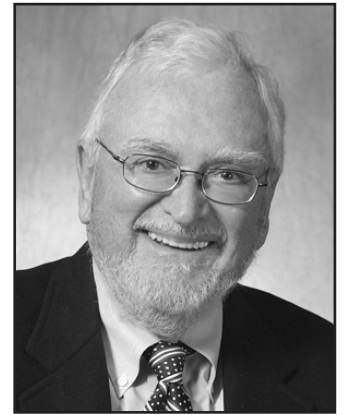


Seven Days in the Life of a Rockingham County Superior Court Petit Juror



By Attorney Charles A. DeGrandpre

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MONDAY, APRIL 30, 2001

In response to a summons, I reported to the Rockingham County Superior Court in Brentwood, New Hampshire, to serve on a petit jury panel on Monday, April 30, 2001 at 8:30 a.m. I was obligated to report for jury panel selection every Monday for a consecutive four-week period. Since this was a new experience for me, I recorded my thoughts about my service as a juror at the end of each day. However, I am sure that what I experienced is not particularly surprising to a seasoned trial lawyer.

Since judges, lawyers, and doctors are no longer exempt from jury service, I didn't try to avoid serving and, in fact, hoped I would have, for a lawyer, a once-in-a-lifetime experience of serving as a juror in a criminal or civil case. When I was in law school at the University of Michigan in 1959, I was told that I had missed the opportunity of a lifetime, since I would never be able to serve as a juror, just by the fact that I was a lawyer. It was unclear to me just what roll or list that the county used for its jury panels: the motor vehicle rolls, voter registrations or some other diverse list.

After identifying myself as a juror, I was placed in a large room (the jury gathering room) which soon had every seat filled and it was overflowing with jurors by the time everyone had arrived. I would estimate that there were about 100 people there, serving on the initial panel. There was another lawyer present besides myself, who later told me he was initially chosen for a criminal panel, but had been challenged off. I don't know whether he ever served on panels chosen later.

Everything was smoothly organized by the Rockingham County Superior Court staff. After waiting around for about an hour with a helpful and genial bailiff telling us in general what was going to happen, we were marched into courtroom 2, a cavernous room, where Judge Kenneth

McHugh and chief court clerk Ray Taylor awaited us. Judge McHugh gave us a very interesting and informative charge, "in good laymen terms" [as was noted by one juror who had served on a jury previously] of about an hour and a half, relating general instructions concerning burdens of proof, the difference between civil cases and criminal cases, what our role was, what his role was, etc.

He pointed out that he didn't allow jurors in his courtroom to take notes or ask questions and he explained his reasoning for this, although he said we might serve before other judges who felt differently. This issue never came up in our deliberations. I found his comments quite interesting, although the time weighed long on some of my fellow jury panel members. Judge McHugh was interrupted at one point by the deputy clerk who indicated he was taking too long and the chastised judge told us to note "who was really in charge here." After the judge finished his remarks, in a solemn moment, we were then all sworn in as jurors by court clerk Taylor.

We were taken back into the jury gathering room at which time those who wanted to attempt to be excused from the jury panel were left with Ray Taylor and the rest of us were led back into courtroom 2 again, with only those of us remaining (perhaps 90 of us by now) in the pool. For the week, four criminal juries of 13 persons each were to be chosen and one 12-person civil jury. The first jury chosen was the civil jury and I was the third juror called, as luck would have it. I was surprised but I still did not expect to sit.

My luck continued when I had to reveal in private at the bench to the judge and attorneys that I knew one of the two attorneys, with whom I had dealings, both with him on a case and against him on a case. As I approached the bench, expecting I would have an excuse, Judge McHugh jokingly said "And I was going to appoint you to be foreman, Charlie." However, both attorneys voiced no objection. McHugh then turned to me and asked whether I could make a fair judgment. I said, "yes" and so I was allowed to sit.

Since both attorneys had indicated no objection, I was not later preemptorily challenged (although a total of three preemptories were

used) and I took my place as juror number three. [It turns out that it's important to remember your jury number because that is how you are referred to from then on]. The panel was finally constituted and was made up of seven women and five men.

The case is an automobile collision case with only about \$2,100 worth of medicals, \$100 of lost pay and no permanent injuries. There were to be only two witnesses, the plaintiff and the defendant. There was to be no medical testimony, the medical records being introduced by agreement. It was a small case by any standards, but obviously important to the contestants. It was expected to take no more than a day, and since evidence was to start later in the day at 1:00 p.m., we were given a long lunch hour (at our own expense) and were told to return by 1:00 o'clock to start the case.

As we gathered for our 1:00 o'clock deadline, we began to get to know and learn about each other. I quietly disclosed for the first time that I was a lawyer. No one ever mentioned it again.

The case started soon after 1:00 p.m. when each of the attorneys made their opening statement. The plaintiff was represented by a solo attorney from Dover and the defendant was represented by a Dover attorney from a small firm.

The plaintiff was a young woman still in college and the defendant was a middle-aged truck driver. After an hour and a half of the openings and the testimony of the two parties, the case was submitted by both sides. Since it was 3:30 p.m., the judge decided to let us go home for the day so that we will have closing arguments and the charge tomorrow and, hopefully, we will be through our deliberations by noontime. That's what I would expect.

My early impressions are that the jury is quite an interesting mix of people with only one voluble person in the group at this point, a white-haired, mustachioed, gentleman who indicated during one of our waits that he had been an alternate juror in the federal district court (which he described as "very posh") and, then unfortunately, as he was an alternate, he never got to participate in deciding the case. That bothered him he said because he had strong feelings about the failure of the government to prove its case against the defendant, it being some sort of a perjury or lying under oath case. I predict that he will be very vocal in our deliberations.

