

**WILLIAM REECE SMITH, JR.
DISTINGUISHED LECTURE
IN LEGAL ETHICS**

**A ROADMAP FOR TRIALS: THE ETHICAL
TREATMENT OF JURORS***

Patricia Lee Refo**

Thank you for that generous introduction.

It is a singular privilege to have my name associated in any way with that of William Reece Smith.¹ He is a true giant of our profession—nationally and internationally—and, of course, a great leader in this community. Most importantly, he teaches us, by his commitment to access to justice and his lifetime of pro bono and public service work, what being a lawyer should be about. Sir, by our presence here tonight, we all honor your continuing and extraordinary professional example.

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** © 2007, Patricia Lee Refo. All rights reserved. Partner, Snell & Wilmer LLP, Phoenix, Arizona. B.A., University of Michigan, 1980; J.D., *cum laude*, University of Michigan Law School, 1983. Ms. Refo was Chair of the American Jury Project of the American Bar Association (ABA). She is also a former Chair of the ABA Section of Litigation and a former member of the Advisory Committee on the Federal Rules of Evidence.

1. William Reece Smith, Jr. has assumed numerous leadership positions over the course of his fifty-year career. He has served as president of the Florida Bar Foundation, the Florida Bar, and the International Bar Association. He is currently the Chair Emeritus at the law firm of Carlton Fields in Tampa, Florida. The National Association of Pro Bono Professionals annually bestows the William Reece Smith, Jr. Special Services and Pro Bono Award to individuals who have made outstanding commitments to and positive impacts upon institutions or systems by providing pro bono legal services. Am. Inns Ct., *Awards*, <http://www.innsofcourt.org/content/Default.aspx?Id=362> (accessed Jan. 17, 2007); ABA, *NAPBPro—National Association of Pro Bono Professionals*, <http://www.abanet.org/legalservices/probono/napbpro/home.html> (accessed Jan. 17, 2007).

Though this is a lecture on legal ethics, I want to talk to you this evening not about the Rules of Professional Responsibility or the most recent ethics opinions. Instead, I want to talk to you about an entirely different aspect of our ethical responsibilities—our duties to the American juror.

I had the privilege last year, at the request of American Bar Association (ABA) President Robert Grey,² to Chair the American Jury Project.³ President Grey tasked us with drafting a set of national principles for juries and jury trials which, after much comment from the bench and bar, were enacted by the ABA House of Delegates in February 2005.⁴ Much of our work involved thinking about the justice system from the juror's point of view, a perspective to which most of us who practice do not devote enough time.

I believe it is really undisputable that if we as a profession do a better job of treating the American juror ethically, the American juror will in turn be able to deliver justice even more knowledgeably and even more efficiently. Ethical treatment will also mean that the American juror will leave his or her jury service feeling better about our justice system. So we have the opportunity to strengthen the justice system in two ways—by delivering better justice and by making the citizens who serve as jurors *believe* in our justice system because they've seen it work and they've been treated well.

Do not hear me to say that the jury system is somehow broken. It isn't. I am a passionate believer in the American jury and if you are in this room on this occasion, you should be too. The jury is at the very heart of our democracy. Serving on a jury is, for most Americans, their only opportunity to actually participate in self-government.⁵ Through juries, we bring the values of our

2. Robert J. Grey, Jr. is a partner in the Richmond, Virginia office of the law firm Hunton & Williams. In his term as ABA president, Mr. Grey worked to improve ABA programs to increase diversity in the legal profession, to advance the ABA's international rule of law efforts, and to safeguard the independence of the legal profession. ABA, *Press Room*, <http://www.abanet.org/media/rgreybio.html> (accessed Jan. 17, 2007).

3. Although the ABA had a large body of work relating to jury standards at the inception of the American Jury Project, it was the Project's task to consolidate, update, and improve those standards. ABA, *Principles for Juries & Jury Trials 2* (2005) (available at <http://www.abanet.org/juryprojectstandards/home.html>).

4. Memo. from Lindsay Hansen, ABA Div. Delegate, to L. Student Div., *2005 Midyear Meeting of the American Bar Association and Meeting of the House of Delegates 8* (Mar. 7, 2005) (available at <http://www.abanet.org/lrd/legislation/04-05/05my-hod.pdf>).

5. ABA, *Dialogue on the American Jury: We the People in Action, Part I, The History*

communities into courtrooms across the country everyday. And in 80,000 trials last year, the American jury resolved disputes that the parties, or the State and the defendant, couldn't resolve any other way.⁶ So I do not talk about jury "reform"—because our system isn't broken.

