

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

HOSPITALITY WELL DONE!, INC., et al. :
 :
 Plaintiffs, :
 :
 v. : Case No. 2:03-cv-84
 :
 LIFESTYLE VENTURES, LLC and :
 ANDREW J. REVELLA, :
 :
 Defendants. :

JURY CHARGE

Members of the Jury:

The plaintiff in this case is Hospitality Well Done!, Inc., et al. ("HWD") and the defendants are Andrew J. Revella and Lifestyle Ventures, LLC ("Lifestyle").

HWD claims that Lifestyle breached a contract; breached an implied covenant of good faith and fair dealing; made intentional misrepresentations; tortiously interfered with the contractual relations between HWD and Amresco; and tortiously interfered with HWD's advantageous business relations.

Lifestyle denies these allegations.

ROLE OF THE COURT, THE JURY AND COUNSEL

You have listened carefully to the testimony presented to you. Now you must pass upon and decide the factual issues of

this case. You are the sole and exclusive judges of the facts. You pass upon the weight of the evidence, you determine the credibility of the witnesses, you resolve such conflicts as there may be in the evidence, and you draw such inferences as may be warranted by the facts as you find them. I shall shortly define the word "evidence" and instruct you on how to assess it, including how to judge the credibility of the witnesses.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. You are not to be concerned with the wisdom of any rule of law stated by the court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty as judges of the facts to base a verdict upon anything but the evidence in the case.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts. That is your function.

You are to discharge your duty as jurors in an attitude of complete fairness and impartiality. You should appraise the evidence deliberately and without the slightest trace of sympathy, bias or prejudice for or against any party. All parties expect that you will carefully consider all of the evidence, follow the law as it is now being given to you and

reach a just verdict regardless of the consequences.

EVIDENCE

You have seen and heard the evidence produced in this trial and it is the sole province of the jury to determine the facts of this case. The evidence consists of the sworn testimony of the witnesses, any exhibits admitted into evidence, and all the facts admitted or stipulated. I would now like to call to your attention certain guidelines by which you are to evaluate the evidence.

There are two types of evidence which you may properly use in reaching your verdict. One type of evidence is direct evidence. Direct evidence is when a witness testifies about something she or he knows by virtue of their own senses -- something she or he has seen, felt, touched, or heard. Direct evidence may also be in the form of an exhibit where the fact to be proved is the exhibit's existence or condition.

Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts. You infer on the basis of reason and experience and common sense from one established fact the existence or non-existence of some other fact.

Circumstantial evidence is of no less value than direct evidence for it is a general rule that the law makes no distinction between direct evidence and circumstantial evidence but requires

that your verdict must be based on all the evidence presented.

CHARTS AND SUMMARIES IN EVIDENCE

Certain charts and summaries have been received into evidence to illustrate information brought out in the trial. Charts and summaries are only as good as the underlying evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.

CHARTS AND SUMMARIES NOT IN EVIDENCE

Certain charts and summaries were shown to you that were not admitted into evidence. These charts and summaries were shown to you in order to make the other evidence more meaningful and to aid you in considering the evidence. They are no better than the testimony or the documents upon which they are based, and are not themselves independent evidence. Therefore, you are to give no greater consideration to these schedules or summaries than you would give to the evidence upon which they are based.

It is for you to decide whether the charts, schedules or summaries correctly present the information contained in the testimony and in the exhibits on which they were based. You are entitled to consider the charts, schedules and summaries if you can find that they are of assistance to you in analyzing the evidence and understanding the evidence.

CREDIBILITY OF WITNESSES

You as jurors are the sole judges of the credibility of the witnesses and the weight of their testimony. You do not have to accept all the evidence presented in this case as true or accurate. Instead, it is your job to determine the credibility or believability of each witness. You do not have to give the same weight to the testimony of each witness since you may accept or reject the testimony of any witness in whole or in part. In weighing the testimony of the witnesses you have heard, you should consider their interest, if any, in the outcome of the case; their manner of testifying; their candor; their bias, if any; their resentment or anger, if any; the extent to which other evidence in the case supports or contradicts their testimony; and the reasonableness of their testimony. You may believe as much or as little of the testimony of each witness as you think proper.