Everyone on our panel has taken the judge's comments and the bailiff's instructions very seriously. We have not discussed the case. Everyone has been timely, and I would expect that we will have an interesting discussion tomorrow. There are not only opposite positions of the plaintiff and the defendant, but the issue will be one of comparative negligence, as raised by the defendant. The defendant essentially claims that the plaintiff, traveling south, got into a middle turning lane on Route 1 (where there were both right turn and left turn arrows) too soon before the intersection and the defendant struck her in the middle turning lane when he proceeded from a parking area directly across the traffic, across two lines of stopped traffic and turned north, having been waved ahead by the driver of a large SUV. The defendant admitted that the SUV obstructed his vision, as a result of which he did not see the plaintiff proceeding in the turn lane. It seemed clear that the defendant was going fast.

The plaintiff says that she turned into the turn lane where an arrow



indicated she could make a left-hand turn in anticipation of the forthcoming intersection and was proceeding slowly along when the defendant suddenly darted out from behind the SUV into her lane of traffic. It is the defendant's position that she should only have gotten into the turning lane when the solid yellow line broke just before the intersection, the defendant claiming that with the traffic tie up, the plaintiff was simply using the breakdown lane as a travel lane.

On first impression, the plaintiff, a young college woman who attends New England College, seems very gentle and truthful and came close to tears when describing her injuries and particularly being all alone at the hospital since she lived with her mother and her mother was then away. She spent one night in the hospital on a heart monitor since she had forcefully hit her chest on the steering wheel and was in some pain and discomfort and the physicians were worried that she had bruised her heart. Her total medical costs were \$2,100 and her lost wages were \$100.00. The defendant is well dressed and appears to be very serious. Their stories of the accident did not differ a lot.

TUESDAY, MAY 1, 2001

On the morning of May 1, 2001, the 12 petit jury members all assembled right on time in the jury gathering room just before 9:30 a.m., as the judge had instructed us to do. However, the bailiff came in to indicate that the judge had some other business and there would be some delay before we got started. It turned out to be about a 40-minute delay.

During that time, the jurors began to really get to know each other a little bit more. I learned that one of the jurors was a retired business owner who had been born in Germany and was bilingual. He turned out to be a very strong voice in the final negotiations toward an agreed-upon verdict. One woman (juror number one) had come in the day before reading a novel. She looked like a well-educated person and she later proved to be a pivotal defendant's advocate in the verdict negotiations. Another juror was a young woman who had a new Volkswagen Beetle similar to the one owned by the defendant, and who worked as a training person for hairdressers. Another was a teacher and one gentleman was

with the Department of Transportation.

There was one young and quiet fellow who was a computer programmer in Concord who was our youngest person by far. He looked no more than 18. He was a thoughtful juror. One of the women was a teacher and there was a reticent woman who had been on two prior Rockingham County juries and seemed to be less well off than most and proved to be a much more plaintiff-oriented person.

Next to me was a chatty woman who had also been born in Germany and about whom I never did get to know what she did, but she tended to be plaintiff-oriented. These last two referenced women and another juror, a male, proved to be the more plaintiff-oriented persons, although not completely so.

The gassy, elderly person with the southern drawl turned out to be a former Texan. I never learned what he did although he was well-educated. Perhaps a teacher? Another juror, a young woman, was a health care worker. None of us had talked about the case until after we were charged, except for one comment from the Texan, who expressed some surprise that all this expense was being devoted to a case so small. This latter point proved to be a constant refrain in the jury deliberations.

Finally, we were called into the courtroom where Judge McHugh apologized for the delay. He began immediately charging us with the laws of evidence, etc., and since the charge preceded arguments, I was surprised since I recalled the arguments in my few jury trials long ago as being made before the charge. The judge spent considerable time on four statutory rules of the road which were apparently quite controversial between the attorneys because, after his charge, a long bench conference ensued with the stenographer where exceptions were taken. The judge then returned to his charge to say that whatever the rules of the road were as stated in the statutes, that it was up to us as jurors to decide whether they applied or not.

Let me say that, at least in this court room, a large one, it was possible to hear some parts of what was spoken at the bench during a bench conference. A witness, being much closer, would hear even more, if inclined to listen.

Next followed the polished closing presentation on behalf of the defendant by defendant's counsel. Later, most of the jurors commented that he had made the better argument of the two lawyers, although at least two jurors thought the lawyers were evenly matched.

Defense counsel's major argument was that the plaintiff had no right to be in the passing lane and was using it as a way to get around the stopped-up traffic in order to more quickly reach her left hand turn some 300 yards away. His presentation was about 20 minutes long. Plaintiff's counsel's argument was of a similar length.

The plaintiff's attorney presented a much more spontaneous argument. Where defense counsel had stood at a podium and had his argument carefully spindled into a three-ring binder to which he referred, the plaintiff's attorney had a simple legal pad and he stood, not behind a podium, but closely in front of the jurors. He leafed through his argument which relied mainly on the fact that the defendant had not edged out into traffic as was prudent but he had been traveling at a high rate of speed, as shown by the fact that he ended up, after the collision, completely on the other side of the road. He argued that the plaintiff had a right to be in the turning lane since she was going to make a left-hand

turn, and that any talk that the left-turn arrow was to be used for a turn into a cemetery was a lot of hogwash since pictures, taken later in the summer (which were in evidence), showed that there was no road into the cemetery at all, nor were any other left turns available other than the turn at the upcoming intersection and a left turn arrow was clearly marked on the pavement when she entered the turn lane.

Interestingly, plaintiff's counsel spent very little time on damages and it was not until the very end that he got to his demand. He did not make it forcefully. He indicated that he thought something in the range of \$5,000 to \$10,000 would be a satisfactory award to the plaintiff for her damages. He almost seemed apologetic asking.

When the case ended, we filed out after the judge told us that we had about 45 minutes to decide whether we were going to make an early decision or stay for lunch. If we were going to stay for lunch, some time would be required and we were told to order it and they would bring it in, etc.

