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I have been privileged to serve as a juror in two cases. The experiences changed my perception of the essential conduct of trials.[1] No matter which court is considered, the usual trial consists of a rambling *voir dire* of the jury, opening statements frequently confused with closing arguments, tumid questioning of witnesses interrupted by distracting objections and stuttering side-bar conferences, unexplained recesses for "gatekeeper" hearings, a seemingly interminable instruction conference in which template instructions are cobbled together, a monotone reading of those instructions to the jury, and closing arguments which offend every known rule of rhetoric. If indeed a sense of justice emerges with the verdict, it has more to do with the intuition of ordinary people on the jury than to all the contrivances inflicted upon them.

Of course not all trials are so woeful, but most of them contain some elements of mindless rituals that could easily be avoided. Proponents of the status quo frequently urge that juries are no longer competent to decide cases because the issues are too numerous and complicated and the proof required by the inexorable advance of technology too sophisticated for people of merely ordinary experience to comprehend. The fault lies not with juries, but with we who profess to know what we are doing. It is the responsibility of court and counsel to communicate with juries in clearly understandable terms; it is not the job of juries to translate or divine meaning from the entrails of legalistic monstrosities.

Counsel also burden juries with often needless information. Personal injury cases, for example, now require at least three and usually more expert witnesses per side. Photographs of wrecked cars no longer suffice.

A computerized reconstruction of the event complete with laser technology and an explanation by a Ph.D. are now considered *de rigueur*. Even drunk driving cases involve issues of metabolism rates, reaction times, and comparative physiology. Gone are the days when a policeman could testify, "I saw the car weaving down the highway and pulled it over. The driver was bleary eyed. I ordered him out of the car. His breath smelled of booze. He couldn't walk a straight line and he fumbled around to get his wallet out of his pocket." Bingo! Next case. The present scheme requires the arresting officer to call in a Driving Under The Influence Technician, a blood sample is taken or a Breathalyzer is administered, videotapes are recorded, laboratory results are scrutinized, and a plethora of charts, summaries, and reports are ceremoniously marked as exhibits and presented to jurors as burnt offerings. The result is usually the same; it just takes a lot more time, effort, and money to get there.

Of particular concern are the instructions provided to juries. Until quite recently, no one dared state the obvious—that jury instructions were incomprehensible. In the first half of the Nineteenth Century when jurors were not presumed or screened for the ability to read, judges instructed them orally in frank, natural language. As appellate courts came into prominence, an insistence developed that a written record of the charge to the jury be made. Cases were reversed for incorrect statements of the law, with the implied and characteristically unexamined assumption that the jury followed them in the first place. While special verdicts using specific questions leading to a coherent judgment could have helped solve the problem, they were not used. As trial judges were naturally averse to being reversed and appellate courts rigorously insistent upon compliance with their increasingly precise pronouncements of law, resort was made to instructions written in the language of the appellate opinions. It was another demonstration of the triumph of form over substance.

As Professor Lawrence Friedman observed in his monumental *A History of American Law,* instructions became "technical, legalistic, utterly opaque . . . [,and] almost useless as a way to communicate with juries; the medium contained no message. Each instruction had to be framed with great care, so as not to give the upper court a chance to find reversible error."[2] Further, as a very practical matter, jurors will pay no more heed to the instructions than demonstrated by the judge and counsel. One size fits all template instructions offer nothing more than jargon and leave jurors with no viable alternative but to resort to their own preconceptions.

In a truly ludicrous example, in a more than seven month long Robinson-Patman Act trial between Liggett & Myers and Brown and Williamson tobacco companies, the judge gave no instructions before or during trial. Without giving the jury copies of the instructions with which to follow along, he began reading in the morning session and did not finish until mid-afternoon with eighty-one pages of gobbledegook such as this: "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of supply and demand between the product itself and the substitutes for it."[3]

In 1993, the United States Supreme Court reversed the verdict in this case and said, *inter alia*, "[A] reasonable jury is presumed to know and

FAST FACT

The U.S. District Courts commenced 265,091 civil cases from April 1, 2001 to March 31, 2002—57,646 of which involved the United States as a party and 207,445 involving private parties. The eight federal districts comprising the Tenth Circuit handled 11,203 of these cases, with the District of Colorado accounting for 2,701 of those cases filed in the Tenth Circuit.

