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Insights into the Deliberative Process

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INSIGHTS INTO THE DELIBERATIVE PROCESS

THE HONORABLE WILLIAM D. STIEHL*

Thank you Dean Goldstein, ladies and gentlemen. Dean, I didn't anticipate that you would actually say the exact year of my graduation, but I'll let the students try to calculate that as we go along. Before I start my remarks, I would like to thank the school, not only for my education, but also for the number of very fine students that have come to my chambers over the years to intern. I'm grateful for that because, in the first place, we don't have to pay them, and in the second place, we enjoy having young people; and are delighted that we can give them an opportunity to see some of the workings of a court that aren't necessarily revealed in the education process. You've already mentioned Chris Tracy, and Doug Hickel is here somewhere, there he is, and Tim Forneris is in my chambers right now, and Robin Jefferson was there a few years ago, and so we are happy to have all of them and all of the others who have worked with us.

I was assigned the title of "Insights into the Deliberative Process" and in order to lay a little groundwork for that, I'd like to take us back a bit. As all of you will recall, in 1789, Thomas Jefferson said; "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its Constitution." The Sixth Amendment of the Constitution provides, in pertinent part "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district where the crime shall have been committed." Article III of the United States Constitution provides, in pertinent part: "The Trial of all Crimes except in Cases of Impeachment shall be by Jury and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress made by Law have directed."

In about 1956, Lord Devlin said: "Trial by jury is more than an instrument of justice and more than one wheel of the constitution, it is the lamp that shows that freedom lives." As lawyers, and as law students, I believe we can agree

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that our system of trial by jury as set forth in the Constitution and its Amendments is a bedrock of freedoms that makes our Country so great.

Most lawyers never have the opportunity to participate in jury deliberations themselves. Look around you. Would you pick the person next to you in this room to serve on one of your juries? Not many of you would like to have a lawyer as a juror because you know and you fear that the lawyer would be too informed, too critical, not willing to listen to the facts as you have presented them, and that the other jurors might defer to the attorney among them. Mark Twain said, "We have a criminal jury system which is superior to any in the world; and its efficiency is only marked by the difficulty of finding twelve men every day who don't know anything and can't read." Herbert Spencer put it more succinctly, "[a] jury is a group of twelve people of average ignorance." Most attorneys don't want an ignorant jury, but they do want one they can educate, and an attorney on a panel seems to defeat that objective.

A few years ago I was called to jury service in the state court in Belleville, and after sitting around for two days, I was finally called out on the third day on a panel. However, to my great disappointment, but not to my surprise, I was not selected to serve on a jury. Had I been selected, I, of course, would have taken my responsibilities very seriously and I would like to assure you that, similarly, jurors are most attentive to their responsibilities.

I routinely speak to juries after a trial and am always impressed by how conscientiously they treat their job, and by the attention to detail they demonstrate. This attention to detail can, however, boomerang. The wife of a well-known and sartorially resplendent criminal defense attorney, who will remain unnamed at least for these purposes, was selected to serve on a jury here in the Eastern District of Missouri. It was a criminal case. She commented to her husband after the trial was over that the jury knew as soon as they got into the courtroom and saw the defense attorney in his \$1,500 suit that the defendant must be guilty.

An attorney must be prepared and have a thorough knowledge of both the law and the facts of his or her own case. Jurors are quick to pick up on a lack of preparation, which undermines the attorney's credibility and is a detriment to the success of his or her case. Jurors comment on the nervousness of the attorney, or his or her apparent lack of experience, or the way in which he or she treats the opposing counsel, or bullies witnesses. Although there is a sympathy factor for the overmatched attorney, that does not usually translate into success.

