Litigation
Summer, 2006

From the Bench

*3 A JUDGE ON THE JURY

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WESTLAW LAWPRAC INDEX

JUD -- Judicial Management, Process & Selection

The envelope arrived in a stack of Monday morning mail. As she has done for nearly 20 years, my administrative assistant, Marianne Bowman, sorted through the mail, separating pleadings, copies of motions, and legal papers from correspondence, the usual mailers, and junk mail. On this spring day in 1999, however, instead of placing one particular envelope into my inbox with the rest of the mail, Marianne brought it directly into my chambers, something she rarely does. She handed it to me with an amused smile.

On the outside of the plain white envelope, the words **Jury Duty Summons** were stamped in bold, black print. I had been summoned to jury duty in state district court. On the morning of jury selection, I gathered my staff together to discuss the status of their assignments and then told them I was leaving the office to report for jury duty. It is unusual for lawyers or judges to be selected to serve on juries, so there was some good-natured kidding about the likelihood that I would be stricken from the panel by a peremptory challenge. One of my law clerks even predicted, with a smile of course, “Judge, you'll be back by noon.”

Subconsciously, I agreed with the law clerk. But I have to admit that I hoped I would have the opportunity to serve as a juror. As a trial lawyer and a judge for nearly 35 years, I have told prospective jurors that some of them were going to have the privilege of serving on a jury and that it was an opportunity I probably would never have.

Little did I know when I left the federal courthouse that morning that I would be a juror for *more than two months*. Certain events in life leave indelible impressions on our minds. This would prove to be one of those experiences for me.

I entered the historic, 1930s-era Ada County Courthouse, adjacent to the Idaho Supreme Court building, where I once had served as a law clerk to Chief Justice Robert E. Bakes and later served as an associate justice. As I walked into the jury assembly room, I saw Jury Commissioner Marji Shepard, a delightful woman I had worked with briefly in 1986 when I was a state trial court judge and had granted a change of venue because of extensive pretrial publicity in a highly publicized capital murder case. This day, my meeting with Marji was for a much different reason. She was in the assembly room to give me and nearly 100 other potential jurors an intro-

duction to what awaited us in the courtroom.

Each of the jurors had been given preassigned numbers, drawn randomly by computer, and we were instructed to sit in numerical order once we entered the courtroom. This was as close to a déjà vu moment as I have ever experienced. After many years, I was back in the same courtroom where, in 1986, I had selected a jury for the murder trial, only now I would have a considerably different role.

Presiding Judge George Carey had been a colleague of mine when I served on the state trial bench, and was also a good friend. He introduced the jury panel to the lawyers and the parties. Judge Carey informed us generally that we had been called in as potential jurors in a criminal case against the former owner of an insurance agency. The charges included insurance fraud, racketeering, solicitation of grand theft, and destruction of evidence. We were told that the case would take four or five weeks to try. I knew nothing about the defendant and had never heard or read anything about the charges.

***4** I watched the four lawyers closely as they conducted voir dire. They occasionally glanced at the first two rows of jurors sitting in the courtroom and talked quietly. I found myself being mentally prepared to be excused. I considered the odds; I had a low juror number, which would probably force at least one side or the other to consider exercising a peremptory challenge. I personally knew or was acquainted with all of the attorneys involved and may have ruled for or against them in previous court proceedings. I figured that one or the other set of lawyers would err on the side of caution and strike me from the panel. I concluded it was highly probable that I would be back in my office before the day was over.

Considering the complexity of the trial, the voir dire by both sets of lawyers was remarkably efficient, effective, and brief. All of the prospective jurors had completed a standard information form-but, importantly, at the specific request of the attorneys, each of us had also answered a questionnaire that specifically inquired about relationships with law enforcement, or employment or business dealings with the defendant, his insurance agency, or the bank that had purchased his insurance agency. With that information in hand well in advance of trial, the attorneys' voir dire questions were direct and to the point. They focused on eliciting information about our attitudes, philosophy, and, particularly important, our willingness to follow the court's instructions on the burden of proof in criminal trials. The only questions I recall the attorneys asking me were along the lines of whether I would put aside the fact that I was a judge and function as just one of the jurors. I assured the attorneys I would be “just one of the jurors” and certainly would not attempt to dominate or overly influence the deliberations in any way.