The last thing the judge did before releasing us was to pick a number of a juror out of a cup to act a foreman. As luck would have it, the gray-haired Texan was chosen and he switched seats with juror number one. This was probably a fateful decision since original juror number one turned out to be the major advocate for the defendant's position, while the chosen foreman turned out to do (in hindsight) a very quiet and good job as foreman, enabling us to reach a decision. All in all, my opinion of the foreman's abilities grew as we wrangled our way toward reaching unanimity.

We had a four-part question form which is now apparently common in comparative negligence situations. The first question (whether the defendant was less than 50 percent at fault) was one we struggled with almost to the end because there were two advocates, one very opinionated, [new juror number nine who was formerly old juror one] who felt that the plaintiff was more at fault for the accident than the defendant. However, about ten other people felt that the defendant was at least 60 percent responsible, if not more. If we answered question one in favor of the defendant (i.e., he was less than 50 percent negligent) our discussions would have then ended and we would then return a defendant's verdict.

As our discussions unfolded, it appeared that there were about three jurors who felt strongly for the plaintiff, but the majority seemed to be at a 60/40 position on the comparative negligence issue, i.e., the defendant was 60 percent responsible for the accident and the plaintiff 40 percent. No one argued that the plaintiff was entirely free of negligence.

It became apparent that juror nine (former number one) had very strong opinions which she expressed forcefully. She argued that it was the plaintiff's own fault for being where she was and that she should be awarded nothing. The native-born German, retired business owner was also for the defendant's position, but eventually he strongly argued for a 50/50 finding, crucial to the jury reaching a unanimous decision.

Although the majority was about 60/40 as to comparative negligence in the beginning, in order to reach unanimity the jury was pulled toward the position taken by juror nine and so ended up compromising at 50/50. Even then, there were times that it wasn't even certain we would get to that point. Things were very fluid and every so often jurors who had not spoken previously would chime in with new ideas which sent us all back

to square one. Everyone took this case seriously.

It was interesting to me how everyone remembered different facts. At one point, the foreman remarked upon the fact that the plaintiff, in her testimony, only showed any emotion when she got to her time in the hospital when she got red-faced and teared up. He then noted that she was a drama major student in college and perhaps she was putting the whole thing on! No one else had picked up on the drama major part. In another instance, two or three jurors could see the plaintiff's mother, the only attendee at the trial, make motions with her head and facial gestures as her daughter was testifying in a way that at least two or three jurors thought she was trying to signal her daughter. These jurors also felt that it was quite clever of defense counsel, who apparently noticed this, to move the podium to the rear of the plaintiff's desk, thereby blocking the view of the witness from her mother and vice versa. I saw none of this.

We had not been taken on a view but at least one person claimed he was very familiar with this intersection and a couple of other jurors said that they were also aware of it. The fellow who knew the intersection well was defendant-minded and as a result his personal knowledge of the intersection seemed to carry more weight. Earlier that morning, I had been tempted to go by the intersection on my way to court since it was nearby but I felt that that would be improper and did not do it. I was a little put off that this juror was using his personal recollection of the intersection to impart information to the jury which I thought was out of line. I did not say anything, however.

A constantly recurring theme was whether or not the plaintiff had already been paid for her medical expenses of about \$2,100 and whether there was insurance. There were different views on this and I expressed my own view that the defendant was insured and the reason that we were hearing this small matter was probably because the insurance company had probably refused any settlement.

It seemed to be held against the plaintiff that she had brought this small matter to a jury trial. [As it turned out when the judge came in after our verdict and we asked why this small case was in superior court, he indicated that the plaintiff originally brought her writ in the district court for a non-jury trial, but the defendant (who had insurance, the judge indicated) transferred the case to superior court for a jury trial, as was the defendant's right. I felt vindicated about my earlier reasoning on this point.

On the issue of damages, a lot of time was spent. There was very little feeling that the plaintiff should be entitled to any pain and suffering since she had no permanent disability and the medical records did not indicate that she was in any great pain, etc. A couple of jurors thought that she should get something for pain and suffering, but it soon appeared that the plaintiff would be lucky to get her medical bill damages, with the conservative cut of the jury.

This got us again into the tricky area of comparative negligence. Some argued that she should get all of her medical bills paid (\$2,100) whether or not they had been paid by insurance, and, thus, the figure to be put on the line for question four of the verdict form should be \$4,200 because, with the jury's tentative 50/50 allocation of fault, it would yield her \$2,100. Even the business person felt that once we decided the comparative negligence percentage, the plaintiff should be entitled

to a fair compensation and he felt that fair compensation was for her total medical damages and he argued for a verdict of \$4,200. His view ultimately prevailed, after much discussion.

However, juror number nine (former juror number one) argued the plaintiff shouldn't even get that because by giving her all of her medical bills, we were really giving her something for pain and suffering and that was somehow rewarding her and she shouldn't be rewarded. This juror would have returned a verdict of \$2,100, thereby having the plaintiff receive only \$1,550.

We had called for lunch since we joked that it was clear we weren't going to get too far without some time and some compromises. At this point, the discussions were sometimes loud and boisterous, with everyone weighing in. We continued to talk while waiting for lunch and we talked through lunch. We began again right from the beginning and there seemed to be a time when a defendant's verdict would be returned, to somehow cut to the chase. However, by this time a consensus seemed to be emerging for a 50/50 division of fault. Therefore, the final issue became one of damages and we spent a lot of time [a substantial time for the small amount involved] on the damage issue, particularly with the peculiarities of the comparative negligence statute.

The foreman was careful not to force a decision and he finally he got permission from all the jurors to write down a \$4,200 verdict, with a 50/50 negligence percentage. He had to write the verdict in words (not in figures), as we were instructed. We finished our deliberations after 2:00 p.m., having started about 11:00 a.m.

