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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NICK MAKREAS,
Plaintiff,
v.
FIRST NATIONAL BANK OF
NORTHERN CALIFORNIA, et al.,
Defendants.

Case No. [11-cv-02234-JST](#)

FINAL JURY INSTRUCTIONS

United States District Court
Northern District of California

5000. Duties of the Judge and Jury

1
2 Members of the jury, you have now heard all the evidence. The attorneys will have one last
3 chance to talk to you in closing argument. But before they do, it is my duty to instruct you on the
4 law that applies to this case. You must follow these instructions as well as those that I previously
5 gave you. You will have a copy of my instructions with you when you go to the jury room to
deliberate. I have provided each of you with your own copy of the instructions.

6 You must decide what the facts are. You must consider all the evidence and then decide what you
7 think happened. You must decide the facts based on the evidence admitted in this trial.

8 Do not allow anything that happens outside this courtroom to affect your decision. Do not talk
9 about this case or the people involved in it with anyone, including family and persons living in
your household, friends and coworkers, spiritual leaders, advisors, or therapists. Do not do any
research on your own or as a group. Do not use dictionaries or other reference materials.

10 These prohibitions on communications and research extend to all forms of electronic
11 communications. Do not use any electronic devices or media, such as a cell phone or smart phone,
12 PDA, computer, tablet device, the Internet, any Internet service, any text or instant-messaging
13 service, any Internet chat room, blog, or website, including social networking websites or online
diaries, to send or receive any information to or from anyone about this case or your experience as
a juror until after you have been discharged from your jury duty.

14 Do not investigate the case or conduct any experiments. Do not contact anyone to assist you, such
15 as a family accountant, doctor, or lawyer. Do not visit or view the scene of any event involved in
16 this case. If you happen to pass by the scene, do not stop or investigate. All jurors must see or
17 hear the same evidence at the same time. You must not let bias, sympathy, prejudice, or public
opinion influence your decision.

18 I will now tell you the law that you must follow to reach your verdict. You must follow the law
19 exactly as I give it to you, even if you disagree with it. If the attorneys say anything different
about what the law means, you must follow what I say.

20 In reaching your verdict, do not guess what I think your verdict should be from something I may
21 have said or done.

22 Pay careful attention to all the instructions that I give you. All the instructions are important
23 because together they state the law that you will use in this case. You must consider all of the
instructions together.

24 After you have decided what the facts are, you may find that some instructions do not apply. In
25 that case, follow the instructions that do apply and use them together with the facts to reach your
verdict.

26 If I repeat any ideas or rules of law during my instructions, that does not mean that these ideas or
27 rules are more important than the others. In addition, the order in which the instructions are given
28 does not make any difference.

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Most of the instructions are typed. However, some handwritten or typewritten words may have been added, and some words may have been deleted. Do not discuss or consider why words may have been added or deleted. Please treat all the words the same, no matter what their format. Simply accept the instruction in its final form.

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You must not consider whether any of the parties in this case has insurance. The presence or absence of insurance is totally irrelevant. You must decide this case based only on the law and the evidence.

5002. Evidence

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You must decide what the facts are in this case only from the evidence you have seen or heard during the trial, including any exhibits that I admit into evidence. Sworn testimony, documents, or anything else may be admitted into evidence. You may not consider as evidence anything that you saw or heard when court was not in session, even something done or said by one of the parties, attorneys, or witnesses.

What the attorneys say during the trial is not evidence. In their opening statements and closing arguments, the attorneys talk to you about the law and the evidence. What the lawyers say may help you understand the law and the evidence, but their statements and arguments are not evidence.

The attorneys' questions are not evidence. Only the witnesses' answers are evidence. You should not think that something is true just because an attorney's question suggested that it was true. However, the attorneys for both sides have agreed that certain facts are true. This agreement is called a stipulation. No other proof is needed and you must accept those facts as true in this trial.

Each side had the right to object to evidence offered by the other side. If I sustained an objection to a question, you must ignore the question. If the witness did not answer, you must not guess what he or she might have said or why I sustained the objection. If the witness already answered, you must ignore the answer.

5003. Witnesses

A witness is a person who has knowledge related to this case. You will have to decide whether you believe each witness and how important each witness's testimony is to the case. You may believe all, part, or none of a witness's testimony.