The weight of the evidence is not determined by the number of witnesses testifying. You may find the testimony of a small number of witnesses or a single witness about a fact more credible than the different testimony of a larger number of witnesses. The fact that one party called more witnesses and introduced more evidence than the other does not mean that you should necessarily find the facts in favor of the side offering

the most witnesses. Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons may well hear or see things differently, or may have a different point of view regarding various occurrences. Innocent misrecollection or failure of recollection is not an uncommon experience. It is for you to weigh the effect of any discrepancies in testimony, considering whether they pertain to matters of importance, or unimportant details, and whether a discrepancy results from innocent error or intentional falsehood. You should attempt to resolve inconsistencies if you can, but you also are free to believe or disbelieve any part of the testimony of any witness as you see fit.

EXPERT WITNESSES

In this case, I have permitted certain witnesses to express their opinions about matters that are in issue. A witness may be permitted to testify to an opinion on those matters about which he or she has special knowledge, skill, experience and training. Such testimony is presented to you on the theory that someone who is experienced and knowledgeable in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing this opinion testimony, you may consider the

witness' qualifications, his or her opinions, the reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness' testimony. You may give the opinion testimony whatever weight, if any, you find it deserves in light of all the evidence in the case. You should not, however, accept opinion testimony merely because I allowed the witness to testify concerning his or her opinion. Nor should you substitute it for your own reason, judgment and common sense. The determination of the facts in this case rests solely with you.

TESTIMONY AND ARGUMENTS EXCLUDED

I caution you that you should entirely disregard any testimony that has been excluded or stricken from the record. Likewise, the arguments of the attorneys and the questions asked by the attorneys are not evidence in the case. The evidence that you will consider in reaching your verdict consists only of the sworn testimony of witnesses, the stipulations made by the parties and all exhibits admitted into evidence. When the attorneys for the plaintiff and the defendants stipulate or agree as to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

Anything you have seen or heard outside the courtroom is not evidence, and must be entirely disregarded. You are to consider

only the evidence in the case. But in your consideration of the evidence, you are not limited merely to the statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as you feel are justified in light of your experiences.

During the course of the trial, reference was made to the exercise of attorney-client privilege. You should not consider in any way the exercise of, or reference to, attorney client privilege as evidence for or against any party.

BURDEN OF PROOF

This is a civil case and as such HWD has the burden of proving every element of its claim by a "preponderance of the evidence." The only exception is with regard to HWD's claim of intentional misrepresentation against Lifestyle and Revella. As explained below, that claim requires a different standard of proof.

The phrase "preponderance of the evidence" means the evidence of greater weight, logic, or persuasive force. It does not mean the greater number of witnesses or documents. It is a matter of quality, not quantity. Preponderance of the evidence is evidence that is more convincing and produces in your minds a

belief that what is sought to be proved is more likely true than not. In other words, to establish a claim or a defense by a "preponderance of the evidence" means proof that the claim or defense is more likely so than not so. In determining whether any fact at issue has been proved by a preponderance of the evidence, you may consider the testimony of all the witnesses, regardless of who called them, and all the exhibits received in evidence, regardless of who may have produced them.

CORPORATION ENTITLED TO TREATMENT AS A PERSON

The fact that corporations are parties in this case must not affect your decision in any way. Corporations and all other persons are equal before the law and must be dealt with as equals in a court. You should consider and decide this case as an action between persons.

HWD'S CLAIMS AGAINST LIFESTYLE AND ANDREW J. REVELLA

BREACH OF CONTRACT (COUNT 1)

HWD alleges that it suffered damages as a result of Lifestyle's breach of the Confidentiality Agreement. In order to prevail on its claim, HWD has the burden of proving the following essential elements by a preponderance of the evidence:

1. that a contract or agreement existed between HWD and

- Lifestyle;
2. the terms of the contract;
 3. the fact that a breach of the contract occurred;
 4. the fact that damages resulted from the breach; and
 5. the amount of those damages.