Some lawyers, later learning with surprise of my selection as a juror, said to me that since the other jurors knew I was a lawyer, I must have been deferred to. Nothing could have been further from the truth. I was never asked a legal question and certainly no one thought my opinions were better than theirs and the discussion was wide open. Everyone was given a chance to talk and everyone did talk. There was not one silent person there. Most of the jurors were quite thoughtful about the discussion and listened to what the other jurors were saying, although a few seemed to have made up their minds pretty quickly.

After we finished our deliberations and issued our verdict, Judge McHugh came in to the deliberation room, as he said he would. He asked if we had any questions and, of course, we peppered him with many questions. He answered the one about how this small matter got to the superior court and then asked us how we got to our verdict. We told him and he said he wasn't surprised. He also told us that he thought the lawyers would not be surprised at the result that we had reached and that the verdict was in the range of what he thought we could have reached.

He asked us whether we spent any time on whether the law of the road (the four statutes he had read to us) had entered our deliberations. We answered they had not because we had simply talked about whether it was reasonably prudent for the plaintiff to do what she was doing and whether the defendant acted prudently in coming out into traffic when his left side was blinded as he said it was by the big SUV that blocked the way. The judge said he wasn't surprised that we had spent no time on the law of the road statutes. One juror asked why there was no police report and the judge indicated that it did not add anything to the case.

One of the things the judge commented upon after the verdict was

that he himself wasn't sure exactly what the law was in such a turning lane situation and that he was interested in our verdict and how we got to it. He indicated that this was a case where both stories were almost the same—there were very little differences between the stories of both. It was not a case, he said, where one said the light was red and the other said it was green, so he thought we did have our work cut out for us and it did not surprise him that it took us some time to reach a verdict. He joked that there are times as the door closes on the jury room the jurors immediately knock and indicate they have already reached a decision, but he said not all cases are like that. The judge appeared to me to have no feelings one way or the other as to how the case should have come out. It seemed clear to us that he was really leaving it up to us.

One interesting thing the judge said was that he was impressed with the plaintiff's counsel's analogy on the plaintiff's behalf to someone who is crossing a highway only a foot away from a crosswalk and then gets run down by a negligent driver. Plaintiff's counsel argued that just because the plaintiff perhaps was in the wrong place, this did not mean that the defendant could not be at fault. The judge thought that was a telling argument. No one in our deliberations mentioned that argument at all.

One of the jurors bravely told the judge that he had caught him sleeping, but Judge McHugh responded that judges were trained to listen with their eyes closed!! This response was followed by a gale of skeptical laughter.

My observations on the process (upon reflection later that same day) was that superior court juries in New Hampshire, at least as presently chosen, are a very diverse lot, much more diverse than those of 20 or 30 years ago. They are chosen from a wide range of economic status and ages and genders. They are generally smart and educated and are very, very, skeptical of almost any claim. It also appeared to me that these jurors were a very frugal bunch. It seemed to me that the more educated a juror was and the more involved in business or professions, the less plaintiff-oriented and less generous the juror was. That is an observation that seemed to be true at least as a general rule, but I could be wrong.

I enjoyed very much the opportunity to be on the jury as a juror. I hope it happens again in the next two weeks in which I have to report (the fourth week being one that I have an airline reservation that will get me excused). I came away feeling that however it worked, the American jury system seems to work pretty effectively. Perhaps it's like what they say about seeing sausages being made: "If you eat them, you don't want to see the process of making them."

Perhaps we don't need to know all of the details how a jury reaches its decision, but it appears to be a process of compromise from a broad and diverse set of citizens; and how some people who are strong advocates for one party or the other exert influence on the majority which seem often to be in a state of flux and who are influenced by their more outspoken colleagues. As I have spoken with legal colleagues after my jury service, several mentioned how wide-ranging our discussions were, even involving stuff we weren't supposed to discuss. I think it's fair to say that we didn't think that there was anything we were not free to discuss, assuming we followed the judge's instructions in general.

I would not put myself in the position of being one of the outspoken ones, but you would have to ask the other jurors about that. I did not stay

silent but, on the other hand, I did not attempt to force a decision one way or the other. I agreed with my fellow jurors to a verdict that did not give the plaintiff very much money and found her 50 percent responsible.

One last comment: I can't say enough about the job that Judge McHugh did. He was personable, humorous, clear in his instructions, and made clear to the jurors the line between their duty and his. He left a very favorable impression on the jury. It was especially important that he took the time to talk with us after our verdict.

MONDAY, MAY 7, 2001

I reported to Rockingham County Superior Court for my second week of jury duty on schedule at the later hour of 10:00 o'clock in the morning. The usual efficient process ensued but it was soon clear that the panel for the jury drawings for this week had been much reduced. Because of the much smaller number of jurors present, it was soon realized that apparently some jurors had been called during the weekend and instructed not to report since there was only one case for which a jury would be drawn that day. It was not explained to us if this selection process was done by lot or simply whether you answered your phone or not on Sunday. On this smaller panel, there was only one person there that I recognized, a chatty woman who had sat on the same civil jury as I had the week before.

We were soon ushered into courtroom 2 where Judge McHugh presided. He told us that there was only one jury to be drawn today, a criminal case involving a sexual molestation charge, which was expected to last three days, with testimony starting the next day.

By this time, my personal life and professional business duties had grown a little more complex and I was not as eager to serve as the week earlier. However, again as fortune would cast its lot, I was chosen as the tenth juror. I was still pretty confident that I wouldn't serve and I so indicated to juror number nine, who turned out to be the woman I had served with earlier. No sooner had I said that, when the county prosecutor's representative and defense counsel both indicated they were satisfied with the panel as drawn, no challenge being exercised. Of course, that got me immediately thinking about my schedule, etc., as I contemplated the fact that today and for the next three days, I would have to give serious thought to rescheduling client meetings, etc. We were through by 11:30 a.m. and were sent off to report back the following day at 10:00 a.m.

