

8 GCA CRIMINAL PROCEDURE
CH. 105 CONDUCT OF JURY AFTER SUBMISSION OF CASE:
VERDICT OR FINDING

CHAPTER 105
CONDUCT OF JURY AFTER SUBMISSION OF CASE:
VERDICT OR FINDING

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- § 105.10. Conduct of Jury After Receipt of Instructions.**

After receiving the instructions from the court, the jury shall retire for deliberation and an officer shall be sworn to keep them together for deliberation in some private and convenient place, and, during such deliberation not to permit any person to speak to or communicate with them, nor to do so himself, unless by order of the court, or to ask them whether they have agreed upon a verdict, and to return them into court when they have so agreed, or when ordered by the court. The court shall fix the time and place for deliberation. The jurors shall not deliberate on the case except under such circumstances. If the jurors are permitted by the court to separate, the court shall properly admonish them. When the jury is composed of both men and women and the jurors are not permitted by the court to separate, in the event that it shall become necessary to retire for the night, the women must be kept in a room or rooms separate and apart from the men.

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NOTE: Section 105.10 is new. However, it continues the former practice and is substantially the same as § 1128 of the California Penal Code. See generally B. Witkin, California Criminal Procedure Judgment and Attack in Trial Court §§ 517, 522 (1963, Supp. 1973); 8 Moore, Federal Practice ¶131.06 (1974). It should be noted that only during deliberations of the jury, does § 105.10 (and California § 1128) require the jury to be kept together. See also § 90.40 (custody and separation of jury). The federal rules are silent on the matter, although Moore indicates that the general practice is to separate before submission (for reasons of economy) and to sequester the jury after submission whether they are actually deliberating or not. In short, under federal law, as provided here, the matter is left to the court's discretion and error results from separation after submission only if prejudice is shown.

§ 105.14. What Items Jury May Take With Them.

Upon retiring for deliberation, the jury may take with them all papers (except depositions) which have been received as evidence in the case, or copies of such public records or private documents given in evidence as ought not, in the opinion of the court, to be taken from the person having them in possession. They may also take with them the instructions given by the court and notes of the testimony or other proceedings on the trial which they have personally taken during the course of the trial. The court shall provide for the custody and safekeeping of such items.

NOTE: Section 105.14 is new. It is substantively the same as § 1137 of the California Penal Code. See generally B. Witkin, California Criminal Procedure Judgment and Attack in Trial Court § 518 (1963, Supp. 1973).

§ 105.18. Procedure for Hearing of Testimony Again, or Question.

After the jury has retired for deliberation, if there is any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they may require the officer to conduct them into court. Upon being brought into court, the information required shall be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called and after a reasonable time have failed to appear.

NOTE: Section 105.18 is new. It is substantially the same as § 1138 of the California Penal Code. See generally B. Witkin, California Criminal Procedure Judgment and Attack in Trial Court §§ 519-520(1963, Supp. 1973).

§ 105.22. When Jury Can be Discharged.

(a) The jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, except:

- (1) By consent of both parties, entered upon the minutes;

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(2) At the expiration of such time as the court may deem proper, if it satisfactorily appears that there is no reasonable probability that the jury can agree; or

(3) If one of the jurors becomes ill, or by any other accident or cause, the jury is prevented from continuing its deliberations.

(b) In any case, where a jury is discharged pursuant to Subsection (a), the cause may be tried again.

NOTE: Section 105.22 is new. It is substantially the same as §§ 1140 and 1141 of the California Penal Code. However, it provides an additional exception for discharge of the jury where a juror becomes incapacitated during deliberations. Under California law, an alternate juror would be permitted to be seated in such circumstances, under § 85.45 this is not permitted and the jury must be discharged and a mistrial declared. See § 85.45 and Note thereto. See generally B. Witkin, *California Criminal Procedure Judgment and Attack in Trial Court* §§ 525-529 (1963, Supp. 1973); 8 Moore, *Federal Practice* ¶131.04 (1974). But see § 85.15 (parties may stipulate to jury less than twelve).

§ 105.24. Instruction Options as to Juror's Duties.

(a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:

(1) that in order to return a verdict, each juror must agree thereto;

(2) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(3) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(4) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

(5) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in Subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals and shall not inquire as to the division of the jury.

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(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

NOTE: Section 105.24 is new; however, it is based on ABA, Project on Standards for Criminal Justice Trial by Jury § 5.4 (Approved draft 1968).

§ 105.26. Court to be Available for Jury.

While the jury is absent the court may adjourn from time to time, as to other business, but it shall be open for every purpose connected with the cause submitted to the jury until a verdict is rendered or the jury discharged.