But our clients, particularly corporate America, have voted with their feet. In 1985, there were about 6,000 civil jury trials in the federal courts of the United States.⁷ In 2002, there were about half that many.⁸ To the extent data is available, the picture looks much the same in our state courts.⁹ We must do everything we can to preserve and strengthen the jury trial, and we can make our extraordinary justice system even better if we think more about the duties we owe to jurors.

If you think about it, jury service is the only form of conscription left in the United States. You get a piece of paper in the mail telling you that you must show up for government service. Some of the men of the room—I won't say the "older" men but perhaps the more "seasoned" ones—may have once received a paper calling them for a different sort of government service. But they are both conscription. You are taking people away from their ordinary lives and ordering them to be part of the government. And it is the conscriptive nature of jury service that gives rise to our ethical duties to jurors. It is high time we started thinking about things from the juror's point of view.

My friend Tom Munsterman at the National Center for State Courts,¹⁰ who probably knows more about jurors than anyone in

of Trial by Jury 1 (available at <http://www.abanet.org/jury/moreinfo/dialoguepart1.pdf>) (accessed Nov. 9, 2006) (stating: "Besides voting, nothing is so active and participatory in nature").

6. Terry Carter, *Grey, Sandra Day O'Connor Kick Off ABA Program for Changes in Jury System*, 3 ABA J. E-Report ¶ 6 (Dec. 10, 2004) (reporting former Supreme Court Justice O'Connor's support for the changes recommended by the American Jury Project).

7. Patricia Lee Refo, *Opening Statement: The Vanishing Trial*, 30 Litig. 1, 2 (Winter 2004).

8. *Id.*

9. *Id.* at 3.

10. Mr. Munsterman is Director of the Center for Jury Studies of the National Center for State Courts. He has worked with the ABA Committee on Jury Standards since its inception in 1982 and has authored several books on jury systems and trial management. See ABA, <http://www.abanet.org> (providing information on partnerships with organizations such as the National Center for State Courts). The National Center for State Courts provides information about judicial administration, researches and develops tools to improve judicial administration, and helps state courts improve service by exploring a variety

the country, has a great line—"Everyone loves jury service—just not this week."¹¹ There is an important message in that humor. Indeed, there are many improvements that courts have put in place to make jury service more convenient, more efficient, and less burdensome. Some of the more prevalent enhancements include so-called "one-day, one-trial" jurisdictions,¹² systems through which prospective jurors can call an automated line to be told whether they need to appear at the courthouse the following day,¹³ and wireless Internet access in the juror assembly room so prospective jurors can work, or play, while they wait.¹⁴ Many courts across the country are innovating—the District of Columbia has a child care center in the courthouse, available for jurors and witnesses with child care needs.¹⁵ Arizona has just enacted a new system for juror pay during long trials.¹⁶ And there are many, many more examples.¹⁷

But this evening, I want to focus on the trial itself.

We have an obligation to do everything we can to help jurors understand the evidence better and do their jobs better.

Shouldn't we start by telling them at the outset of the trial what they are going to be asked to decide and what standards they are going to use to make those decisions?¹⁸ I am not talking

of legal issues, including jury innovation. Natl. Ctr. St. Cts., Brochure, *National Center for State Courts* (available at http://www.ncsconline.org/images/NCSC_GeneralBrocWEB.pdf).

11. See Natl. Ctr. St. Cts., Ctr. for Jury Stud., *Jur-E Bulletin*, http://www.ncsconline.org/WC/Publications/KIS_JurInnJurE11-19-04.pdf (Nov. 19, 2004) (referencing Munsterman's adage).

12. A "one-day, one-trial" jurisdiction is one in which a juror completes his or her service in one day if he or she is not selected to serve as a juror in a trial. ABA, *Glossary*, http://www.abanet.org/publiced/glossary_o.html (accessed Nov. 9, 2006).

13. VoiceMetrix, *Speech-Enabled Jury Information System Streamlines Jury Process and Reduces Costs*, http://download.microsoft.com/download/3/E/B/3EBF74DD-2FB3-4193-92A1-0F86D267CD62/VoiceMetrix_CaseStudy.pdf (accessed Nov. 9, 2006).

14. Courtroom Connect, *Advanced Communication Services for the Legal Industry*, http://www.courtroomconnect.com/products_&_services/courts/ (accessed Nov. 9, 2006).