In deciding whether to believe a witness's testimony, you may consider, among other factors, the following:

- (a) How well did the witness see, hear, or otherwise sense what he or she described in court?
- (b) How well did the witness remember and describe what happened?
- (c) How did the witness look, act, and speak while testifying?
- (d) Did the witness have any reason to say something that was not true? For example, did the witness show any bias or prejudice or have a personal relationship with any of the parties involved in the case or have a personal stake in how this case is decided?
- (e) What was the witness's attitude toward this case or about giving testimony?

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

Do not make any decision simply because there were more witnesses on one side than on the other. If you believe it is true, the testimony of a single witness is enough to prove a fact.

You must not be biased against any witness because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, or socioeconomic status.

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5006. Nonperson Party

A bank, First National Bank of Northern California (which I will hereafter refer to as “First National Bank”) is a party in this lawsuit. First National Bank is entitled to the same fair and impartial treatment that you would give to an individual. You must decide this case with the same fairness that you would use if you were deciding the case between individuals.

When I use words like “person” or “he” or “she” in these instructions to refer to a party, those instructions also apply to First National Bank.

200. Obligation to Prove—More Likely True Than Not True

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A party must persuade you, by the evidence presented in court, that what he or she is required to prove is more likely to be true than not true. This is referred to as “the burden of proof.”

After weighing all of the evidence, if you cannot decide that something is more likely to be true than not true, you must conclude that the party did not prove it. You should consider all the evidence, no matter which party produced the evidence.

In criminal trials, the prosecution must prove that the defendant is guilty beyond a reasonable doubt. But in civil trials, such as this one, the party who is required to prove something need prove only that it is more likely to be true than not true.

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201. More Likely True—Clear and Convincing Proof

Certain facts must be proved by clear and convincing evidence which is a higher burden of proof. This means the party must persuade you that it is highly probable that the fact is true. I will tell you specifically which of the facts must be proved by clear and convincing evidence.

202. Direct and Indirect Evidence

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Evidence can come in many forms. It can be testimony about what someone saw or heard or smelled. It can be an exhibit admitted into evidence. It can be someone’s opinion.

Direct evidence can prove a fact by itself. For example, if a witness testifies she saw a jet plane flying across the sky, that testimony is direct evidence that a plane flew across the sky. Some evidence proves a fact indirectly. For example, a witness testifies that he saw only the white trail that jet planes often leave. This indirect evidence is sometimes referred to as “circumstantial evidence.” In either instance, the witness’s testimony is evidence that a jet plane flew across the sky.

As far as the law is concerned, it makes no difference whether evidence is direct or indirect. You may choose to believe or disbelieve either kind. Whether it is direct or indirect, you should give every piece of evidence whatever weight you think it deserves.

203. Party Having Power to Produce Better Evidence

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You may consider the ability of each party to provide evidence. If a party provided weaker evidence when it could have provided stronger evidence, you may distrust the weaker evidence.

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205. Failure to Explain or Deny Evidence

If a party failed to explain or deny evidence against it when it could reasonably be expected to have done so based on what it knew, you may consider its failure to explain or deny in evaluating that evidence.

It is up to you to decide the meaning and importance of the failure to explain or deny evidence against the party.

208. Deposition as Substantive Evidence

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During the trial, you received deposition testimony that was read from the deposition transcript. A deposition is the testimony of a person taken before trial. At a deposition the person is sworn to tell the truth and is questioned by the attorneys. You must consider the deposition testimony that was presented to you in the same way as you consider testimony given in court.

209. Use of Interrogatories of a Party

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Before trial, each party has the right to ask the other parties to answer written questions. These questions are called interrogatories. The answers are also in writing and are given under oath. You must consider the questions and answers that were read to you the same as if the questions and answers had been given in court.

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212. Statements of a Party Opponent

A party may offer into evidence any oral or written statement made by an opposing party outside the courtroom.

When you evaluate evidence of such a statement, you must consider these questions:

1. Do you believe that the party actually made the statement? If you do not believe that the party made the statement, you may not consider the statement at all.
2. If you believe that the statement was made, do you believe it was reported accurately?

You should view testimony about an oral statement made by a party outside the courtroom with caution.

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215. Exercise of a Communication Privilege

Kathy Castor has an absolute right not to disclose what she told First National Bank’s attorney in confidence because the law considers this information privileged. Do not consider, for any reason at all, the fact that Kathy Castor did not disclose what she told her attorney. Do not discuss that fact during your deliberations or let it influence your decision in any way.

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430. Causation: Substantial Factor

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.

3700. Introduction

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A bank is responsible for harm caused by the wrongful conduct of its employees or agents while those agents or employees are acting within the scope of their authority.

