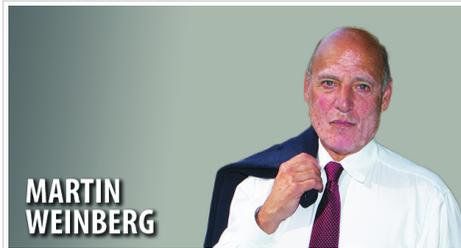


Irregular verdict form still an issue in pharmacist case

Prosecution cites 'majority' to combat post-trial motion

By: Kris Olson May 25, 2017



Irregularities on the verdict form on which New England Compounding Center co-owner and head pharmacist Barry J. Cadden was acquitted of 25 counts of second-degree murder are unusual and noteworthy, local attorneys say. Whether those irregularities chronicle a miscarriage of justice is open to debate, but they remain a hot topic as the case moves toward sentencing.

As reported by Law360 and locally by WBUR, a jury member — presumably the foreman — wrote numbers on the lines next to the words “Not Guilty” and “Guilty” on the form, while also placing a checkmark next to “Not Guilty” on many of the 100 counts Cadden was facing, including all of the murder charges.

Cadden and several other defendants had been charged in more than 60 deaths and hundreds of illnesses caused by contaminated drugs shipped from NECC around the country.

On the vast majority of the murder charges, the numbers written suggest that, at least at some point in their deliberations, more jurors than not were prepared to convict Cadden. Cadden’s Boston attorney, Bruce A. Singal, had called those charges a “terrible injustice” and “unprovable, unwarranted and unjustified” in the immediate aftermath of the verdict.

On the first 15 murder charges, the verdict form suggests an 8-4 split; on the next three, a 9-3 split; and on the following three, a 7-5 split, all in favor of guilt. Only on the final four second-degree murder charges are there more “not guilty” votes, two 9-3 and two 12-0.

U.S. District Court Judge Richard G. Stearns had instructed the jurors, before they began to deliberate, that their verdict needed to be unanimous. And he affirmed their verdicts once his clerk read them aloud. But since the verdict form has become public, most have agreed that Stearns insufficiently dispelled any ambiguity as to whether the acquittals were, in fact, unanimous.

Neither party, however, has filed for any sort of relief specifically related to the verdict-form issue, according to the docket.

Asked to comment about the verdict form, Singal declines, citing pending post-trial motions and appeals.

Similarly, Christina DiIorio-Sterling, spokeswoman for acting U.S. Attorney William D. Weinreb, declines to comment on the verdict form.

Boston defense attorney Martin G. Weinberg, however, thinks the form indicates not a lack of unanimity, but suggests instead that the number next to “guilty” merely represents jurors leaning in that direction but ultimately agreeing that prosecutors had not proven their case beyond a reasonable doubt.

Count	Victim	Defendant	Not Guilty	Guilty
1	Karla Baxter	Barry J. Cadden	4	8
2	Paula Brent	Barry J. Cadden	4	9
3	Dayle Cipres	Barry J. Cadden	4	7
4	Dennis Kravich	Barry J. Cadden	9	3
5	Lyn Lapierre	Barry J. Cadden	12	0

What is also clear, Weinberg says, is that this was not a case of a “lone holdout” refusing to convict but, at minimum, three or four jurors declining to do so after a nine-week trial and three-plus days of deliberations.

“There’s not a lot of light between an unambiguous acquittal and the verdict of not guilty in this case,” he says.

Boston attorney Eric P. Christofferson, a former assistant U.S. attorney, is not so sure.

A reading at least as fair is that the verdict form indicates the jury did not understand the need to reach unanimity to acquit, he says.

While on the state level, the door has been opened further to post-verdict contact with jurors, such is not the case on the federal level, Weinberg notes. But even if there were access, jurors have enjoyed a right to privacy over their deliberations, he adds.

"It would be hard to formulate an inquiry without coming close to asking them to disclose what is historically private," Weinberg says.

Fellow Boston defense attorney Norman S. Zalkind believes the defense should just enjoy the verdict, as such breaks — if this was a break — do not come along often.

"It could be a great win for the defense," he says, noting that Stearns very well might have sent the jury back for further deliberations or ultimately declared a mistrial on the second-degree murder charges, if he had taken steps to discover that the jury was, in fact, deadlocked on those charges.

It was incumbent upon Stearns to conduct such an inquiry, according to Zalkind.

As a defense attorney, "you don't look for perfect; you look to win," he says.



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— Martin G. Weinberg, Boston

Impact on sentencing

Cadden is scheduled to be sentenced on June 29.

Stearns technically can consider the conduct underlying the second-degree murder charges, so long as he believes prosecutors established that conduct by a preponderance of the evidence, Weinberg says of the discretion established in the 1997 U.S. Supreme Court case *United States v. Watts*.

Zalkind agrees that the prosecution may try to address the issue at sentencing, arguing that the defendant did not get a "real" acquittal and had already gotten a break with the verdicts.

While its sentencing memorandum has yet to be filed in the case, its response to Cadden's post-trial motion for judgment of acquittal or a new trial would seem to offer a preview that the government very much intends to attach significance to the numbers written on the jury form.

Cadden's attorneys write in their memorandum that "the jury acquitted [him] of all 25 murders, and in doing so sent the same powerful message [he] had long trumpeted: This was a horrible tragedy, but it was never murder."

In its response, the government parries back: "But the jury's message was far from a trumpet call absolving the defendant of guilt on these acts. In fact, the verdict form returned by the jury revealed that a majority of the jurors found Cadden guilty of 21 out of 25 of the charged murder racketeering acts."

Another open question is whether the verdict-form revelations will impact how the government approaches the trials of the other New England Compounding defendants.

In theory, unambiguous acquittals on all the murder charges levied against Cadden might have softened the prosecution's stance in plea negotiations with those defendants.

But the response brief suggests that the numbers on the verdict form may swing the pendulum back in the other direction, emboldening prosecutors by revealing that they may have been more than halfway home to get the jury to convict on the murder charges.

Similar charges are also facing NECC pharmacist Glenn Chin, who is scheduled to go on trial Aug. 9.

Asked whether he thinks the verdict-form issue would affect the government's posture, Chin's attorney, Stephen J. Weymouth of Boston, replies simply, "No, it won't make any difference." He declines to comment further with the case pending.

But Christofferson thinks the unexpected additional information that the verdict form has provided almost certainly will impact the prosecutors' assessment of the strength of their cases against the other NECC defendants.

"I'm sure they are thinking about all of those things as they get ready for the next trial," he says.

DiIorio-Sterling also declines to answer questions about the impact of the verdict form on the Chin trial.