After excusing a handful of jurors for cause, hardship, inconvenience, employment, and other reasons, the panel was passed for cause; and each side exercised its six peremptory challenges. Twenty jurors were seated to try the case: 12 jurors plus eight alternates. To my pleasant surprise, I was not excused by a peremptory challenge and instead became “Juror Number Nine.” More than two months later, the morning after the verdicts were returned, a newspaper referred to my inclusion on the jury as “an unusual element.”

Judge Carey conducted the trial from 9:00 to 2:00, with two ten-minute “convenience” breaks, one mid-morning and the other around noon. Looking back on this schedule, I have concluded that it is a good way to conduct a lengthy trial. Many of the jurors returned to a partial day at their jobs, and the lawyers had a good part of the day to prepare for the next. That schedule was ideal for me because I could meet with my staff at 7:00 to plan the day and conduct a couple of short criminal hearings at the federal courthouse before I joined the other jurors. When the jury was excused from state court for the day, I would return to the federal courthouse and,

between 2:30 and 6:00, hear motions on my civil cases.

As the trial began, we heard witnesses testify that the defendant was a successful, independent insurance agent in Boise whose agency, one of the largest in the state, sold commercial, casualty, general home, and business insurance policies and bonds. Prior to the filing of the charges, the defendant sold his agency and book of business to a large regional bank that had an insurance division. He was then employed by the new owners to manage the agency during the transition.

An interesting twist in the case came in the form of a clause in the contract between the purchasing bank and the seller/defendant. The clause provided that the defendant would receive a large payment up front and the balance would be paid through performance bonuses over a period of years, provided that he had an insurance license and remained as manager of the agency. If he lost his insurance license as a result of a criminal conviction, however, he would lose his job as manager of the agency. Should that occur, the purchasing bank would be relieved of paying the “performance bonuses” and would own the agency with no obligation to make the remaining purchase payments. Another curious twist appeared when we learned that prior to trial, Judge Carey had ordered the special prosecutor to retrieve the secret grand jury transcript and the defendant's tax returns, which had improperly been given to the bank.

As the evidence unfolded before us, it became clear to me that this was a complex, document-heavy case. The documentary exhibits were contained in dozens of bankers boxes. Additionally, leaning against the wall behind the prosecutors' table were stacks of enlarged exhibits mounted on sheets of white poster board. More than 40 witnesses were called over the next two months.

From the parade of the state's witnesses, some of whom had been granted immunity, we heard about the “police raid” on the insurance agency. The raid occurred during business hours but, interestingly, on a day when the defendant was out of town on “company business.” The authorities, led by the original special prosecutor, entered the building, and the startled employees were instructed to step away from their computers. The authorities lined up several of the employees against a wall and took individual mug-shot-type photographs. After the files and computers were taken into police custody, the agency doors were locked and secured with a padlock. The once busy and prosperous insurance business was shut down.

The former owner, soon to be the criminal defendant, was subsequently charged with more than 165 counts and predicate acts of insurance fraud-related crimes. At that time, on the theory that the defendant's assets and property were subject to forfeiture, the state also obtained a temporary restraining order preventing him from disposing of any property.

We heard testimony that the day before the raid, the purchasing bank had directed the defendant to fly to the bank's Salt Lake City headquarters for a meeting the next morning. The defendant***5** caught an early-morning commercial flight but, after sitting in the waiting room for several hours, was informed by the receptionist, without explanation, that the bank's officers would not meet with him and he should return to Boise. The defendant arrived in Boise on an evening commercial flight, unaware of what had happened at the insurance agency.

That same afternoon-also without the defendant's knowledge-while he waited for his commercial flight at the Salt Lake City airport, the bank officers had been advised of the raid and had flown to Boise on a corporate jet.

After the trial was over, the news media described this case as “one of the most complicated white-collar cases in state history.” Unlike most document-heavy cases, this trial proved to have some real intrigue.

After we heard the attorneys' opening statements and the initial witnesses' testimonies, the pieces of the puzzle began to fit together and the parties' theories began to unfold. The prosecution painted the defendant as a rich, big-shot insurance agent who got greedy and violated the law to fill his own pockets.