The parties have stipulated that the Confidentiality Agreement is a contract between the parties. The first element is therefore proven.

Your next task is to determine the terms of the contract. Again, the burden is on HWD to prove each term on which it relies by a preponderance of the evidence.

Once you have determined the terms of the contract, the next step is to determine whether HWD has proved by a preponderance of the evidence that Lifestyle has in fact breached one or more of the terms. A person or corporation breaches a contract when the conduct of that person or corporation does not comply with the terms of the contract as agreed to by the parties.

Next, HWD must prove by a preponderance of the evidence that it has suffered damages as a proximate result of Lifestyle's breach. Injuries or damages are proximately caused by the act of another whenever it appears by a preponderance of the evidence that the act played a substantial part in bringing about or actually causing the harm. Proximate cause is shown when you can find by a preponderance of the evidence that HWD's damages were

either a direct result or a reasonably probable consequence of Lifestyle's breach of contract.

Lastly, HWD must prove the amount of its damages by a preponderance of the evidence.

If you find that HWD has proved each of these elements by a preponderance of the evidence, then you should find Lifestyle liable for breach of contract, and assess damages in the amount proved. The proper measure of damages is an amount that will fairly and reasonably compensate HWD for its losses and make it whole—in other words, place HWD in the position that it would have occupied had Lifestyle not breached the contract. If, however, you find HWD has failed to prove any one of these essential elements, then you should enter a verdict on behalf of Lifestyle.

BREACH OF IMPLIED COVENANT OF GOOD FAITH & FAIR DEALING (COUNT 2)

HWD alleges that Lifestyle breached the implied covenant of good faith and fair dealing in the Confidentiality Agreement when Lifestyle made a non-bona fide bid to acquire HWD's restaurants.

Under Vermont law, an implied covenant of good faith and fair dealing exists in every contract. In other words, an underlying principle implied in every contract is that each party promises not to do anything to undermine or destroy the rights of the other party to receive the benefits of the agreement. The

implied covenant of good faith and fair dealing exists to ensure that parties to a contract act with faithfulness to the purpose of the contract and act consistently with the justified expectations of the other party. The implied covenant protects against a variety of types of conduct that could be characterized as involving "bad faith" because they violate community standards of decency, fairness, or reasonableness. Whether a party has acted in "good faith" or "bad faith" is a question for you to decide.

If HWD proves by a preponderance of the evidence that Lifestyle breached the implied covenant, then HWD must prove by a preponderance of the evidence that it has suffered damages as a proximate result of Lifestyle's breach.

Lastly, HWD must prove the amount of its damages by a preponderance of the evidence.

If you find that HWD has proved each of these elements by a preponderance of the evidence, then you may find Lifestyle liable for breach of implied covenant and assess damages in the amount proved. The proper measure of damages is an amount that will fairly and reasonably compensate HWD for its losses and make it whole—in other words, place HWD in the position that it would have occupied had Lifestyle not breached the contract. If you find that HWD has not proved breach by a preponderance of the evidence, then you should enter a judgment on behalf of

Lifestyle.

INTENTIONAL MISREPRESENTATION (COUNT 4)

HWD alleges that it suffered damage as a result of intentional misrepresentations by Lifestyle, or by Revella acting on behalf of Lifestyle.

As I mentioned earlier, a claim of intentional misrepresentation carries with it a different standard of proof. To prevail on its claim of intentional misrepresentation, HWD must prove the elements set forth below by "clear and convincing evidence" not by a "preponderance of the evidence."

"Clear and convincing evidence" is a more exacting standard than proof by a "preponderance of the evidence," where you need believe only that a party's claim is more likely true than not true. On the other hand, "clear and convincing evidence" is not as high a standard as "beyond a reasonable doubt"--the burden of proof applied in criminal cases.

"Clear and convincing evidence" leaves no substantial doubt in your mind. It is proof that establishes in your mind, not only that the proposition at issue is probable, but also that it is highly probable. It is enough if HWD establishes the elements beyond any "substantial doubt"; it does not have to dispel every "reasonable doubt."