TUESDAY, MAY 8, 2001

Having raced to the office to catch up on matters that needed attending, I hurried over to the Rockingham County Superior Court in Brentwood, on a beautiful spring day. It was gorgeous. I wondered whether I wanted to sit on this jury or not, although, since it was my first criminal case, I was intrigued.

All of the jurors gathered promptly at about 9:30 a.m. to 9:45 a.m. and we had a chance to get to know each other a little bit. This "getting to know one another" time I think is a very important part of the process of a jury coalescing together to try to reach a verdict. Little things are said by one person or another, as each takes stock of their fellow jury members. Most jurors are quiet and offer little about themselves. No one seemed to want to pry into the life of another. I had taken in a crossword

puzzle and I used that to pass the waiting time while getting some input from my fellow jurors.

Again, we seem to be a very diverse lot. All took the judge's admonitions seriously, particularly since this was a serious criminal matter and I think there was some trepidation about undertaking to be the arbiters of such an important case. Still, by this time, we acted as veterans, knowing that we had to line up in numerical order to enter the jury box and to exit it, etc. At about 10:30 a.m. we were unexpectedly ushered upstairs to courtroom 6 where Judge Patricia Coffey presided, instead of courtroom 2, (Judge McHugh's courtroom) and where we had expected to return.

Also, as we filed into the courtroom, as we had been told earlier, a different representative from the Rockingham County Attorney's office was there to present the case, the jury having been selected by a different lawyer from that office. However, defense counsel was the same.

I knew neither of the lawyers involved. There were a few spectators in the courtroom (less than five), one of whom it turned out was probably the victim advocate, a position that wasn't even known when I first started practicing law. It took me some time during the course of the next few hours to realize that all of the witnesses were sequestered before their testimony and each entered separately and did not hear the testimony of the prior witnesses.

This was a case in which there were five separate indictments (each separately read) involving a charge by the Rockingham County Grand Jury that the defendant, with the same 11-year old victim on five separate dates, had molested her by placing his hands inappropriately and contrary to statute upon her breast. The prosecutor then opened his case with a short opening in which he stressed that the defendant, as a guest in the home of his friend, had made inappropriate sexual advances to his friend's stepdaughter. The prosecutor claimed that this had happened on at least five occasions and had involved a situation where the defendant, an older person, placed himself constantly and inappropriately in the presence of the victim and a female friend of hers, had used inappropriate sexual language to the two young women and had disabused his friendship with his friend, the stepfather of the girls and the owner of the home in which he was visiting.

Defense counsel elected to make an immediate opening statement, the thrust of which was that we would hear a lot of conflicting testimony, that any touching that had occurred was purely innocent and that essentially the victim had made up the story after the fact in order to draw attention to herself in a situation where she was unhappy in her new stepfather's home. Defense counsel indicated that there would be some jarring inconsistencies in the testimony and that we should note those.

Testimony immediately began with the victim taking the stand. Now age 14 (11 and in the sixth grade at the time of the alleged offense), this young woman told her story at some length (on direct, indirect and redirect). Most jurors later felt too much time was taken by the lawyers with this witness. She alleged that the defendant had inappropriately made advances on her, in the presence of her female friend, which included using sexual language and finally on two or three occasions actually tickling her, during the course of which he inappropriately placed his hand fully on her breast for some brief moments.

The victim, however, did not go off lightly. On cross-examination, it appeared that there were several internal inconsistencies in her story

and with her story and the indictments. She could not allege with any particularity the exact dates that the offenses had occurred. It appeared at the end of her testimony, at least to me, that she had shown no more than three alleged inappropriate sexual encounters with the defendant, not the five which the prosecution had charged. Defense counsel was particularly adept at showing inconsistencies between statements she had previously made to police or county attorney investigators and those that she was making at the trial. He made much of her story concerning her disclosure of an overheard conversation between her parents (natural mother and stepfather) in which she testified that she heard that the defendant had engaged in immoral sexual acts with a Mexican female minor and had been charged with sexual abuse. A limousine figured in this story.

This proved to be of importance since later in subsequent testimony, it appeared that the parents themselves denied that they ever had such a conversation involving the defendant! I found this astounding. This inconsistency continued to ring throughout the case, although the members of the jury in its deliberations did not place as much weight on this as did I.

During the testimony of the victim, many jurors seemed to be uncomfortable. There was a lot of shifting in their seats, looking sideways to other jurors and, in general, there was a feeling that the questions were repetitive and that too much time had been spent on the issue of the particulars of the crime alleged.

The State presented three other witnesses: the stepfather, the natural mother of the child, and a detective who had interviewed the victim. The result of this testimony seemed to me to be quite contradictory. Both the natural mother and stepfather seemed to contradict each other and they seemed to contradict their daughter. The reason that the detective's testimony was offered was unclear to me (and later to the other jurors) since his short testimony seemed to add nothing to the situation. In deliberations, the jurors laughed at why he had been called at all. It almost seemed to me at one point that the State was presenting all of the evidence that it had, whether it was favorable to its position or favorable to the defendant. Maybe this is how it's done now with the new disclosure provisions, but it surprised me.

Testimony concluded about 3:30 p.m. The lawyers went to the bench and it appeared there were motions to be filed and the judge instructed the jury that it would be released until 10:00 a.m. the next morning. Judge Coffey carefully warned the jury once again not to discuss the case at all before all of the evidence was in, etc.

As I left the courtroom, all of the jurors followed this advice. Jurors voiced the thought that the judge was quite serious. We talked about small things—not big things. As I left, it appeared to me at this point that it would be surprising if a verdict of guilty would be returned, since the State had closed its case and the evidence against the defendant seemed thin to me.

