the court's instructions, was "stupid." After instructing the jury on the duty to follow the law, deliberations resumed. Several days later, the juror in question wrote a note to the court stating that the jury was deadlocked. The court conducted a hearing and concluded initially that the juror in question was not deliberating, and then concluded that she was not following the law and dismissed her. The defense intends to raise this dismissal as an issue on appeal.

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