As you know, the first step in the deliberative process is the selection of a foreperson. The Jury Research Institute, a jury consulting organization located in San Francisco, provides the following statistics on the selection of a foreperson: a foreperson is likely to be male, over age of forty, with two plus

years of college, and some management experience. When a female is the foreperson, she is generally likely to be in her mid-thirties, with four years or more of college, and single. These of course are just statistics and my experience does not bear them out. The dynamics of each jury panel, and the foreperson the panel selects, will differ from trial to trial. The role, of course, of the foreperson, however, is not to be underestimated. The jury looks to that person to guide the deliberations. One of the pattern Seventh Circuit jury instructions in a criminal case requires the jurors to send their questions in writing to the court. It is evident from the questions I receive from the jury during deliberations that the jury pays close attention to the jury instructions. Often they want a term defined. Sometimes it is something more mundane—that they want an easel, which they can get, a dictionary, which they can't. Juries will frequently ask to review surveillance tapes, to listen again to recorded conversations, or to view seized drugs or guns. I don't allow guns or drugs to be taken to the jury room during deliberations, but I do make them available on request.

Although jury instructions may be the bane of a lawyer's day, they are the foundation for a jury's verdict. The evidence can be thought of as the brickwork and the lawyer's style the mortar. Each part is important. You should think of your case not only from the standpoint of the evidence but from the position of how this evidence will look to each of the jurors in light of the instructions. To illustrate how carefully they take their responsibilities, I have had juries in multiple count, multiple defendant, criminal cases ask for individual sets of copies of the instructions, one for each of the twelve jurors.

The jury's task, of course, is to determine from the evidence what actually happened, not just what opposing counsel has told them happened. If trials were like those portrayed in the movies and on television, then I would have to agree with Robert Frost's comment that, "[a] jury is twelve people brought together to decide which side has the best lawyers." However, in the vast majority of cases which have been tried before me in the past fifteen years or so, the jury has done a good job of determining the truth from the evidence presented and in the context of the law as I have given it to them in the jury instructions. They make a real effort to apply the law from the instructions to the facts that they have found. It is clear that jurors are very willing to interpret the evidence presented to them. It is rare that they just accept the conclusions presented by the attorneys. Although they are allowed in my courtroom to take notes during the trial, and from the state of the jury room after deliberations close they take those notes seriously, they are also clearly influenced by a good closing argument.

I would encourage each of you to use opening statements and closing arguments efficiently. In openings, set forth a road map of the expected evidence so that the jury can easily follow your route through the trial. In

closings, don't ask the jury to remember what a witness said. You should try to specifically and accurately reiterate the testimony and recount the important exhibits. Give the jury a summary of the evidence and testimony and they are more likely to follow your theory. I instruct before closing arguments, thereby allowing you to help the jury to apply the instructions to the evidence, and thus, help your client's case.

While juries often strive to reach a compromise in the verdict in civil cases, there is little room for compromise in a criminal case. Although there may be a few strong personalities on a jury, most jurors are open-minded, as we want them to be, and are willing to be persuaded by their fellow jurors. If you haven't watched the movie *Twelve Angry Men* in a while, I encourage you to take the time to watch it again. Although dramatized, it does a good job of depicting the deliberations and the deliberative process and the effort the jurors make to find the truth from what has been presented to them during the trial.

As I have mentioned, I always speak to the jurors after they complete their deliberations. I also routinely speak to the alternates after the jury retires. Some years ago I had a fairly long trial, which we completed just before Thanksgiving. It was a case that had several interruptions due to matters that had to be resolved outside the hearing of the jurors. One of the jurors had occupied her time during these breaks by crocheting. At the close of my conversation with the jury after they returned their verdict, this juror asked me if she could give me a gift. She stepped forward and handed me this crocheted turkey. I took that to be in honor of the holiday, not as a comment on my style of adjudication, as my always-reverent staff suggested.

Similarly, a few years ago we had another trial, a criminal case, and a week or so after the case was over and the jury retired and had returned their verdict, one of the jurors called and asked if she and her husband could come visit my chambers to give me something. They arrived and this woman's husband who is a coal miner, had a certain practice of gathering certain items from the mine, cleaning them up, and lacquering them. They are some type of fossilized leaf or petal found in the mine. I'm not sure what she was trying to tell me! The suggestions made by that turkey/ fossil, I will leave you to determine.

I want to thank you for your attention and I know we are all going to enjoy the first discussions this morning. Thank you very much.