Administrative Office of the U.S. Courts, Federal Judicial Caseload Statistics 2002, U.S. District Courts - Civil Cases Commenced, Terminated, and Pending during the 12-Month Period Ending March 31, 2002, available at http://www.uscourts.gov/caseload2002/tables/c01mar02.pdf (Mar. 31, 2002).

understand the law, the facts of the case, and the realities of the market."[4] In the face of such mind numbing instructions delivered only once after more than seven months of technical economic testimony, that presumption evanesces into pure fantasy.

All is not lost, however. Constructive efforts to reform this theatre of the absurd are being made throughout the country. Numerous state and federal circuit and district courts have organized committees to revise and update jury instructions expressed in plain English. It remains a nascent art, but nevertheless modest optimism is justified. Some judges are now instructing juries in advance of testimony and as needed during the trial. Some are providing jurors with copies of the instructions to use throughout the trial. Permitting jurors to take notes and ask questions in some regulated manner is becoming a routine practice. Another promising innovation in trials lasting more than ten days is to have the lawyers make weekly "mini-summations" in which the jury is told what has been accomplished in the past week and what is expected to occur in the next. Some courts are cross-indexing the instructions with the special verdict forms so that easy reference can be made during deliberations.

Another innovation is needed. D. Graham Burnett is a professor of history at Princeton. He was summoned for jury service in New York City and served as foreman of the jury in a murder case. The experience was so wrenching, he wrote a book about it.[5] The book is well worth reading for many reasons. Among them, Professor Burnett points out that though he is an experienced teacher, well familiar with conducting discussions in seminars and classrooms, the court gave no instruction about how the jurors were to proceed once their deliberations began. In this Manhattan court, the judge appointed the foreman and left the jury to their own devices.[6]

In consequence of his observations, I crafted and have begun using a new advisory instruction to assist jurors in structuring their deliberations. Post verdict interviews with jurors reveal they found the instruction most useful. Moreover, in each case in which this advisory instruction was used, no notes or questions from the juries were received during their deliberations and no mistrials because of deadlock were declared. I crafted this instruction after corresponding with Professor Burnett and consulting a highly experienced mediator, Joseph Tita. Their suggestions were indeed essential to the task. Undoubtedly revisions will be made from time to time, but the basic ideas are contained in the following exemplar of the instruction.

INSTRUCTION NO. ___

Jury Deliberations

Once you have elected your Presiding Juror as directed by the previous instruction, you are free to proceed as you agree is appropriate. Therefore, I am not directing you how to proceed, but I offer the following suggestions that other juries have found helpful so that you can proceed in an orderly fashion, allowing full participation by each juror, and arrive at a verdict that is satisfactory to each of you.

First, it is the responsibility of the Presiding Juror to encourage good communication and participation by all jurors and to maintain fairness and order. Your Presiding Juror should be willing and able to facilitate productive discussions even when disagreements and controversy arise.

Second, the Presiding Juror should let each of you speak and be heard before expressing his or her own views.

Third, the Presiding Juror should

FAST FACT

In order for a case to be granted certiorari before the U.S. Supreme Court, four justices must decide to hear the case.

United States Supreme Court Website, Visitor's Guide to Oral Argument, at http://www.supremecourtus.gov/visiting/visitorsguidetooralargument.pdf (last visited Apr. 20, 2003).

never attempt to promote nor permit anyone else to promote his or her personal opinions by coercion or intimidation or bullying of others.

Fourth, the Presiding Juror should make certain that the deliberations are not rushed to reach a conclusion.

If the Presiding Juror you select does not meet these standards, he or she should voluntarily step down or be replaced by a majority vote.

After you select a Presiding Juror, you should consider electing a secretary who will tally the votes, help keep track of who has or hasn't spoken on the various issues, make certain that all of you are present whenever deliberations are under way, and otherwise assist the Presiding Juror.

Some juries are tempted at this point to hold a preliminary vote on the case before them to "see where we stand." It is most advisable, however, that no vote be taken before a full discussion is had on the issue to be voted on, otherwise you might lock yourself into a certain view before considering alternative and possibly more reasonable interpretations of the evidence. Experience has also shown that such early votes frequently lead to disruptive, unnecessarily lengthy, inefficient debate and ineffective decision-making.