Since we had 13 jurors, and not 12, and one would be excused by lot, the female acquaintance from the prior jury indicated that she hoped she would not be excused because she felt very strongly about the case, although she didn't indicate which way or the other. However, at the end of the testimony that day, my impression was that the State had rested its case and had not proven its case beyond a reasonable doubt. I thought,

but did not know, that there was considerable feeling amongst the jurors that the State had not proven its case. However, my short experience with jury duty has already shown that it's foolhardy to predict what the jury will do in its deliberations. I also wondered whether the defendant would testify—his counsel having cleverly left that issue open. I thought that he would and that it would be important for his case that he do so.

I'm looking forward to tomorrow, hoping that the defendant, who had not yet offered evidence, will have only few witnesses, and that we will be charged and go to our deliberations before the end of the day. Perhaps I'm just everlastingly optimistic.

However, it has not passed my mind that Judge Coffey may very well dismiss at least two of the charges for the alleged sexual assault for two of the five dates alleged, since there seems to be no evidence presented by the State on the later of the two occasions. In my mind, at this point, it's not even beyond the realm of possibility that the State's case will be thrown out in its entirety. However, I do not think that's probable since I think the judge will probably allow some of these charges to go to the jury to let them decide the defendant's fate one way or the other.

WEDNESDAY, MAY 9, 2001

After all 13 jurors had gathered at 10:00 a.m. in the jury gathering room at the courthouse in Brentwood, we were unexpectedly surprised when, unannounced, Judge Coffey walked in to the room with her robe on. She said that she had an unusual announcement to make—something that didn't happen very often. I immediately assumed that the case had settled by the defendant copping a plea, but what had, in fact, happened was that a member of the family of one of the attorneys had died during the night and the judge was granting a continuance. Judge Coffey asked us to return the following Monday at 9:00 a.m., so that we could finish the matter in one day, since she said there are very few witnesses left and that we could expect to get the case for deliberation by noontime.

MONDAY, MAY 14, 2001

Right on time and following the judge's instructions to the letter about not discussing the case, the 13 members of the jury arrived well before the nine o'clock hour. I have not yet described this jury. Of 13 members, seven were women and six men. One woman was an Asian-American from Taiwan and I learned that my fellow juror from the earlier panel (the talky plaintiff-oriented person) sold cosmetics at department stores. There was a young man who was an electrician, and a young-looking, middle-aged man who was a security officer at a college, and a more elderly woman who was the most quietly spoken of all, about whom I learned nothing. There was also a very elderly gentleman who was very quiet, but very friendly. I would say that this was a fairly young jury, with only two or three of us over the age of 60. This was quite a contrast to me to the juries of the 60's where retirees who were accepted as volunteers made up a large portion of the juries. How we used to complain about the advanced age of the jurors in those days!

This jury seemed to be well-educated and diverse and represented a good cross-section of our community. If anything, it was a lot more quiet and serious than the earlier civil jury, perhaps because of the serious nature of the matter involved which placed the liberty of a defendant in

our hands.

At about 9:30 a.m., we were ushered upstairs to jury deliberation room 6, outside of Judge Coffey's courtroom number 6. Soon we entered the courtroom where the defendant proceeded to call witnesses on his behalf. The first witness called was, to me, not surprising: the 14-year old girlfriend of the victim who had been present at all occasions during the alleged acts and whom the prosecution had indicated had been quite uncooperative, both with the State and with the defense, and who had only been interviewed shortly before the trial began by both the State and defense counsel. She appeared only as a result of a subpoena, as defense counsel made clear. In the courtroom were several people, including at this point, the victim with her mother who had testified earlier, and her stepfather. The previous day, after her testimony, the victim had sat in the courtroom with another gentleman who the jury later surmised was her natural father.

The testimony of the girlfriend was very important. It later troubled the jury. She denied that she had seen any sexual contact between the defendant and the victim, although she said she felt uncomfortable in the situation that was created and had told the defendant so. She claimed he had not molested her, although she indicated that the defendant had tickled both her and the victim, but nothing further had ensued. The State pretty much left this witness alone since she did not help the State's case at all. The defendant next called the defendant's mother who testified that on the evening of Christmas day (one of the alleged dates) the defendant, who lived with her, had spent the evening at home with her.

The third witness called by the defendant was a young woman of Hispanic complexion who, it turned out, was apparently the so-called "Mexican girl" with whom the defendant supposedly had made improper advances. She, however, testified that the defendant was a friend of her family and remained so until now. She testified that when she had graduated from sixth grade, the defendant had arranged for a limousine to take her and her friends (and him) to a restaurant for dinner, etc. She said the defendant had never made inappropriate advances to her. With that, the defense rested.

It was surprising to me that the defendant did not take the stand, although of course he was not required to do so. I thought that it would help him if he had, and I felt at this point that the jury would punish him for that. [In fact, during jury deliberations, not one adverse mention was made of the fact that the defendant did not testify. That was very surprising to me.]

The Court took a short break and we returned to the jury deliberation room where small talk, not about the case, ensued. We then returned back into the courtroom where the State offered on redirect both the victim and the victim's mother and stepfather who denied some of the things that the victim's girlfriend had said. This testimony was short and the defense counsel did very little questioning. The judge then took a short break after which we would then have closing arguments and she would charge us.

When we resumed after the break, the judge turned first to arguments (in contrast to Judge McHugh in the earlier civil case). Defense counsel hammered away at the inconsistencies in the testimony of the victim, her mother, and her stepfather, all of whom told a slightly different

story about the events, particularly on the two dates which took on the most importance, Christmas day (or the day before or after Christmas day), and the following New Year's Eve. He suggested that the victim was unhappy at home and needed attention and was very unhappy with her stepfather. She had invented her story because she wanted attention. As a result of all this happening, defense counsel pointed out that she ended up spending all of her weekends now with her own natural father, being completely alienated from her stepfather, something defense counsel argued she had wanted in the first place.