NOTE: Section 105.26 is new. It is substantively the same as § 1142 of the California Penal Code.

§ 105.30. Return of Verdict; Jury Poll.

(a) When the jury has agreed upon a verdict, they shall be conducted into court by the officer having them in charge. When they appear in court, they shall be asked by the judge, whether they have agreed upon their verdict, and if the foreman answers in the affirmative, they shall declare the same. The verdict shall be unanimous.

(b) When a verdict is returned, before it is recorded, the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberation or may be discharged pursuant to § 105.22.

NOTE: Section 105.30 continues the substance of Subdivisions (a) and (d) of former Rule 31. See also Cal. Pen. Code §§ 1147, 1149, 1163, 1164. See generally 8 Moore, Federal Practice ¶¶31.02, 3107 (1974); B. Witkin, California Criminal Procedure Judgment and Attack in Trial Court §§ 530-531 (1963, Supp. 1973).

§ 105.34. General Verdict: Special Verdict: Forms.

(a) The jury shall render a general verdict except when all parties stipulate in writing with the approval of the court to the return of a special verdict.

(b) A general verdict upon a plea of not guilty is either "guilty" or "not guilty." A general verdict upon a plea of not guilty by reason of mental illness, disease or defect is either "guilty" or "not guilty by reason of mental illness, disease or defect."

(c) A special verdict is that by which the jury finds the facts only, leaving the judgment to the court. It shall present the conclusions of fact as established by the evidence, and not the evidence to prove them, and these conclusions of fact shall be so presented that nothing remains to the court

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but to draw conclusions of the law upon them. The special verdict shall be written but need not be in any particular form provided that it presents intelligibly the facts found by the jury. The special verdict shall be read to the jury and agreed to by them, before they are discharged.

NOTE: Section 105.34 is new. It is inspired by §§ 1150 to 1154 of the California Penal Code. See generally B. Witkin, California Criminal Procedure Judgment and Attack in Trial Court §§ 534-535 (1963, Supp. 1973). The procedure provided here, however, is intended to be more in the nature of special interrogatories, to the jury. These interrogatories are prepared and stipulated to by all parties and then presented to the jury. It is not contemplated that the jury will prepare its own verdict. For judgment on a special verdict, see § 105.38. For procedure on a defect in a special verdict, see § 105.42.

§ 105.38. Special Verdict; Judgment on.

The court shall give judgment upon the special verdict as the facts prove or fail to prove the defendant guilty of the offense charged in the indictment, information or complaint or of any other offense of which he could be convicted under that indictment, information or complaint.

NOTE: Section 105.38 is new. It is based on § 1155 of the California Penal Code. See § 105.34 and Note thereto.

§ 105.42. Special Verdict; Defect or Insufficiency.

If the jury does not, in a special verdict, pronounce affirmatively or negatively on the facts necessary to enable the court to give judgment, the court shall direct the jury to retire and return another special verdict. The court may explain to the jury the defect or insufficiency in the special verdict returned, and the form which the special verdict to be returned must take.

NOTE: Section 105.42 is new. It is based on § 1156 of the California Penal Code. See § 105.34 and Note thereto.

§ 105.46. Finding of Fact of Prior Convictions.

Whenever the fact of a previous conviction of another offense is charged in an indictment, information or complaint, and the defendant is found guilty of the offense with which he is charged, the court shall, unless the answer of the defendant admits such previous conviction, find whether or not he has suffered such previous conviction. If more than one previous conviction is charged a separate finding must be made as to each.

NOTE: Section 105.46 reflects the need for a determination whether a defendant has suffered previous convictions but also reflects the policy decision that such determination should be made by the court in all cases, *i.e.*, whether or not a jury

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decided guilty on the general issue. Contrast Cal. Pen. Code § 1158. See also § 90.13 (reading of accusatory pleading not to include reference to prior convictions).

§ 105.54. Jury to Determine Degree of Offense.

When a defendant is charged with a crime which is distinguishable by degrees, the jury shall, upon a finding of guilt, also find the degree of the crime of which the defendant is guilty. If the jury agrees upon the guilt of the defendant but cannot agree upon the degree, it shall render that verdict, and the defendant shall be deemed guilty of the lowest degree of the crime charged. If the jury agrees that the defendant is not guilty of the higher degree but cannot agree as to the lower, it shall render a verdict of not guilty of the higher degree and the defendant may again be tried only for the lower degree of the crime upon which the jury disagreed.

NOTE: Section 105.54 is new. It is based on § 1157 of the California Penal Code but, consistent with § 105.62, makes clear that the jury shall render a verdict as to charges on which it is certain.

§ 105.58. Guilt of Included Offense Permitted: Defined.