In contrast, the defense targeted the original special prosecutor, describing him as an aggressive, ambitious lawyer in the Attorney General's (AG) office looking to make a name for himself. Although the original prosecutor had been replaced at the last minute, his name was mentioned hundreds of times in the course of the trial because he allegedly had his hand in everything, from raiding the insurance agency's office building to delivering grand jury transcripts and the defendant's tax returns to the purchasing bank. The defense claimed that millions of dollars motivated both the state's seizure of assets under the racketeering statutes and the purchasing bank's alleged collusion with the prosecution that enabled it to own the agency without having to pay for it under the forfeiture clause in the purchase contract. By planting their respective themes in the jurors' minds during opening statements and continuing to touch on the themes throughout the evidentiary phase of the case, the attorneys created graphic, mind's-eye impressions that stayed with the jurors through the deliberation process. Visions of an ambitious special prosecutor trying to make a name for himself; a greedy, big-shot insurance agent cooking the books; and a revenue-seeking state government seizing a man's life work were firmly embedded in our minds during the first days of trial. It was all very effective.

The attorneys for the defendant were some of Idaho's finest criminal defense lawyers, who were prepared and exuded charisma and confidence. On the other side of the case, the special prosecutors were two capable lawyers from the AG's office, but from the very start the jurors sensed they were uncertain, cautious, and tentative-a stark contrast to the defense team across the courtroom. The disparity in presentation between the teams of lawyers was obvious to me. I was puzzled from the very beginning and couldn't help speculating as to what had happened, but I learned the whole story weeks later.

During each recess of the first week, one or more of the jurors would ask me the meaning of words like *indictment, immunity, predicate acts, prior proceeding* (grand jury) *testimony*, and *racketeering*. They also asked, “Why is it called a sidebar?” and inquired about words and phrases mentioned during witness testimony or the judge's preliminary instructions and rulings on objections. Although I sensed it was a little disappointing to the jurors asking the questions, I consistently responded by saying that if they had a question, they should write a note to the judge and hand it to the bailiff. I realized how important it is that lawyers and judges not assume that jurors will know the meaning of words that are very familiar to those of us in the legal profession but may be understood only vaguely, if at all, by the nonlawyer.

After a series of exchanges, the other jurors quit asking me questions, and we spent our time talking about golf, the weather, kids, the excellent peanut butter cookies brought by juror number six, new movies, grandchildren, and the cost of a college education. So we could become better acquainted with one another, one of the jurors during the second week of trial proposed that we take turns telling the group a little about ourselves during recesses. It was during this period of the trial that the jurors quit referring to me as “Judge,” and very soon I was just “Larry.” I had completely blended in as “just another juror.”

After patiently watching the prosecution's plodding pace during the first two weeks of trial, it was clear that the case would take considerably longer than four or five weeks to try. By the third week of trial, the case had slowed to a crawl, and some of the jurors were becoming irritable and annoyed about little things, though they were interesting to me as a trial judge. For example, some jurors pointed out the obvious, complaining that it was difficult to read the documents on the overhead projector screen or the closed circuit television monitors in

front of the jury box. Descriptions like *fuzzy* and *out of focus* were common. At times, reflections on the monitor obscured the document, or the screen was too far away from the jury box for the document to be legible.

After several days of squinting at the monitor or the projection screen, I decided that a three-ring binder or jury notebook with photocopies of the key documents arranged by admission into evidence would be far more effective in informing and educating a jury. I also concluded in my mind that a high-tech evidentiary presentation is considerably less effective than some of the old-fashioned means. Enlarged, mounted ***6** documents placed on an easel in front of the jury box are excellent. Better yet is allowing the jurors to place copies of exhibits into their own binders after they were exhibited using the visual aids, so that jurors could make notes or highlight key language in the document.

I also became acutely aware of the boredom and restlessness inherent in a lengthy, document-heavy trial. Several jurors were not accustomed to sitting in a chair for five or six hours a day, concentrating on the evidence or doing little more than listening to lawyers and witnesses. Jurors who were employed in physically active jobs said that time in the courtroom moved very slowly.