HWD must prove, by clear and convincing evidence, each of

the following elements:

1. that Lifestyle or Revella intentionally misrepresented an existing fact;
2. the fact was material;
3. the misrepresentation was false when made and Lifestyle or Revella knew it was false;
4. the correct information was not available to HWD; and
5. HWD justifiably relied on the misrepresentation and suffered injury as a result.

On the first element, an individual or corporation can misrepresent an existing fact either by making an affirmative misstatement of fact or by remaining silent and failing to disclose facts the individual or corporation had knowledge of and had a duty to disclose.

The second element is materiality. A fact is material when it affects the essence of the transaction or when a reasonable person would attach importance to its existence or non-existence when deciding whether to enter into the transaction.

The third and fourth elements are self-explanatory.

With respect to the fifth element, to find reliance, you must find that HWD actually relied on the misrepresentation when entering into the transaction, and that its reliance was justifiable. In determining whether HWD's reliance was justifiable, you should consider all the circumstances

surrounding the transaction.

If you find that HWD has proven each element of its claim for intentional misrepresentation, then you should enter a verdict for HWD and proceed to award it damages. The proper measure for damages is an amount that will fairly and reasonably compensate it for the losses actually sustained and place HWD in the same position that it would have occupied had the misrepresentation not been made.

INTERFERENCE WITH CONTRACTUAL RELATIONS (COUNT 5)

HWD alleges that Lifestyle tortiously interfered with a contract between HWD and Amresco and induced Amresco to breach or abandon those relations, thereby causing damage to HWD. To prevail on this claim, HWD has the burden of proving by a preponderance of the evidence each of the following essential elements:

1. the existence of a contract between HWD and Amresco;
2. that Lifestyle knew of the contract;
3. that Lifestyle intentionally and improperly interfered with the contract by inducing or causing a breach or termination;
and
4. that the intentional interference proximately caused damage to HWD.

On the first element, HWD must show by a preponderance of

the evidence that it had an existing contract with a third party, in this case Amresco.

In order to establish that it had an existing contract with Amresco, HWD must prove by a preponderance of the evidence both that there was a meeting of the minds between HWD and Amresco and that there was consideration for the agreement. A "meeting of the minds" occurs when two or more parties reach agreement on a particular issue under negotiations between them. Put another way, HWD must prove that both parties to the contract understood what was being negotiated and assented to it. HWD must make this showing for each aspect of the contract under which HWD claims relief.

Consideration, the other prerequisite to a valid contract, is simply another way of saying "value." By this I mean that HWD must show that the parties to the contract each exchanged something of value in return for what they planned to receive. The consideration necessary to support a contract does not have to be money; it can be anything of value to the person receiving it, including personal property, real property, or even a promise not to do something. I also instruct you that the consideration exchanged between the parties need not in your opinion be equal. Your job here is not to weigh whether one side or the other got the better deal, but instead you must determine whether any deal existed. Thus, although the particular form and amount of the

consideration is not important, HWD does have the burden of proving that some consideration was exchanged.

To be enforceable, a contract does not need to be signed or in writing.

The second element is knowledge. HWD must prove by a preponderance of the evidence that Lifestyle had knowledge of the contract with which they allegedly interfered. Moreover, HWD must prove by a preponderance of the evidence that Lifestyle had knowledge of the fact that it interfered with the contract between HWD and Amresco.

Third, you must find by a preponderance of the evidence that Lifestyle acted with intent. Interference with another's contract is intentional if the actor desires to bring it about or if the actor knows that interference was certain or substantially certain to occur as a result of the actor's action.

Finally, HWD must prove by a preponderance of the evidence that it suffered damages as a proximate cause of Lifestyle's intentional conduct.

If you find that HWD has proved each of these elements by a preponderance of the evidence, then you should find Lifestyle liable for tortious interference with contractual relations and assess damages in the amount proved. The proper measure of damages is an amount that will fairly and reasonably compensate HWD for its losses and make it whole—in other words, place HWD in

the position that it would have occupied had Lifestyle not interfered. If, however, you find that HWD has failed to prove any of these essential elements by a preponderance of the evidence, then you should enter a verdict on behalf of Lifestyle.