(a) The jury, or the judge if a jury trial is waived, may find the defendant guilty of any offense, the commission of which is included in that with which he is charged.

(b) An offense is included under Subsection (a) when:

(1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged;

(2) It consists of an attempt or solicitation to commit the offense charged or to commit an offense otherwise included therein; or

(3) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

NOTE: Section 105.58 continues the substance of former Rule 31(c) however, it now includes a reference to court-tried cases and Subsection (b) has been added to give statutory guidance to the determination of what is an included offense. Subsection (b) is substantively the same as Model Penal Code § 1.07(4). Compare former § 1151. See also Cal. Pen. Code § 1159; Fed. R. Crim. P. 31(c). See generally B. Witkin, California Criminal Procedure Judgment and Attack in Trial Court §§ 541-543 (1963, Supp. 1973); 8 Moore, Federal Practice ¶31.03(1974).

§ 105.62. Multiple Defendants: Jury May Find as to One (1) Only; New Trial as to Others.

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(a) On a charge against two or more defendants jointly, if the jury cannot agree upon a verdict as to all, they may render a verdict as to the defendant in regard to whom they do agree, on which a judgment shall be entered accordingly, and the defendant as to whom they do not agree may be tried again.

(b) Where two or more offenses are charged in any indictment, information or complaint, if the jury cannot agree upon a verdict as to all of them, they may render a verdict as to the charge upon which they do agree, and the charge on which they do not agree may be tried again.

NOTE: Subsection (a) of § 105.62 is substantively the same as former Rule 3(b). See also Fed. R. Crim. P. 31(b); former § 970; Cal Pen. Code § 1160. Subsection (b) of § 105.62 is substantively the same as the second paragraph of § 1160 of the California Penal Code. See generally B. Witkin, California Criminal Procedure Judgment and Attack in Trial Court §§ 539-540 (1963, Supp. 1973); 8 Moore, Federal Practice ¶31.02[2](1974).

§ 105.66. Reconsideration of Verdict, When Allowed; Conditions.

(a) When there is a verdict of conviction, in which it appears to the court that the jury has mistaken the law, the court may explain the reason for that opinion and direct the jury to reconsider its verdict, and if, after the reconsideration, they return the same verdict, it must be entered; but when there is a verdict of acquittal, the court cannot require the jury to reconsider it.

(b) If the jury renders a verdict which is neither general nor special, the court may direct the jury to reconsider it, and it cannot be recorded until it is rendered in some form from which it can be clearly understood that the intent of the jury is either to render a general verdict or to find the facts specially and to leave the judgment to the court. Court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment.

(c) A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on a remand of the case.

(d) A motion for a new trial based on any ground other than the ground of newly discovered evidence shall be made within seven days after verdict or finding of guilty or within such further time as the court may fix during the seven-day period.

NOTE: Section 105.66 is new. It is substantively the same as § 1161 of the California Penal Code. See generally B. Witkin, California Criminal Procedure Judgment and Attack in Trial Court §§ 532A, 533, 545-552(1963, Supp. 1973).

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§ 105.70. Informal Verdict; Judgment Thereon.

If the jury persist in finding an informal verdict, from which, however, it can be clearly understood that their intention is to find in favor of the defendant upon this issue, it must be entered in the terms in which it is found, and the court must give judgment of acquittal. But no judgment of conviction can be given unless the jury expressly find against the defendant upon the issue, or judgment is given against him on a special verdict.

NOTE: Section 105.70 is identical to § 1162 of the California Penal Code. See generally B. Witkin, California Criminal Procedure Judgment and Attack in Trial Court § 533(1963).

§ 105.74. Clear Verdict to be Recorded by Clerk.

When the verdict given is such as the court may receive, the clerk shall record it in full upon the minutes.

NOTE: Section 105.74 is new. It is substantively the same as the first portion of § 1164 of the California Penal Code, and serves the same purpose for a jury trial as former § 1149 served for a court-tried case. See generally B. Witkin, California Criminal Procedure Judgment and Attack in Trial Court §§ 532, 532A(1963, Supp. 1973). Regarding defective or inconsistent verdicts and impeachment of the verdict, see Witkin, *supra* §§ 544-554A; 8 Moore, Federal Practice ¶¶31.05, 31.08 (1974).

§ 105.78. Trial Without Jury; Findings Required.

In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially. Such findings shall be entered upon the minutes. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

NOTE: Section 105.78 is substantively the same as former Rule 23(c). See also former § 1149; Fed. R. Crim. P. 23(c). Compare Cal. Pen Code § 1167. See generally 8 Moore, Federal Practice ¶23.05 (1974); B. Witkin, California Criminal Procedure Judgment and Attack in Trial Court § 556(1963).
