

One of the easiest times for the trial court to make an error affecting the outcome of the trial is during deliberations when answering a note from the jury. That's why the court is obligated to call the parties together and discuss a note from the jury prior to giving any response. Nonetheless, notes are sometimes handled by court deputies with no input from the court, or by the court with limited input from counsel. This is error.

Under *People v O'Rama* (78 NY2d 270 [1991]), the court must rendezvous with the attorneys and obtain their input before answering a note from the jury calling for instruction either on the law or on the proof at trial. The obligation arises from CPL 310.30, which allows the jury to request further instruction, and requires the court to reconvene with notice to the prosecution and defense, and give any further instructions in the presence of the defendant. Mere requests for admitted exhibits do not require defense agreement to provide the jury with the requested exhibit (*People v Damiano*, 87 NY2d 477 [1996] [where the jury has requested a boulder, it can be provided without notice to the defense - "other than production of the boulder, the note called for no other response"]). If the jury requests a boulder in a case where there no boulder was introduced into evidence, then the court must recall the attorneys to discuss the response.

The court must also inform counsel of the content of the note, not simply paraphrasing the contents. "The trial court's core responsibility under the statute is both to give meaningful notice to counsel of the specific content of the juror's request - in order to ensure counsel's opportunity to frame intelligent suggestions for the fairest and least prejudicial response - and to provide a meaningful response to the jury" (*People v Kissoon* 8 NY3d 129 2007]). So we are entitled to be made aware of the "specific content" of the jury's note. *Kissoon* was reversed because the trial court read that the jury said that they were deadlocked, but left out the current state of deliberations, votes for Guilty and Not Guilty, which the jury included: "failure to read the note verbatim deprived counsel of the opportunity to accurately analyze the jury's deliberations and frame intelligent suggestions for the court's response."

We are not entitled to notice and an opportunity to give input where the note pertains only to procedural or logistical concerns, such as making arrangements for lunch or leaving contact information for juror families and the like. Where there is any issue at all regarding the note, however, as to either the law or the evidence at trial, counsel must be given an opportunity to give input into the response before the response is given, and must see the note or have it read verbatim.

"[t]here are few moments in a criminal trial more critical to its outcome than when the court responds to a deliberating jury's request for clarification of the law or further guidance on the process of deliberations. Indeed, the court's response may well determine whether a verdict will be reached, and what that verdict will be" (*People v Ciaccio*, 47 NY2d 431, 436 [1979]).