15. Super. Ct. D.C., *D.C. Superior Court Jurors Office*, http://www.dccourts.gov/dccourts/superior/special_ops/jurors.jsp (accessed Nov. 9, 2006).

16. Ariz. Rev. Stat. Ann. § 21-222 (West 2007); Terry Carter, *The Verdict on Juries*, http://www.nyjuryinnovations.org/materials/Carter_The_Verdict_on_Juries.pdf (accessed Nov. 9, 2006).

17. See VoiceMetrix, *supra* n. 13 (discussing a variety of technological advancements in the jury summonses process, such as an automated outbound calling system to remind jurors of their appearance times and a real-time juror appearance schedule accessible via the Internet).

18. ABA, *supra* n. 3, at Principle 6(C)(1).

about complex contention instructions, but straightforward instructions about the elements of the claims and defenses, given at the very beginning of the case. The idea is to give jurors some meaningful context for the testimony they will be hearing and the exhibits they will be reading. The only argument I have heard against preliminary instructions is that they might somehow cause a problem if a claim or defense goes out of the case during the trial. But we deal with that all the time when a party leaves a case during trial—when one defendant settles or is directed out and other defendants remain.

I also believe we have an ethical duty to allow jurors to pose written questions to the witnesses.¹⁹ We owe it to them. Think about your own life, when you are trying to make an important decision. Can you imagine being told to make an important decision without being able to ask a single question of anyone? If there is something that the jurors didn't hear, or didn't understand, or that doesn't make sense to them, they should not have to just sit there. And in most courtrooms, regrettably, they are still instructed that they can't even talk to each other about the case during the trial.²⁰ We owe our jurors better treatment.

The naysayers on this one can be pretty loud—and they are all wrong. Jurors don't try to become Perry Mason. They don't always ask about settlement offers, or insurance, or who is going to take care of the defendant's children if she is convicted and goes to jail. Most of the questions they ask are fine.

Depending on the study, anywhere from seventy-two percent to eighty-six percent of juror questions are allowed by the trial judge.²¹ And can we, as trial lawyers, allow for the possibility that some of their questions are our fault? That we did not explain something as well as we should have? In the first trial I had during which jurors were allowed to ask questions, there was a part of the evidence that required a general understanding of what a

19. *Id.* at Principle 13(C).

20. "As a rule, it is improper for jurors to discuss among themselves the case or any subject connected with the trial until all of the evidence has been presented and the case has been submitted to them after final instructions by trial court." 75B Am. Jur. 2d *Trial* § 1610 (2005).

21. See Shari Seidman Diamond et al., *Juror Discussions during Civil Trials: Studying an Arizona Innovation*, 45 Ariz. L. Rev. 1, 68–70 (2003) (compiling and analyzing statistics related to juror questions).

debenture is. Both sides thought the witness had done a good job of explaining a debenture. But after the next break, the jury came back in with a question—“What’s a debenture?”

Another worry is, what about questions the jurors submit that do not get asked? Do they get stuck on their unasked—and therefore, presumably inappropriate—questions? Shari Diamond, of the American Bar Foundation and Northwestern Law School, has now answered that question.²² The Arizona Filming Project taped fifty real civil trials and the jury rooms during those trials.²³ Professor Diamond analyzed that raw data and found that seventy-six percent of the questions jurors submitted were allowed.²⁴ Of the disallowed questions, sixty-two percent were never again mentioned in the jury room.²⁵ When a disallowed question was mentioned, half of the time there was either no complaint about the question not being asked or the juror explicitly accepted that the question must not be relevant or proper.²⁶ Actual annoyance or displeasure with the judge was exceedingly rare—only seven responses in three cases, four of which were a single juror on one issue.²⁷ Interestingly, with sixteen percent of the disallowed questions, jurors tried to answer the question themselves and half of those involved either insurance or attorneys’ fees—which we know they talk about whether we let them ask questions or not.²⁸ The average frequency of juror questions was .76 questions per hour, which rose with longer, more complex cases.²⁹

My favorite story about a juror question came from Judge Pendleton Gaines, a great trial judge on the Superior Court of

22. Shari Seidman Diamond received her Ph.D. in social psychology from Northwestern University and received her J.D. from the University of Chicago. She is a Howard J. Trienens Professor of Law and Professor of Psychology at Northwestern University School of Law. She is also a senior research fellow at the American Bar Foundation and is a leader on studies of the American Jury. Northwestern U., *Shari Diamond, Faculty Profiles*, <http://www.law.northwestern.edu/faculty/fulltime/Diamond/Diamond.html> (last updated Oct. 9, 2006); see Shari Seidman Diamond et al., *Jurors’ Unanswered Questions*, 41 Ct. Rev. 20, 29 (Spring 2004) (discussing Professor Diamond’s American Filming Project Research).

