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by *Scott K. Behrendt*

Reopening of Closing Arguments to Break Jury Deadlock

In the recent California appellate decision of *People v. Young* (2007 Cal. App. Lexis 1849 (filed November 13, 2007)), the Court recognized the authority of trial courts to reopen closing arguments while the jury is deliberating in an effort to break a jury deadlock. In its decision, the Court referenced the changes to the California Rules of Court concerning the conduct of jury trials that became effective on January 1, 2007 – specifically, Rule 2.1036.

Rule 2.1036 was adopted together with five other rules that (1) give trial judges the discretion to permit jurors to submit written questions directed to witnesses (Rule 2.1033), (2) give trial judges the discretion to allow opening statements to the jury panel prior to

voir dire (Rule 2.1034), (3) require trial judges to inform jurors that they may take written notes during the trial (Rule 2.1031), (4) provide that trial judges “should encourage” counsel in complex civil cases to provide notebooks containing key documents and exhibits for use by the jurors during trial (Rule 2.1032), and (5) permit trial judges to pre-struct the jury immediately after it is sworn concerning the elements of the charges or claims, the legal principles that will govern the proceeding, the jurors’ duties and conduct, and related matters (Rule 2.1035).

Rule 2.1036 itself is directed towards assisting both criminal and civil juries that are at an impasse in deliberations, *i.e.*, a hung jury. It permits attorneys to make additional closing arguments if the trial court judge determines that doing so might assist the jury in reaching a verdict. In addition to allowing further closing arguments, the Rule permits the trial judge to give additional jury instructions, clarify previous instructions, or utilize any combination of these three measures to assist the jury in its deliberations. To help the trial judge determine what additional assistance to provide, the Rule states that the judge should ask the jury whether they have specific concerns which, if resolved, might assist them in reaching a verdict. The Rule also expressly permits the judge to advise the jury of “its duty to decide the case based on the evidence while keeping an open mind and by talking about the evidence with each other.”

In *People v. Young*, a criminal case concerning a gas station robbery, the trial judge, when faced with a deadlocked jury, asked if

additional argument might be helpful in an attempt to “ascertain the reasonable probability of the deadlock being broken and a means by which that might be accomplished.” (*Young* at *10.) After some jurors agreed that additional closing argument might be of assistance, “it was not inappropriate for the court to seek to offer that alternative to aid the jury.” (*Id.*) After hearing the additional argument, the jury reached a guilty verdict. The defendant appealed his conviction in part on the grounds that the trial court lacked the authority to reopen closing arguments after the jury declared itself deadlocked.

In finding that the trial judge’s conduct was authorized and appropriate, the Court cited sections 1093, 1094, and 1140 of the Penal Code. Section 1140 allows the trial judge to ascertain whether a reasonable probability of breaking a jury deadlock exists and section 1094 grants the trial judge broad discretion to depart from the usual order of closing arguments specified in section 1093. Although Rule 2.1036 was not in effect as of the time of the trial in *Young* in 2006, the Court specifically noted that the Judicial Council relied upon the authority conferred by sections 1093 and 1094 in enacting the new Rule: “This rule expressly states that after a jury reports it has reached an impasse in deliberations, if the trial judge determines further action may assist the jury in reaching a verdict, the trial judge may ‘permit attorneys to make additional closing arguments.’”

Now that Rule 2.1036 is in effect and, in particular, in light of the decision in *Young*, it can be expected that trial judges may be more

open to allowing additional closing arguments or other actions under the Rule when confronted with a deadlocked jury, *e.g.*, additional jury instructions, clarification of previous instructions, or a combination of all three. As noted in *Young*, “when faced with questions from the jury, including that they have reached an impasse, ‘a court must do more than figuratively throw up its hands and tell the jury it cannot help.’” (*Young* at *9.)

As to whether Rule 2.1036 or its accompanying rules will have a significant impact on the outcome of trials, serve the purposes for which they were intended, benefit plaintiffs and prosecutors over defendants, or *vice versa*, “the jury is still out.” Nonetheless, all trial practitioners would be well served to be familiar with Rule 2.1036 and, in the event of a deadlocked jury, should be prepared to engage the court as to whether or not the actions permitted under Rule 2.1036 should be utilized.



Scott K. Behrendt is an attorney at Theodora Oringher Miller & Richman PC, a business litigation and transactional law firm with offices in Costa Mesa and Los Angeles. Scott’s practice is dedicated to a wide range of complex commercial litigation matters in state and federal courts representing both public and private entity clients. Scott works out of both of the firm’s offices and can be reached at sbehrendt@tocounsel.com.