

Ninth Circuit Model Civil Jury Instructions

2.14 EVIDENCE IN ELECTRONIC FORMAT

Those exhibits capable of being displayed electronically will be provided to you in that form, and you will be able to view them in the jury room. A computer, projector, printer and accessory equipment will be available to you in the jury room.

A court technician will show you how to operate the computer and other equipment; how to locate and view the exhibits on the computer; and how to print the exhibits. You will also be provided with a paper list of all exhibits received in evidence. (Alternatively, you may request a paper copy of an exhibit received in evidence by sending a note through the [clerk] [bailiff].) If you need additional equipment or supplies, you may make a request by sending a note.

In the event of any technical problem, or if you have questions about how to operate the computer or other equipment, you may send a note to the [clerk] [bailiff], signed by your foreperson or by one or more members of the jury. Be as brief as possible in describing the problem and do not refer to or discuss any exhibit you were attempting to view.

If a technical problem or question requires hands-on maintenance or instruction, a court technician may enter the jury room [with [the clerk] [the bailiff] [me] present for the sole purpose of assuring that the only matter that is discussed is the technical problem.] When the court technician or any non-juror is in the jury room, the jury shall not deliberate. No juror may say anything to the court technician or any non-juror other than to describe the technical problem or to seek information about operation of equipment. Do not discuss any exhibit or any aspect of the case.

The sole purpose of providing the computer in the jury room is to enable jurors to view the exhibits received in evidence in this case. You may not use the computer for any other purpose. At my direction, technicians have taken steps to make sure that the computer does not permit access to the Internet or to any “outside” website, database, directory, game, or other material. Do not attempt to alter the computer to obtain access to such materials. If you discover that the computer provides or allows access to such materials, you must inform me immediately and refrain from viewing such materials. Do not remove the computer or any electronic data [disk] from the jury room, and do not copy any such data.

Comment

This instruction is premised on the assumption that the parties have stipulated in writing to the availability of electronic display devices in the jury room and to the procedures set forth in the instruction. The stipulation should be subject to approval by the judge and entered as an order. It should contain the following provisions:

1. The parties agree to an allocation of the costs of providing the necessary equipment, including the computer, hard drive, projector, cable, printer, monitor and other accessories.
2. The parties jointly will arrange to load images of the admitted exhibits onto a hard drive in “PDF” format. (This format is meant to assure maximum security.) They shall

assure that the hard drive contains only such items and nothing else.

3. The parties jointly will compile a document entitled “Admitted Exhibit List” that consists of all trial exhibits actually received into evidence, listed in numerical order and containing the date (where available) and a brief description of the exhibit. The Admitted Exhibit List should be text searchable. (In complicated or document-laden cases, it would be advisable for the parties to prepare a second exhibit list that would contain the same information, except that the exhibits would be listed in chronological order. That second list would be made available to the jury in "hard copy," not electronic form.)

4. Before the jury retires to deliberate, the parties will review the notebook computer, the exhibit list interface and the images of the exhibits, to assure their accuracy. Unless a party objects before the jury retires to deliberate, that party will waive all objections to the materials and equipment submitted to the jury.

5. The parties shall maintain at the courthouse a backup notebook computer and a backup hard drive with images and data identical to what was loaded onto the hard drive sent into the jury room.

6. [During the “tutorial” that the technician provides in the jury room and on any later occasion that a technician enters the jury room to address a technical problem or matter, the judge will be present and the court reporter will record what is said.]

Paragraph 6 of the recommended stipulation is bracketed because if the jury encounters a technical problem after it has begun to deliberate, a variety of potentially difficult issues can arise. Inevitably, the technician will require and receive information from one or more jurors about the difficulty the jury is encountering. In many instances, the court technician will need to re-enter the jury room in order to address the problem. It is conceivable that the technician will be exposed to evidence that the jury was attempting to view or at least to the exhibit number(s) of such evidence. If the jurors themselves had developed charts, summaries, vote tallies or other indicia of their deliberations, or if they had written summaries of their findings thus far, the technician might be exposed to that information. (E.g., such matters could have been placed on a blackboard or in summaries strewn about the jury table.) If the judge and court reporter enter the jury room they, too, could be exposed to aspects of the jury’s deliberations that are not supposed to be revealed. The committee therefore suggests that in the event that a non-juror might be required to enter the jury room to deal with a technical problem, the judge should *sua sponte* raise these and related issues with counsel, before authorizing such entry. Among the factors that the judge and counsel should discuss are the following.

(a) Can the technical problem be addressed without entry into the room; e.g., by removing the equipment for examination outside the presence of jurors?

(b) Can the technical problem be addressed without any information from the jury other than an innocuous statement to the effect that (for example) “the printer isn’t working”?

(c) Can the risk of even inadvertent disclosure of the jury’s deliberations be eliminated by instructing the jury to cover any charts and to remove or conceal any papers, etc.?

(d) Should the technician, bailiff or clerk be sworn in, with an oath that requires them not to disclose whatever they see or hear in the jury room, except for the nature of the

technical problem and whether the problem has been fixed?

Whether or not these or other appropriate precautions to minimize or eliminate the risk of disclosure are taken, the judge may consider giving the jury this instruction:

You have informed me that there is a technical problem that has interfered with your ability to review evidence electronically. I will send a technician into the jury room to deal with the problem. Please do not allow any materials reflecting any aspect of your deliberations to be visible during the technician's presence.

Finally, if Instruction 2.14 is given in a criminal case, the judge should not permit any tape-recorded conversation or evidence to be included in the electronic evidence loaded onto the hard drive that contains the PDF files, because under Fed. R. Crim. P. 43, the defendant has a right to be present at the replaying of a tape. *United States v. Felix-Rodriguez*, 22 F.3d 964, 966-67 (9th Cir.1994).