3703. Legal Relationship Not Disputed

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In this case Duke Wall, Greg Righetti, Kathy Castor, and Randy Brugioni were the agents or employees of First National Bank and were acting within the scope of their authority when they performed the actions at issue in this case. Therefore, if Nick Makreas proves that those individuals caused harm to him as provided in these instructions, then First National Bank is responsible that harm.

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1600. Intentional Infliction of Emotional Distress—Essential Factual Elements

Nick Makreas claims that First National Bank’s conduct caused him to suffer severe emotional distress. To establish this claim, Nick Makreas must prove all of the following:

1. That First National Bank’s conduct was outrageous;
 2. That First National Bank intended to cause Nick Makreas emotional distress; or
That First National Bank acted with reckless disregard of the probability that Nick Makreas would suffer emotional distress, knowing that Nick Makreas was present when the conduct occurred;
 3. That Nick Makreas suffered severe emotional distress; and
 4. That First National Bank’s conduct was a substantial factor in causing Nick Makreas’s severe emotional distress.
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1602. Intentional Infliction of Emotional Distress—“Outrageous Conduct” Defined

“Outrageous conduct” is conduct so extreme that it goes beyond all possible bounds of decency. Conduct is outrageous if a reasonable person would regard the conduct as intolerable in a civilized community. Outrageous conduct does not include trivialities such as indignities, annoyances, hurt feelings, or bad manners that a reasonable person is expected to endure.

In deciding whether First National Bank’s conduct was outrageous, you must consider, among other factors, the following:

- (a) Whether First National Bank abused a position of authority or a relationship that gave it real or apparent power to affect Nick Makreas’s interests;
 - (b) Whether First National Bank knew that Nick Makreas was particularly vulnerable to emotional distress; and
 - (c) Whether First National Bank knew that its conduct would likely result in harm due to mental distress.
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1603. Intentional Infliction of Emotional Distress—“Reckless Disregard” Defined

First National Bank acted with reckless disregard in causing Nick Makreas emotional distress if:

1. First National Bank knew that emotional distress would probably result from its conduct; or
 2. First National Bank gave little or no thought to the probable effects of its conduct.
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1604. Intentional Infliction of Emotional Distress—“Severe Emotional Distress” Defined

Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame.

“Severe emotional distress” is not mild or brief; it must be so substantial or long lasting that no reasonable person in a civilized society should be expected to bear it. Nick Makreas is not required to prove physical injury to recover damages for severe emotional distress.

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2000. Trespass—Essential Factual Elements

Nick Makreas claims that First National Bank trespassed on his property. To establish this claim, Nick Makreas must prove all of the following:

1. That Nick Makreas occupied the property;
2. That First National Bank intentionally caused another person to enter Nick Makreas’s property;
3. That Nick Makreas did not give permission for the entry;
4. That Nick Makreas was harmed; and
5. That First National Bank’s conduct was a substantial factor in causing Nick Makreas’s harm.

Elements 1 through 3 of this instruction have already been established.

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Special Instruction No. 1. Wrongful Eviction—Essential Factual Elements

Nick Makreas claims that First National Bank wrongfully evicted him from the Sylvan Way property. To establish this claim, Nick Makreas must prove all of the following:

1. Nick Makreas was in possession of the Sylvan Way property;
2. First National Bank caused another person to interfere with Nick Makreas’ possession of the Sylvan Way property;
3. Nick Makreas did not consent to this interference;
4. Nick Makreas was harmed; and
5. First National Bank’s conduct was a substantial factor in causing Nick Makreas’ harm.

Elements 1 through 3 of this instruction have already been established.

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2100. Conversion—Essential Factual Elements

Nick Makreas claims that First National Bank wrongfully exercised control over his personal property. To establish this claim, Nick Makreas must prove all of the following as to each item of personal property:

1. That Nick Makreas owned or had the right to possess the items of property listed on Exhibit 287, as well as the other items to which Nick Makreas testified;
 2. That First National Bank intentionally and substantially interfered with Nick Makreas’ property by:
 - a. preventing Nick Makreas from having access to the property for a significant period of time; or
 - b. destroying that property; or
 - c. refusing to return that property after Nick Makreas demanded its return.
 3. That Nick Makreas did not consent;
 4. That Nick Makreas was harmed; and
 5. That First National Bank’s conduct was a substantial factor in causing Nick Makreas’ harm.
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3900 & 3901 (Combined). Introduction to Tort Damages

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You must decide whether Nick Makreas has proved his claim against First National Bank for conversion and intentional infliction of emotional distress. If he has, you must also decide how much money will reasonably compensate Nick Makreas for the harm. This compensation is called “damages.”