Defense counsel spent little time on what the judge would later charge us was the law, except for one point. Since most of the case was based on circumstantial evidence, he had put on a board the law that he said the judge would instruct us on concerning circumstantial evidence, which he said was that if there were two possibilities explaining the circumstantial evidence, one of which found the defendant not guilty, under the burden of proof we were bound to find the defendant not guilty. Indeed, the defense counsel indicated that he anticipated that the judge would, as she often did, use the analogy of a steaming tea kettle to explain this matter [and it turned out that the judge, in fact, did use that analogy].

The defendant's argument was short—no more than 20 minutes. The prosecutor's argument was of similar length. He focused on the entire chain of evidence which included the fact that the defendant was a 30-year-old man comporting himself with 11-year-old girls, taking advantage of the problems that his friend's family was experiencing

at the time (the long hospitalization of the victim's mother during the birth of a new baby who turned out to be quite colicky) and who had no business being where he was (in the victim's bedroom) and had no business in engaging in any physical contact of any kind with the victim or her friend. The prosecutor argued that the fact that the victim's friend did not corroborate her story was due to the pressures of her mother who didn't want her daughter to get involved with the case [the friend's mother seemed to be in the courtroom and was not called by anyone]. The prosecutor argued that taking into account the totality of the evidence, we could find beyond a reasonable doubt that the defendant had committed the alleged acts.

The judge next charged us. She indicated that two of the indictments were no longer before us but that we were to adhere to the basic premise that the defendant was innocent unless proven guilty by the State beyond a reasonable doubt. She mentioned in passing that the defendant's failure to testify should not be used against him. She directed most of her attention to the fact that the case turned on a lot of circumstantial evidence.

Judge Coffey did, indeed, give the tea kettle analogy that the defendant counsel had alluded to: She said that if you were looking out your rear window on a cold, wintry day and saw a red snowmobile go by leaving tracks in the deep snow of your yard, you could properly surmise that a red snowmobile had gone through your back yard. However, if instead while looking out your back window, the tea kettle had whistled and you turned to tend to it and when you turned back you saw only the tracks of

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a snowmobile in the snow, clearly recognizable as such, you could fairly surmise that a snowmobile had gone through your yard, but you could not properly conclude that it was a red snowmobile. I thought that this was a very good way of illustrating the circumstantial evidence burden of proof.

It was not a long charge and then the judge announced that she would draw by lot an alternate juror. It surprised us, however, when the judge indicated that the alternate would not be dismissed but would have to sit in a separate room while we were deliberating, in case the alternate were needed to replace a juror who might not be able to continue to serve because of illness, etc. As it was, the number Judge Coffey chose by lot was juror 13 and the judge remarked that it was quite unusual that juror thirteen was chosen as the alternate juror. The alternate turned out to be a very quiet, intelligent young woman who, I'm sure, did not relish being chosen as alternate. As we had all discussed earlier, none of us wanted to sit through the case and then be excused from deciding it.

The judge then announced that she would choose a foreman by lot. She chose juror 8, who then announced (as the judge indicated she might) that she did not want to serve in that position. The judge then chose a new number by lot, juror ten, i.e., myself. The judge, who knows me fleetingly, did not blink an eye when she designated me as foreman after I indicated that I was willing to do the job.

We were soon back into the deliberation room and it was about 11:30 a.m. at this point. Since it was clear that we would be deliberating for some time, lunch had already been ordered by the bailiff from a local restaurant so we got down to work while waiting for lunch.

I took my role as foreman very seriously and not being used to this, used as a guide the good job the earlier foreman had done in the civil case we had heard the week before. I indicated that perhaps we should go around the table and take a preliminary vote. Instead, the jury determined that they first wanted to talk amongst themselves, and a wide ranging discussion then ensued. I made sure that everyone had a chance to talk as we went around the table.

At this point, it appeared that there was substantial agreement that the defendant was not a likable character; that he should not have placed himself in the company of the young women and had overall exercised poor judgment. There was a slim majority of the jurors that did not feel that the State had proven its case beyond a reasonable doubt. However, that was a little unclear and so I suggested that perhaps we should show by our hands whether or not any of us would find the defendant not guilty on all three counts. However, the juror who had been first designated as foreman indicated that she thought it would be better if we did this by secret ballot. We agreed to do so and this and all subsequent votes were then taken by secret ballot.

The first ballot showed that only one or two were in favor of finding the defendant not guilty on all three counts, although all agreed that of the remaining three counts, the count alleging an occasion after Christmas and New Year's was not founded and that count was quickly put aside.

The jury then turned to a discussion of the remaining two counts. All participated and the situation amongst the jury developed slowly as

each of us spoke, voicing our thoughts and concerns and inclinations. It was soon apparent that no one agreed that the defendant was very wise for having put himself in a compromising position, most of us agreeing that he had been stupid to do so. Many were surprised that the victim's parents allowed that to happen and we all agreed we would not ourselves have let it happen if we were the parents. Two or three jurors felt strongly that the defendant was obviously a sexual predator who, even if he hadn't accomplished it in this case, had he been given enough time or enough occasions, would have sexually molested the victim! Not many jurors agreed with that view, although it was spoken so forcefully that no juror at first took that view on directly. Again, as previously, no one deferred to me because I was an attorney although I did not hide that fact nor did they give me any special weight because I was foreman.

There was much discussion about the inconsistencies in the testimony. It appeared to me that some jurors were more confused than they had been before they heard the defense witnesses because at least a couple of jurors indicated that. It appeared that the testimony offered by the defendant had confused matters somewhat.

The deliberations were deliberate and slow. Lunch arrived and we agreed to deliberate through lunch. At about 1:30 p.m. or so (two hours into the deliberations), the jury reached a tentative agreement that there was only one date in which the testimony might clearly indicate that the defendant was guilty: the testimony regarding his conduct on New Year's Eve when the defendant visited at the victim's stepfather's home and where he remained overnight. The jurors seemed to agree that the testimony concerning that date was the clearest of all. From time to time, as we deliberated we took secret ballots and it initially appeared that four jurors were in favor of finding the defendant guilty of this one indictment, eight against.