I also was interested to hear jurors' observations about the lawyers' styles. Several jurors commented throughout the trial that they liked the style and presentation methods of one set of lawyers more than the other's. Although we had been instructed by the judge not to discuss the evidence until the case was submitted to us for deliberation, some of the jurors must have felt they were not precluded from making comments about the lawyers-and comment they did, in the privacy of the jury room.

Favorable comments included observations about the attorney who moved quickly and skillfully through examining a witness without referring to notes, or who was nonconfrontational with a nervous witness. Criticisms centered on requests for sidebar conferences; lawyers who paced when asking questions; requests for argument outside the presence of the jury; slow, plodding examination; and one lawyer's frequent searches through his notes, as if looking for the one that would prompt his recollection of a question he thought he wanted to ask.

Jurors also were bothered by attorneys who watched or looked at them too frequently. As a former trial lawyer, I recognize that it is difficult to fight the lawyer's interest in observing the jurors' reactions, especially during presentation of key evidence, to get a reading of how the jurors are responding. My word to the wise, however, is to avoid that practice because being “scrutinized” can make some jurors very uncomfortable.

The jury was composed of a group of extremely talented and intelligent people. Several, had they had the opportunity or interest to attend law school, would have made fine attorneys. Instead, they were inventors, nursing specialists, educators, firefighters/paramedics, and otherwise ordinary people with quick, analytical minds.

I was interested to learn that some of the lawyers' tactics or questions that I found theatrical, grandstanding, or even a bit hokey impressed some of the jurors. On the other hand, some jurors completely missed trial tactics or lines of questioning that I thought were excellent practices and demonstrated effective lawyering.

One behavior was unanimously disliked at one point or another during the trial: Every juror mentioned being distracted and annoyed by the noise of lawyers typing notes into their laptop computers. Interestingly, no comments were made during the many weeks of trial about the lawyers who took notes the old-fashioned way, with a pen or pencil and yellow legal pads. One juror was very outspoken about a lawyer's “clanking away” on his laptop while she was trying to listen to important testimony.

The design of the courtroom placed the witnesses directly in front of the jury box, and we could easily hear the witnesses and see every facial expression and subtle display of body language. We could readily observe-and draw conclusions on the basis of-one witness's noticeable perspiration on the brow and upper lip, another's wringing her hands and having tears in her eyes, and others' squirming and slumping in the witness chair.

As we went from week to week, with the prosecution still presenting evidence on only the first third of the charges, it became clear to all of the jurors that the case would not be tried in four or even five weeks. One juror became openly critical about the judge's not moving the case along and not making the lawyers “pick up the pace.” Several jurors voiced renewed criticism about the mechanical, plodding style of the special prosecutor. Two jurors expressed concern about summer vacation plans and prepaid, nonrefundable airfares. Other than when I took my turn in deliberations, this was the only time during the entire trial that I spoke directly about the presentation of the evidence. One particularly difficult day when complaints were becoming increasingly common, I assured the jurors that the judge was aware of the situation, knew and understood our concerns, and he was also concerned. I also explained that it is common for a trial to take longer than initially expected.

In my mind, though, I was frustrated that the lawyers had underestimated the time it would take for the case to be presented. I assumed the lawyers knew that, had they told the prospective jurors it would take ten to 12 weeks to try the case, seating a jury would have been considerably more difficult. More likely, I also reasoned, the prosecution really had no idea how long the trial would take at the time of jury selection. I determined that the next time I impaneled a jury, I would insist that the lawyers be well informed and more candid about the time commitment they were asking of jurors.

What we jurors did not realize until the trial was completed and our verdicts were returned was that just weeks before the start of the trial, the original special prosecutor who had prepared the case for trial had unexpectedly left the AG's ***68** office. The case had been dropped in the lap of another attorney. We later learned that my suspicion that the special prosecutor prepared the case for trial “as it went along” had actually been true.

Most of the jurors found it quite helpful to gain a window into the life of the defendant (I have heard this also described as “humanizing” the defendant). In this case it was very effectively accomplished by defense counsel. We learned that the defendant was an orphan who had been adopted by an older couple, both of whom were teachers. Without having had any formal introduction, the jurors asssumed that the two elderly people who sat in the back of the courtroom during the entire trial were the defendant's adoptive parents. The defendant was a self-made man who built his insurance agency from a one-room office into one of the most successful agencies in the state. He treated his employees well. A number of his business clients were called as witnesses to explain the circumstances of his agency's handling of their insurance accounts, which the state had alleged were criminal acts. The clients explained the circumstances of those transactions, and each left a favorable impression of the defendant and his business.