The court has already determined that Nick Makreas has established certain elements of his claims for trespass and wrongful eviction, as I have instructed you elsewhere in these instructions. If you decide that Nick Makreas was harmed by that conduct, and that First National Bank’s conduct was a substantial factor in causing that harm, then you must also decide what amount of damages, if any, is appropriate.

The amount of damages must include an award for each item of harm that was caused by First National Bank’s wrongful conduct, even if the particular harm could not have been anticipated.

Nick Makreas does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. However, you must not speculate or guess in awarding damages.

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3902. Economic and Noneconomic Damages

The damages claimed by Nick Makreas for the harm caused by First National Bank fall into two categories called economic damages and non-economic damages. You will be asked on the verdict form to state the two categories of damages separately.

3903. Items of Economic Damage

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The following are the specific items of economic damages claimed by Nick Makreas:

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3903K. Loss or Destruction of Personal Property (Economic Damage)

1. The loss of Nick Makreas’ personal property.

To recover damages for the loss, Nick Makreas must prove the fair market value of each item of personal property just before the harm occurred.

“Fair market value” is the highest price that a willing buyer would have paid to a willing seller, assuming:

1. That there is no pressure on either one to buy or sell; and
 2. That the buyer and seller are fully informed of the condition and quality of the property.
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3905. Items of Noneconomic Damage

The following are the specific items of noneconomic damages claimed by Nick Makreas:

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3905A. Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)

1. Past and future mental suffering, inconvenience, and emotional distress.

No fixed standard exists for deciding the amount of these noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

To recover for future mental suffering, inconvenience, and emotional distress, Nick Makreas must prove that he is reasonably certain to suffer that harm.

For future mental suffering, inconvenience, and emotional distress, determine the amount in current dollars paid at the time of judgment that will compensate Nick Makreas for future mental suffering, inconvenience, and emotional distress.

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Special Instruction No. 2. Damages for Trespass and Wrongful Eviction

The law which applies to this case authorizes an award of nominal damages. If you find that Nick Makreas has failed to prove damages in a specific amount as defined in these instructions, you must award nominal damages to him. Nominal damages may not exceed one dollar.

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3924. No Punitive Damages

You must not include in your award any damages to punish or make an example of First National Bank. Such damages would be punitive damages, and they cannot be a part of your verdict. You must award only the damages that fairly compensate Nick Makreas for his loss.

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3925. Arguments of Counsel Not Evidence of Damages

The arguments of the attorneys are not evidence of damages. Your award must be based on your reasoned judgment applied to the testimony of the witnesses and the other evidence that has been admitted during trial.

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3931. Mitigation of Damages

If you decide that First National Bank is responsible for the original harm, Nick Makreas is not entitled to recover damages for harm to his property and/or emotional distress that First National Bank proves Nick Makreas could have avoided with reasonable efforts or expenditures.

You should consider the reasonableness of Nick Makreas' efforts in light of the circumstances facing him at the time, including his ability to make the efforts or expenditures without undue risk or hardship.

If Nick Makreas made reasonable efforts to avoid harm, then your award should include reasonable amounts that he spent for this purpose.

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3934. Damages on Multiple Legal Theories

Nick Makreas seeks damages from First National Bank under more than one legal theory. However, each item of damages may be awarded only once, regardless of the number of legal theories alleged.

You will be asked to decide whether First National Bank is liable to Nick Makreas under the following legal theories:

1. trespass;
2. wrongful eviction;
3. conversion;
4. intentional infliction of emotional distress.

Nick Makreas is only entitled to recover once for his emotional distress and/or the loss of his personal property.

5009. Predeliberation Instructions

United States District Court
Northern District of California

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When you go to the jury room, the first thing you should do is choose a presiding juror. The presiding juror should see to it that your discussions are orderly and that everyone has a fair chance to be heard.

It is your duty to talk with one another in the jury room and to consider the views of all the jurors. Each of you must decide the case for yourself, but only after you have considered the evidence with the other members of the jury. Feel free to change your mind if you are convinced that your position should be different. You should all try to agree. But do not give up your honest beliefs just because the others think differently.