Discussions were all over the place. My acquaintance from the former jury seemed to want to find the defendant guilty, although she had much trouble with the burden of proof issue, saying that even though the defendant was not a good fellow, the State had not proved its case against him beyond a reasonable doubt. This is how she eventually concluded, although during deliberations she seemed to swing both ways. After a couple of more ballots, it appeared that there were two solid votes for finding the defendant guilty on the one New Year's Eve indictment. Arguing strongly for the defendant's guilt was the male security guard [I was surprised that he wasn't challenged from the jury because of his job] who was the strongest advocate for the defendant's guilt, although his sometimes contradictory arguments sometimes seemed to prove the defendant's innocence. Much was made of the defense counsel's argument that the defendant "had probably gone over the boundary of suitable conduct" but he had not, defense counsel argued, committed the crime alleged.

Another strong proponent for a guilty finding was a woman who sat directly opposite me, an older woman, about whom I knew very little. She was very quiet spoken but very eloquent and strong in her conviction. She felt that the defendant had done what the State charged and that the State had proved it beyond a reasonable doubt.

Wide-ranging discussion ensued until about 3:00 p.m. when the strongest proponent of guilt, the security guard, suggested that if the

defendant wasn't guilty of groping the plaintiff's breast, the defendant's counsel had at least admitted that the defendant had patted her fanny and that was enough under the statute [the language which had been given us at the close of the evidence and was with us in the deliberation room]. I felt that the indictment specifically charged the defendant had committed the alleged offense by groping the plaintiff's breast and the indictment's specific language required such a finding. There was general agreement by a majority that that seemed to be true. However, the security guard suggested we ask the judge that question and the jury readily agreed. I suggested that this juror write out the question that he wanted to ask which, after some labor, he did. He read it to the jurors and we agreed that it was appropriately phrased and should be sent to the judge. I signed and dated it as foreman and called down to the sheriff's office on the secure phone and a bailiff soon arrived to pick up the question, being careful not to read the question. After about 20 minutes during which we suspended discussion of the case, the same sheet of paper in which the question was written on, was returned to the jury room at the bottom of which the judge had written and signed in her own handwriting a response: that the allegations of the statute depended upon a specific overt act of the defendant and that the specific overt act of the defendant alleged in these indictments was that the defendant had groped her breast. I read this to the jury.

There was quiet then and the security guard juror asked to look at the judge's answer directly. I then suggested that we take another vote to see where we were and on that vote, all jurors indicated that the defendant should be found not guilty. I made sure that all jurors agreed that the defendant should be found not guilty on that indictment and the other two, and I then called down to the sheriff's office to indicate that we were at agreement. The time between the judge's answer and the second call was only about 20 minutes. I conjectured to myself that the defendant's counsel, if he were aware of the question and answer and the speed by which we arrived at a verdict, would probably be guessing that we were going to be returning a verdict of not guilty.

We were then ordered into the courtroom with myself taking the place of juror one. As I entered the courtroom, I suddenly had some qualms about being the foreman and taking on the awesome task of announcing whether the defendant was guilty or not, although the judge had previously indicated that after the foreman read the verdict, the jury would be inquired if that was their true and unanimous verdict. As I entered the courtroom, I looked at all the parties and even the witnesses in the back and tried to keep a stone face as to what our verdict was, although, later, some of the other jurors indicated that they had taken turns looking at either the plaintiff or the victim, one or the other but not both.

Each indictment was read by number. I stood and responded that

we had found the defendant not guilty as each was read. As each separate verdict was rendered, the judge asked the jury whether this was their unanimous verdict and all responded that it was. We were then led out of the courtroom and we were back to the deliberation room at about 3:30 p.m., at which point the alternate juror joined us. She indicated, as we expected, that it was very disappointing to have been chosen the alternate. She did not indicate her leanings about the case.

Judge Coffey soon arrived in the jury deliberation room in her robes and thanked us for our service and asked us whether we had any questions. Of course, we did. I can't say again how important I think it is that the presiding judge take these very few minutes with the jury to talk with them, to thank them for their service, and to be willing to answer questions. Somehow, it seems to validate what the jury has done. Judge Coffey was very gracious in answering questions and very forthright. When we indicated to her that the biggest issue with us was the issue of proof beyond a reasonable doubt, she responded that she wasn't surprised about that since "there were plenty of issues about which we could find a reasonable doubt all over the case." We told her how hard it was for us to come to a verdict and she said that criminal juries particularly felt that way. We indicated to her that the process was one of a compromise situation. Judge Coffey indicated that that was the nature of the jury system, that which the jury system has its faults but it seems to be better than all the other ways available of resolving cases.

She indicated that she often looked at a case one way and the jury the other and she thought that juries, being composed of 12 persons who had to reach agreement, often found strength and comfort in their decision as a result of knowing that there were 11 other people who they needed to influence and who influenced them. She felt it was good that it required 12 people to come to the awesome conclusion that a criminal defendant was guilty or not guilty. Judge Coffey seemed stern to us after the more amiable Judge McHugh, but all felt she handled the case very well. I was especially impressed with her court demeanor and her adept handling of the jury question. She made us all feel important and made us feel how important the case was for the parties involved.

I departed the courthouse that beautiful spring afternoon feeling very tired. It had been hard work and, at least to me, very draining. As I left the courthouse, a couple of the jurors told me that they thought I had done a good job as a foreman and that made me feel better. Most of all, I thought of the sentiment, expressed by almost all of the jurors, that we would have found it terrible if we let a guilty man go free who might continue to do immoral acts. That weighed on us a lot. On the other hand, as one juror said, the American judicial system was built so that it is better to let one guilty man go free than to send an innocent man to jail. I guess these observations are a good summation of this extraordinary day in my life.