23. Diamond, *supra* n. 21, at 4–5.

24. Diamond, *supra* n. 22, at 22.

25. *Id.* at 25.

26. *Id.* at 25–26.

27. *Id.* at 26.

28. *Id.* at 26–27.

29. Diamond, *supra* n. 21, at pt. VII(E).

Maricopa County in Arizona.³⁰ The trial had already gone a day longer than scheduled, and Judge Gaines was telling the jury that closing arguments would be heard the next morning. The juror's question, which Judge Gaines read from the bench without showing it to counsel, was, "How much repetition from the lawyers are we going to have to listen to tomorrow?"

So I hope your Florida Supreme Court will look favorably on this important rule change.

Research also vindicates one of the other tools that is on my Ethical Treatment of Jurors list—allowing jurors in all cases, civil and criminal, to take notes.³¹ Our best estimate is that in only about fifty percent of America's courtrooms, jurors are allowed to take notes.³² There is simply no research to support the fears of those who say note takers will somehow dominate over non-note takers, or that note takers will be distracted and will miss evidence. Think about it—is there any time in your practice where you listen for extended periods of time to important information and do not take a single note? Of course not, and the reason is that you know you cannot just rely on your memory. And imagine, as a trial lawyer, trying a case to the bench for even a day or two if the judge took no notes? Give jurors the tool that our own experience tells us is really essential for them to be able to do a good job.

Now let me see if I can really get your attention. We should permit jurors in civil cases to engage in pre-deliberation discussions of the evidence during the trial when all of them are together in the jury room.³³ I know this innovation is controversial. I know your Civil Procedure Rules Committee here in Florida rejected pre-deliberation discussions by the razor-thin margin of forty-five to one.³⁴ But once again, I ask you to think about it from

30. Judge Pendleton Gaines has sat on the bench of the Superior Court in Maricopa County since 1999. He received his B.A. from the University of Arizona in 1967 and his J.D. from the University of Virginia in 1969. Super. Ct. Ariz., Maricopa Co., *Superior Court Judges*, <http://www.superiorcourt.maricopa.gov/judicialbios/judicialBio.asp?jdgID=26&jdgUSID=128> (accessed Nov. 13, 2006).

31. ABA, *supra* n. 3, at Principle 13.

32. Am. Judicature Soc., *Jury Improvements*, http://www.ajs.org/jc/juries/jc_improvements_notetaking_statutes.asp (accessed Nov. 13, 2006).

33. ABA, *supra* n. 3, at Principle 13(F).

34. Fla. B., Civ. Pro. R. Comm., *Response by the Fla. Civ. Pro. R. Comm. to the Final Report of the Judicial Management Council's Jury Innovations Committee* 6 (May 2,

the juror's standpoint. Jurors are from different towns. They are of different ages, with different interests, different jobs, different demographics—different everything. They have only one thing in common—and the very first thing we tell them is that they are forbidden to talk about the only thing they have in common. That is kind of scary.

I do understand that this is perceived in some quarters as a revolution rather than an innovation. But we have over a decade of experience in Arizona with pre-deliberation discussions—and our courthouses are still standing.³⁵ Professor Diamond's research from the Arizona Filming Project again tells us what *really* happens in the jury room instead of what we think *might* happen. Some of the fifty trials in Diamond's project allowed pre-deliberation discussions (the "discuss cases") and others followed the traditional model (the "no discuss cases").³⁶ The research showed:

- Deliberations tended to be less time-consuming with discuss cases.³⁷
- Jurors in discuss cases reported that expert testimony was easier to understand.³⁸
- There was evidence that discussing the case helped jurors to clarify the evidence and to more accurately understand the evidence.³⁹
- There was no evidence that pre-deliberation discussions favored the plaintiff.⁴⁰
- In some ninety percent of cases, the trial judge indicated that he or she would have reached the same result as the jury.

2005) (available at http://www.floridasupremecourt.org/decisions/probin/sc05-1091_Report_CivProcRulesComm.pdf).

35. Arizona instituted the pre-deliberation rule in 1994. Ariz. R. Civ. P. 39(f) (2006).

36. Diamond, *supra* n. 21, at 20.

37. *Id.* at 62.