One by one, the parade of witnesses to be called to the stand neared its end. One of the last witnesses called to testify was the defendant. I had wondered from the time of jury selection whether the defendant would testify in his own defense. Having presided over every type of criminal case imaginable, including capital murder cases, I know defense counsel must weigh many inherent risks when deciding whether to call a defendant to the witness stand and waive the right to remain silent. Although there are many tactical decisions riding on defense counsel's shoulders in a criminal case, this is perhaps the greatest.

As a trial judge, I have had jurors tell me after returning their verdicts that an accused's silence suggested the

defendant had something to hide. I also have seen disastrous results from an accused's taking the stand, then being devastated by effective cross-examination.

From the time the trial started, I had carefully studied the defendant as he sat in the courtroom beside his lawyers. He was a man in his early 40s, wearing a conservative suit and tie. He looked like a successful businessman, alert yet calm. He took no notes and let his lawyers do their work without interruption from him. When he took the stand in his own defense in this case, it was the single most significant event of the trial. He had been superbly prepared for this moment.

During three days of intense examination, the defendant was composed as he answered counsels' questions on direct and cross-examination. At appropriate times, without overdoing it, he would look at the jurors to explain or emphasize a crucial point. He picked those moments carefully, and they were extremely effective. This was in contrast to other witnesses, who looked over at the jurors excessively while testifying. As they were with the lawyers who looked at them too often, the jurors were suspicious of witnesses who did so while testifying, and assumed the witness did so at the lawyers' direction. After some discussion, the jurors decided that, regardless of who suggested this tactic, several of them were uncomfortable with it. In the privacy of the jury room, they called it *phony, planned, coached*, and an attempt to *manipulate* them.

Another factor important to the jury was the body language of the witnesses, especially the defendant. Never once during the many hours the defendant occupied the witness stand did he recline or sit against the wooden back of the chair; there was always an inch or two of space between him and the back of the chair. He looked and acted no differently on the witness stand than he had for more than two months sitting beside his attorneys. Having tried many cases as a lawyer and a judge, I had never seen such a display of self-discipline by a witness under great scrutiny.

At the conclusion of the defendant's testimony, most jurors, in the privacy of the jury room, expressed how impressed they were with the defendant's presentation: “Did you see how calm he was?” “Did you see he never sat back in the chair or looked tired?” “I believed him.” And, “Boy, he was an impressive witness.” In my opinion, the defendant's composure made an impact on the jurors' view of him, and this carried over to our deliberations.

When I was a young lawyer, I had the impression, perhaps due to some degree of insecurity or self-consciousness, that the central focus in the courtroom was the lawyers. Then, upon assuming my work as a state district judge of general jurisdiction and presiding over many civil and criminal trials, I noticed my perspective changed slightly. I began to feel that, along with the lawyers presenting the evidence, the judge was the hub around which the wheel of the courtroom revolved. After serving as a juror in an extended trial and putting all of the pieces together with that additional perspective, I am absolutely convinced that the most important chair is in the witness box, and the men and women who occupy that chair are the central focus.

The presiding judge, of course, must make crucial rulings and maintain control of the courtroom during a trial. With competent lawyers presenting believable evidence through the testimony of credible witnesses, however, the presiding trial judge can go nearly unnoticed for hours at a time during the trial. The lawyers, of course, must be competent and prepared and present the evidence clearly and ***69** thoroughly. But if attorneys' egos get in the way, or if the lawyers succumb to the temptation to grandstand, overstate a point, or unnecessarily divert the attention from the evidence of credible witnesses, the attorneys are doing themselves and their clients a great disservice that cannot be overcome by even the most effective closing argument.

A collective sigh of relief came from several of the jurors when the prosecution and the defense rested. At the end of the state's case, the judge dismissed approximately 100 charges due to lack of evidence and other concerns, prompting both “waste of time” and “hooray” comments from the jurors once back in the jury room. The evidentiary phase of the trial had run for ten and a half weeks.