If and only if HWD establishes each of these elements by a preponderance of the evidence, then the burden shifts to Lifestyle to prove by a preponderance of the evidence that it was justified in interfering with the contract or business relations between HWD and Amresco. In determining whether Lifestyle's conduct in intentionally interfering with the contract was improper, you may give consideration to the following factors:

1. the nature of Lifestyle's conduct;
2. Lifestyle's motive;
3. the interests of HWD with which Lifestyle's conduct interferes;
4. the interest sought to be advanced by Lifestyle;
5. the social interest in protecting the freedom of action of Lifestyle and the contractual interests of HWD;
6. the proximity or remoteness of Lifestyle's conduct to the interference; and
7. the relations between the parties.

If you find that Lifestyle has proved by a preponderance of the evidence that it was justified in interfering with the contract between HWD and Amresco, then you should find in favor

of Lifestyle.

INTERFERENCE WITH BUSINESS RELATIONS (COUNT 6)

HWD also alleges that Lifestyle tortiously interfered with a business relationship or the reasonable expectation of a business relationship between HWD and Amresco and induced Amresco to breach or abandon those relations, thereby causing damage to HWD. To prevail on this claim, HWD has the burden of proving by a preponderance of the evidence each of the following essential elements:

1. the existence of a business relationship or a reasonable expectation of a business relationship between HWD and Amresco;
2. that Lifestyle knew of the business relationship or the reasonable expectation of a business relationship;
3. that Lifestyle intentionally and improperly interfered with the business relationship or the reasonable expectation of a business relationship by inducing or causing a breach or termination; and
4. that the intentional interference proximately caused damage to HWD.

On the first element, HWD must show by a preponderance of the evidence that it had an existing business relationship or reasonable expectation of a business relationship with a third

party, in this case Amresco.

Although HWD is not required to show that it had a definite and enforceable contract with Amresco, I instruct you that a reasonable expectation of a business relationship is entitled to a lesser degree of protection than a definite and enforceable contract.

The second element is knowledge. HWD must prove by a preponderance of the evidence that Lifestyle had knowledge of the business relationship or reasonable expectation of a business relationship with which they allegedly interfered. Moreover, HWD must prove by a preponderance of the evidence that Lifestyle had knowledge of the fact that it interfered with the business relationship or reasonable expectation of a business relationship between HWD and Amresco.

Third, you must find by a preponderance of the evidence that Lifestyle acted with intent. Interference with another's business relationship is intentional if the actor desires to bring it about or if the actor knows that interference was certain or substantially certain to occur as a result of the actor's action.

Finally, HWD must prove by a preponderance of the evidence that it suffered damages as a proximate cause of Lifestyle's intentional conduct.

If you find that HWD has proved each of these elements by a

preponderance of the evidence, then you should find Lifestyle liable for tortious interference with business relations and assess damages in the amount proved. The proper measure of damages is an amount that will fairly and reasonably compensate HWD for its losses and make it whole—in other words, place HWD in the position that it would have occupied had Lifestyle not interfered. If, however, you find that HWD has failed to prove any of these essential elements by a preponderance of the evidence, then you should enter a verdict on behalf of Lifestyle.

If and only if HWD establishes each of these elements by a preponderance of the evidence, then the burden shifts to Lifestyle to prove by a preponderance of the evidence that it was justified in interfering with the business relations between HWD and Amresco. In determining whether Lifestyle's conduct in intentionally interfering with a business relationship or reasonably expected business relationship of HWD was improper, you may give consideration to the following factors:

1. the nature of Lifestyle's conduct;
2. Lifestyle's motive;
3. the interests of HWD with which Lifestyle's conduct interferes;
4. the interest sought to be advanced by Lifestyle;
5. the social interest in protecting the freedom of action of Lifestyle and the interests of HWD;

6. the proximity or remoteness of Lifestyle's conduct to the interference; and
7. the relations between the parties.