38. *Id.* at 71.

39. *Id.* at 71 tbl. 7.5.

40. *Id.* at 63.

There was no difference in this figure between the discuss and the nondiscuss cases.⁴¹

In case you were wondering, forty-two percent of the juries that were instructed not to talk about the case did so anyway.⁴²

Let me briefly touch upon a number of other issues that concern the ethical treatment of the American Jury.

- (1) It is unethical to leave jurors sitting in the jury room or to otherwise waste their time while the court or the lawyers conduct other business.⁴³ Courts are experimenting with compressed trial days—7:30 a.m. to 1:30 p.m.—to give jurors the chance to get to work or to pick their kids up from school.⁴⁴ Other courts conduct trial only four days each week, allowing the jurors, the lawyers, and the court to do other business on the fifth day.⁴⁵
- (2) We must respect juror privacy, and not require them to surrender their privacy at the courthouse door.⁴⁶ They should only be asked to provide information about themselves that is relevant to determining whether they can sit as jurors in the case, and we should explain why we are asking them for information, how that information will be used, and who will have access to it.
- (3) We should allow so-called alternate jurors to deliberate in civil cases.
- (4) Courts and trial lawyers should be open to using flexible procedures in long trials to enhance jury comprehension, including:
 - (a) allowing interim commentary or argument;

41. *Id.* at 63–64.

42. *Id.* at 25–26.

43. ABA, *supra* n. 3, at Principle 2(D).

44. Timothy J. Malloy & Consuelo G. Erwin, *A Modified Trial Schedule: A Win-Win Situation* 2 (2003) (available at <http://www.mhmlaw.com/article/winwin.pdf>).

45. *E.g.* Clark Co., Wash., Courts, *2006 Court Calendar & Commissioners Schedule effective 1-03-2006*, <http://www.co.clark.wa.us/courts/documents/2006COURTSchedule.pdf> (accessed Oct. 27, 2005).

46. ABA, *supra* n. 3, at Principle 7.

- (b) giving juror notebooks;
- (c) sequencing testimony, particularly that of experts;
- (d) giving jurors photos of witnesses in a long trial so they can keep them straight; and
- (e) giving each juror a written copy of the instructions.⁴⁷

Jury innovation is not something that should ever stop. We must challenge ourselves to continue to look at new methods for enhancing juror comprehension and improving juror comfort and convenience. One overarching and very serious problem with which the justice system must come to grips is the fact that civil jury trials take much too long. How many of you have ever been involved in a trial which, in retrospect, you think was too short? We ration judicial resources all the time. Every appellate court I know of tells the lawyer how much time the lawyer has to argue the case. Trial courts should also be setting reasonable time limits and requiring the parties to abide by them.⁴⁸

There are also fascinating new issues on the horizon for jury trials:

- Should jurors who wish to do so be allowed to take notes on a laptop?
- When the parties use electronic exhibits, should jurors in the jury room have access to them electronically as well?
- Should jurors, like everyone else in the trial, have access to the electronic, searchable trial transcript?
- Can *Batson v. Kentucky*⁴⁹ and its progeny stop discriminatory peremptory challenges, or was Justice Thurgood Marshall right when he said the only way to end discrimination is to abolish peremptories?⁵⁰

47. *Id.* at Principle 13(B), (G).

48. *Id.* at Principle 12.

49. 476 U.S. 79 (1986).

50. *Id.* at 102–103 (Marshall, J., concurring).

- Finally, an enormous issue for this country in the decades ahead is what to do about jury service for our non-English speaking citizens. New Mexico provides interpreters for its non-English speaking jurors.⁵¹ Is that an experiment that should be replicated in other jurisdictions?

These and other issues compel us to continue to examine how we can improve that hallmark of our democracy, the jury system. As lawyers and judges, it is our unique responsibility to protect and defend the American jury, and that compels us to take off the blinders of tradition and see things afresh. I leave you with a quote from Sir Patrick Devlin. It is in the context of a criminal case, but I believe its message speaks of all juries:

[N]o tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that 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.⁵²

51. Tom Munsterman, *Multi-Lingual Juries* (July 2000) (available at http://www.ncsconline.org/WC/Publications/KIS_JurMan_Trends99-00_Pub.pdf).

52. Sir Patrick Devlin, *Trial by Jury* 164 (Rev. ed., Steven & Sons Ltd. 1971).