At this point, the two remaining alternate jurors were excused, and we were given the final instructions. The closing argument of counsel was helpful but perhaps too long. As a former trial lawyer, I understand the intense responsibility and pressure the lawyers feel, especially at the end of a long trial, to adequately sum up. Sometimes, however, less is more. The most effective closing argument I ever heard was about three or four minutes in length. It was in a premises liability case with a terribly disabling and disfiguring injury to a very attractive and likable woman. Both lawyers represented their clients well. The defense lawyer took a gamble when he summed up, but he was very effective, and it worked. He said something close to the following:

> I like and respect Mrs. Jones, and words cannot express how badly I feel she sustained such a terrible injury. But each of you promised me when we talked during the jury-selection process that even though my client is a large corporation, if her lawyer did not prove the case and the evidence did not prove my client was responsible for the accident, you would not award the plaintiff any judgment. I believed you and chose you to try this case.
>
> You have heard all of the evidence. I won't bore you with a restatement of what all of you have heard and understand. You can draw your own conclusions of the unfortunate accident, and that is all it was, an accident. I feel very badly for Mrs. Jones, but my client did not cause her injuries.
>
> In a few minutes, my opponent will have the last word. He will once again ask you for a large award of money. With the evidence in this trial in mind, if I were in his shoes, I would be embarrassed to ask you for any amount of money. Not because she isn't hurt. Of course, she is hurt. That isn't the question. It is because her injuries were not caused by my client.
>
> I will not be able to talk with you again, and all I ask is that you answer in your minds the response I would make if I could speak again.
>
> Thank you, ladies and gentlemen.

The jury returned a defense verdict in that civil case. It was a big gamble with considerable risk that won't work every time. But the point is this: The jurors had already heard the evidence, and sometimes it is an affront to jurors to remind them of what they've heard and seen. For the example I shared here, I have often asked myself, What more needed to be said? The only reply I can give to my own question is, probably nothing.

There is always a temptation to give a long summation that touches on all the evidence, especially in a long trial. In the trial where I served on the jury, the most helpful part of the closing argument came when one of the lawyers referred to exhibits and testimony hand in hand with the jury instructions. Each of the jurors had a copy of the court's final jury instructions in hand during closing argument and could see the exhibit the lawyer placed on the monitor. When a lawyer referred to the language of an exhibit or the words of a witness, he did so with simultaneous reference to a key jury instruction. When the jurors referred to the exhibit or the testimony of a witness during our deliberations, many of us found we had made notations of that exhibit on the corresponding jury instruction.

We returned to the jury room to elect a foreperson and deliberate on a total of 30 felony counts and predicate acts relating to racketeering, soliciting the destruction of evidence, solicitation of grand theft, and misappropriation of premium funds.

That's when the jury's work and the excitement really began.

Most lawyers and judges say how interesting and educational it would be to be a fly on the wall in the jury room. Now I would have the opportunity to see firsthand how a jury decides an important case.

During the weeks we spent together, we had more than ample time to size up the personalities and talents of our fellow jurors. Many of us became friends. The process of selecting a foreperson moved very quickly. Immediately upon entering the jury room and taking our usual seats around the large conference table, a juror asked me if I would serve as foreperson. I thanked her for her ***70** thoughtfulness but explained that to do so would be viewed as going back on my promise to the lawyers that I would be "just one of the jurors." Instead, I suggested that we go around the table and express our views on which juror should lead our discussions. After three jurors had expressed their thoughts, it became clear that one juror stood out: Eric, the firefighter/paramedic. In a show of hands, he was unanimously elected foreman.

As we would learn over the deliberations that followed, Eric was an absolutely ideal choice. He was intelligent, confident, and a natural leader. His first act as foreman was asking the engineer/inventor to serve as the jury's scribe. This, too, was an excellent choice because Carl had remarkable organizational skills and what I eventually concluded to be a photographic memory. For example, during our deliberations, a juror would ask, "What exhibit was the Acme Trucking billing statement?" and, as he reached over to pull the exhibit out of a stack of well-organized documents, Carl would say, "That was Exhibit No. 1,017." He had organized the exhibits by category into specific types of insurance policies and in numerical order within that particular category. With the hundreds of documents we had to review, his organizational skills saved the jury considerable time.