If you find that Lifestyle has proved by a preponderance of the evidence that it was justified in interfering with the business relations between HWD and Amresco, then you should find in favor of Lifestyle.

LIFESTYLE'S AFFIRMATIVE DEFENSE: WAIVER

Lifestyle has raised the affirmative defense of waiver to HWD's claims that: Lifestyle breached the Confidentiality Agreement (Count 1); that it intentionally interfered with HWD's contract with Amresco (Count 5); and that it intentionally interfered with HWD's advantageous business relations with Amresco (Count 6). Waiver is the voluntary relinquishment of a known right. Lifestyle must prove this defense by a preponderance of the evidence.

If you find by a preponderance of the evidence that HWD has waived its right to claim that Lifestyle breached the terms of the Confidentiality Agreement by including Mr. Revella on the list of potential buyers to be contacted by Amresco on both versions of the Marketing Agreement, then you should enter a verdict on behalf of Lifestyle.

If you find by a preponderance of the evidence that HWD's

inclusion of Mr. Revella on the list of potential buyers to be contacted by Amresco on both versions of the Marketing Agreement constitutes a waiver of either HWD's claim of interference with a contractual relation or interference with an advantageous business relation, then you should enter a verdict on behalf of Lifestyle.

OTHER PARTIES

You should not consider any claims against Amresco in your deliberations. The matter is reserved for the Court to decide.

MITIGATION OF DAMAGES

HWD has a duty to use reasonable efforts to mitigate its damages. In other words, has a duty to take advantage of any reasonable opportunity that exists under the circumstances to reduce or minimize its loss or damages. If you find by a preponderance of the evidence that HWD failed to seek out or take advantage of a business or employment opportunity that was reasonably available under all the circumstances shown by the evidence, then you should reduce the amount of HWD's damages by the amount that could have been reasonably realized if HWD had taken advantage of such opportunity.

UNANIMOUS VERDICT

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree.

It is your duty as jurors to consult with one another, and to deliberate with a view toward reaching an agreement, if you can do so without violence to your individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges -- the judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

NOTES

You may have taken notes during the trial for use in your deliberations. These notes may be used to assist your recollection of the evidence, but your memory, as jurors, controls. Your notes are not evidence, and should not take precedence over your independent recollections of the evidence.

The notes that you took are strictly confidential. Do not disclose your notes to anyone other than your fellow jurors. Your notes should remain in the jury room and will be collected at the end of the case.

CLOSING INSTRUCTIONS

I have selected _____ to act as your foreperson. The foreperson will preside over your deliberations, and will be your spokesperson here in Court.

A copy of this charge will go with you into the jury room for your use.

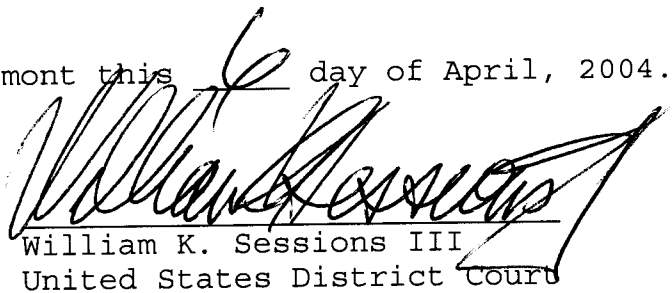
A verdict form has been prepared for your convenience. You will take this form to the jury room. Each of the interrogatories or questions on the verdict form requires the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided opposite each question, and will date and sign the special verdict, when completed.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note through the Courtroom Security Officer signed by your foreperson. No member of the jury should ever attempt to communicate with the Court by

any means other than a signed writing, and the Court will never communicate with any member of the jury on any subject related to the merits of the case other than in writing, or orally here in open Court.

You will note that all other persons are also forbidden to communicate in any way or manner with any member of the jury on any subject related to the merits of the case.

Dated at Burlington, Vermont this 6 day of April, 2004.



William K. Sessions III
United States District Court