Instead, I suggest the Presiding Juror begin your deliberations by directing the discussion to establishing informal ground rules for how you will proceed. These rules should assure that you will focus upon, analyze and evaluate the evidence fairly and efficiently and that the viewpoints of each of you is heard and considered before any decisions are made. No one should be ignored. You may agree to discuss the case in the order of the questions presented in the special verdict form or in chronological order or according to the testimony of each witness. Whatever order you select, however, it is advisable to be consistent and not jump from one topic to another.

To move the process of deliberation along in the event you reach a controversial issue, it is wise to pass it temporarily and move on to the less controversial ones and then come back to it. You should then continue through each issue in the order you have agreed upon unless a majority of you agrees to change the order.

It is very helpful, but certainly not required of you, that all votes be taken by secret ballot. This will help you focus on the issues and not be overly influenced by personalities. Each of you should also consider any disagreement you have with another juror or jurors as an opportunity for improving the quality of your decision and therefore should treat each other with respect. Any differences in your views should be discussed calmly and, if a break is needed for that purpose, it should be taken.

Each of you should listen attentively and openly to one another before making any judgment. This is sometimes called "active listening" and it means that you should not listen with only one ear while thinking about a response. Only after you have heard and understood what the other person is saying should you think about a response. Obviously, this means that, unlike TV talk shows, you should try very hard not to interrupt. If one of your number is going on and on, it is the Presiding Juror who should suggest that the point has been made and it is time to hear from someone else.

You each have a right to your individual opinion, but you should be open to persuasion When you focus your attention and best listening skills, others will feel respected and, even while they may disagree, they will respect you. It helps if you are open to the possibility that you might be wrong or at least that you might change your mind about some issues after listening to other views.

Misunderstanding can undermine your efforts. Seek clarification if you do not understand or if you think others are not talking about the same thing. From time to time the Presiding Juror should set out the items on which you agree and those on which you have not yet reached agreement.

In spite of all your efforts, it is indeed possible that serious disagreements may arise. In that event, recognize and accept that "getting stuck" is often part of the decision-making process. It is easy to fall into the trap of believing that there is something wrong with someone who is not ready to move toward what may be an emerging decision. Such a belief is not helpful. It can lead to focusing on personalities rather than the issues. It is best to be

patient with one another. At such times slower is usually faster. There is a tendency to set deadlines and seek to force decisions. Providing a break or more time and space, however, often helps to shorten the overall process.

You may wish from time to time to express your mutual respect and repeat your resolve to work through any differences. With such a commitment and mutual respect, you will most likely render a verdict that leaves each of you satisfied that you have indeed rendered justice.

And is not rendering justice the purpose of our entire enterprise?

Endnotes

[1] *See* John L. Kane, *Reasonable Doubt and Other Shibboleths*, 29 LITIG. 22 (2002).

[2] LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 399 (2d ed. 1985) (1973).

[3] STEPHEN J. ADLER, THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM 131 (1994).

[4] *Id.* at 141.

[5] D. GRAHAM BURNETT, A TRIAL BY JURY (Alfred A. Knopf ed., 2001).

[6] *See also* Erin Emery, *The Jury that Couldn't: Scenes from a Mistrial in Teller County,* DENV. POST, July 3, 2003, at A1 (Noted one juror in a first-degree murder trial: "'It was really frustrating because we were not getting any help on how do you go about this, how do you approach the situation,' she said. 'You're supposed to decide the outcome of a man's life—blind—and that's not acceptable.'").

Judge John L. Kane is a Senior District Judge for the United States District Court for the District of Colorado and has served on the federal bench for over twenty-five years. Judge Kane received his Bachelor of Arts degree from the University of Colorado, 1958, and his Juris Doctor degree from the University of Denver College of Law, 1960. Prior to his appointment to the federal bench, Judge Kane's legal career included serving as a Deputy District Attorney for the Seventeenth Judicial District of Colorado; the first Public Defender in the State of Colorado in Adams County, Colorado; and as a private practitioner in Brighton and Denver, Colorado. Additionally, Judge Kane acted as Deputy Director for the Peace Corps in the Eastern Region of India, as well as Country Representative for Turkey. Judge Kane was nominated by President Jimmy Carter as a United States District Judge, and received his commission on December 16, 1977. Judge Kane assumed senior status on April 8, 1988. While on the bench, Judge Kane has also acted as an Adjunct Professor of Law for both the University of Denver College of Law and the University of Colorado School of Law.