In our original numerical order, we took turns going around the table, generally speaking our views of the case and the evidence. It was very interesting to me that some of the jurors who were chatty and talkative during recesses now became quiet and tentative. On the other hand, jurors who were quiet or reserved and said very little during the weeks of trial now expressed strong views.

During the many weeks of hearing evidence, the atmosphere among the jurors was pleasant and basically social. Yet when it came time to commence our deliberations, it was all business and work. We deliberated more than 35 hours over four days, going home for the night when we were too tired to continue deliberating. At times we strongly disagreed among ourselves. Our comments were candid and at times forceful. I honored my commitment to be just another juror, but that did not mean I was a wallflower; I spoke my views of the evidence honestly and without reservation.

One by one, we thoroughly discussed each count and carefully studied key exhibits. Jurors thumbed again through their yellow notepads-I had filled up five of them myself. We frequently returned to the jury instructions, especially the "beyond a reasonable doubt" instruction, and we read and carefully reread the "elements" instructions as we deliberated and discussed each charge. Questions arose about some language in one of the instructions. A juror wrote a note to Judge Carey asking for clarification. As I knew he would, in a written response the judge simply referred the jury to the language of the instruction and directed us to continue deliberating. It became even more clear to me that proposing the right jury instructions and making them clear and easy to follow is one of the most important tasks of any trial attorney.

After four days of intense deliberations and what almost became a physical altercation between two male jurors, we were unanimous on all but one count. Despite our attempts to keep at it, as well as the judge's instructions to continue, we became firmly deadlocked at 11-1 on the racketeering charges. When everything was said

and done, the presiding judge had dismissed more than 100 charges; the jury had found the defendant not guilty on most of the charges; and we ended as a hung jury on one count. Judge Carey thanked us for our service.

As we walked out of the old courthouse into a warm spring night, several of us stood on the steps of the courthouse and talked for a few minutes before leaving. Carl, the brilliant engineer/inventor, hopped on his bicycle and rode off into the darkness. I thanked Eric for his calm, strong leadership. We all said our good-byes and shook hands; some jurors gave each other hugs, and I walked away from the historic courthouse for the last time. It was early spring in Boise when the trial started. During the time we served on the jury together, the season had changed. We had served from the beginning of April to the middle of June.

***71** I concluded that it is far more taxing and difficult to be a juror in a tough case than it is to be a judge. More difficult still is the role of the lawyer. Not only is being a good trial lawyer hard work, but the consequences of that work are terribly important in the lives and fortunes of their clients. Nothing in the law, provided it is done right, is more personally taxing and demanding than the work that follows the words "Good morning, ladies and gentlemen...."

Throughout the years prior to this trial, I had impaneled many juries as a presiding judge and, as a trial lawyer, tried many cases to juries when I was not able to solve the problems or reach a reasonable and fair settlement for my clients. For the most part-and I am sorry to admit this-the people on the jury were almost nameless, faceless men and women to me who came in, were selected, served for a given trial, and then were excused. I recall very few of them. But here, the jurors in this case were men and women I lived with every working day for ten and a half weeks. They were real people with jobs, families, and demands on their lives that were still present during the trial and deliberations. As a result of my jury experience, I have been far more sensitive to the needs of jurors and the demands we place upon them as part of what we sometimes cavalierly refer to as their "civic duty."

I would like to think that my time serving on the jury and being actively involved in the deliberation process made me a better judge. Certainly, the experience confirmed what I have thought for many years: Jurors are intelligent and usually make good, commonsense decisions. It also confirmed my well-formed view that better prepared and more experienced lawyers will usually prevail with a jury where a case is close.

All in all, my time as a juror wasn't a burden at all but rather a privilege and a unique learning experience-one that most judges and lawyers try to avoid but could profit from enormously.

Another byproduct of that experience, though, is that I have little patience for those who try to shirk jury duty. Now, when seating a jury in one of my own cases and a juror tells me he is busy and "serving on a jury is pretty inconvenient," I furrow my brow, look over the top of my reading glasses, and say to him, "Let me tell you a story."

32 No. 4 Litigation 3

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