Please do not state your opinions too strongly at the beginning of your deliberations or immediately announce how you plan to vote as it may interfere with an open discussion. Keep an open mind so that you and your fellow jurors can easily share ideas about the case.

You should use your common sense and experience in deciding whether testimony is true and accurate. However, during your deliberations, do not make any statements or provide any information to other jurors based on any special training or unique personal experiences that you may have had related to matters involved in this case. What you may know or have learned through your training or experience is not a part of the evidence received in this case.

Sometimes jurors disagree or have questions about the evidence or about what the witnesses said in their testimony. If that happens, you may ask to have testimony read back to you or ask to see any exhibits admitted into evidence that have not already been provided to you. Also, jurors may need further explanation about the laws that apply to the case. If this happens during your discussions, write down your questions and give them to the clerk. I will talk with the attorneys before I answer so it may take some time. You should continue your deliberations while you wait for my answer. I will do my best to answer them. When you write me a note, do not tell me how you voted on an issue until I ask for this information in open court.

Your decision must be based on your personal evaluation of the evidence presented in the case. Each of you may be asked in open court how you voted on each question.

While I know you would not do this, I am required to advise you that you must not base your decision on chance, such as a flip of a coin. If you decide to award damages, you may not agree in advance to simply add up the amounts each juror thinks is right and then, without further deliberations, make the average your verdict.

You may take breaks, but do not discuss this case with anyone, including each other, until all of you are back in the jury room.

5010. Taking Notes During the Trial

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If you have taken notes during the trial you may take your notebooks with you into the jury room.

You may use your notes only to help you remember what happened during the trial. Your independent recollection of the evidence should govern your verdict. You should not allow yourself to be influenced by the notes of other jurors if those notes differ from what you remember.

At the end of the trial, your notes will be collected and destroyed.

5011. Reading Back of Trial Testimony in Jury Room

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You may request in writing that trial testimony be read to you. I will have the court reporter read the testimony to you. You may request that all or a part of a witness's testimony be read.

Your request should be as specific as possible. It will be helpful if you can state:

1. The name of the witness;
2. The subject of the testimony you would like to have read; and
3. The name of the attorney or attorneys asking the questions when the testimony was given.

The court reporter is not permitted to talk with you when she or he is reading the testimony you have requested.

While the court reporter is reading the testimony, you may not deliberate or discuss the case.

You may not ask the court reporter to read testimony that was not specifically mentioned in a written request. If your notes differ from the testimony, you must accept the court reporter's record as accurate.

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5012. Introduction to Special Verdict Form

I will give you a verdict form with questions you must answer. I have already instructed you on the law that you are to use in answering these questions. You must follow my instructions and the form carefully. You must consider each question separately. Although you may discuss the evidence and the issues to be decided in any order, you must answer the questions on the verdict form in the order they appear. After you answer a question, the form tells you what to do next. All 8 of you must deliberate on and answer each question. You must all agree on the answer to a question before you can move on to the next question.

When you have finished filling out the form, your presiding juror must write the date and sign it at the bottom and then notify the clerk that you are ready to present your verdict in the courtroom.

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5017. Polling the Jury

After your verdict is read in open court, you may be asked individually to indicate whether the verdict expresses your personal vote. This is referred to as “polling” the jury and is done to ensure that you have all agreed to each decision.

The verdict form that you will receive asks you to answer several questions. You must vote separately on each question. It is important for each of you to remember how you have voted on each question so that if the jury is polled, each of you will be able to answer accurately about how you voted.

Each of you will be provided a draft copy of the verdict form for your use in keeping track of your votes.

5018. Audio or Video Recording and Transcript

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A sound recording has been admitted into evidence, and a transcript of the recording has been provided to you. The recording itself is the evidence. The transcript may not be completely accurate. It may contain errors, omissions, or notations of inaudible portions of the recording. Therefore, you should use the transcript only as a guide to help you in following along with the recording. If there is a discrepancy between your understanding of the recording and the transcript, your understanding of the recording must prevail.

5019. Questions From Jurors

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If, during the trial, any of you had a question that you believed should be asked of a witness, you were instructed to write out the question and provide it to me through my courtroom staff. I shared your questions with the attorneys, after which, I decided whether the question could be asked.

If a question was asked and answered, you are to consider the answer as you would any other evidence received in the trial. Do not give the answer any greater or lesser weight because it was initiated by a juror question.

If the question was not asked, do not speculate as to what the answer might have been or why it was not asked. There are many legal reasons why a suggested question cannot be asked of a witness. Give the question no further consideration.
