

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

SARA ANN CONKLING,	:	
Plaintiff,	:	
	:	
v.	:	No. 2:95-CV-96
	:	
THOMAS GAZDA, M.D.	:	
Defendant.	:	

JURY CHARGE

The Plaintiff in this case is Sara Ann Conkling, represented by Thomas Sherrer. The Defendant is Thomas Gazda, M.D., represented by David Borsykowsky.

Now that you have heard the evidence and the arguments, it becomes my duty to instruct you on the law. It is your duty to accept these instructions of law and apply them to the facts as you determine them.

As I mentioned at the beginning of the trial, Plaintiff has brought her claim under the legal theory of medical malpractice. Defendant denies this claim.

Later I will instruct you on the legal theory. First, I would like to give you some general instructions.

Role of the Court, the Jury and Counsel

You have listened carefully to the testimony that has been presented to you. Now you must pass upon and decide the fact issues of this case. You are the sole and exclusive judge 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" for you and instruct you on how to assess it, including how to appraise the credibility or, to put it another way, the believability 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 to base a verdict upon any other view of the law than that given in the instructions I am about to give you, just as 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 deliberatively and without the slightest trace of sympathy, bias or prejudice for or against any party. Both 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 in the Case

As I have said earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. Statements and arguments of counsel are not evidence in the case. When, however, the attorneys on both sides stipulate or agree as to the existence of a fact, you must accept the stipulation and regard that fact as proved.

The evidence includes any stipulated facts, the sworn testimony of the witnesses and the exhibits admitted in the record. Any evidence as to which an objection was sustained

and any evidence that I ordered stricken from the record must be entirely disregarded.

Certain diagrams have been shown to you in order to help explain the facts which are in evidence in the case. However, such diagrams are not in and of themselves evidence or proof of any facts. If such diagrams do not correctly reflect facts or figures shown by the evidence in the case, you should disregard them.

In other words, such diagrams are used only as a matter of convenience; so if, and to the extent that you find they are not in truth summaries of facts or figures shown by the evidence in the case, you are to disregard them.

As I mentioned before, any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

Also, during the course of the trial I occasionally made

comments to the lawyers, asked questions of a witness, or admonished a witness concerning the manner in which he or she responded to the questions of counsel. Do not assume from anything I have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

While you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

Direct and Circumstantial Evidence

The law recognizes two types of evidence -- direct and circumstantial. Direct evidence is provided when, for example, people testify to what they saw or heard themselves; that is, something which they have knowledge of by virtue of their senses. Circumstantial evidence consists of proof of facts and circumstances from which in terms of common experience, one may

reasonably infer the ultimate fact sought to be established. Such evidence, if believed, is of no less value than direct evidence. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

Burden of Proof

This is a civil case and as such the Plaintiff has the burden of proving every element of her claims by a "preponderance of the evidence." 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. In other words, a preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not. To establish a claim by a "preponderance of the evidence" merely means to prove that the claim is more likely so than not so.

In determining whether any fact in issue has been proved

by a preponderance of the evidence, you may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them.

If after considering all of the testimony you are satisfied that the Plaintiff has carried her burden of proof on each element of her claim, then you must find for the Plaintiff on that claim. If, after such consideration you find the testimony of both parties to be in balance or equally probable, then the Plaintiff has failed to sustain her burden and you must find for the Defendant.

Witness Credibility

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence to the contrary of the testimony given.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness

is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor or manner while on the stand. Consider the witness' ability to observe the matters as to which he or she has testified, and whether he or she impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you should give the testimony of each witness such weight, if any, as you may think

it deserves.

You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or non-existence of any fact. You may find that the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

The test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence; but which witness, and which evidence, appeals to your minds as being most accurate, and otherwise trustworthy.

A witness may be discredited or impeached by contradictory evidence; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

An act or omission is "knowingly" done, if voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Expert Witnesses

You have heard testimony from several experts in this case. An expert is allowed to express his or her opinion on those matters about which he or she has special knowledge and training. Expert testimony is presented to you on the theory that someone who is experienced in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing the expert's testimony, you may consider the expert's qualifications, his or her opinions, his or her 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 expert testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept this witness' testimony merely because he or she is an expert. 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.

It sometimes happens that experts disagree. The way you resolve the conflict between experts is the same way that you decide other fact questions and the same way you decide whether to believe ordinary witnesses. In addition, you should consider the soundness of each expert's opinion, reasons for the opinion and his or her motive, if any, for testifying.

It is now my duty to give you instructions on the legal theory that applies to this case.

A. Medical Malpractice

As I said at the outset, this is a medical malpractice case. The term "medical malpractice" is a legal term which simply means that we are dealing with a claim of professional medical negligence in the care or treatment of a patient. In other words, the claim is that Dr. Gazda failed to exercise the proper degree of care and skill which he owed to his patient,

Sara Ann Conkling.

The law requires the Plaintiff to prove the following three essential elements in order to establish Dr. Gazda's liability:

1. The degree of knowledge or skill possessed or the degree of care ordinarily exercised by a reasonably skillful, careful, and prudent health care professional engaged in a similar practice under the same or similar circumstances whether or not within the state of Vermont. This is also known as the standard of care;
2. That Dr. Gazda either lacked this degree of knowledge or skill or failed to exercise this degree of care. This is known as a deviation from the standard of care; and
3. That as a proximate result of this lack of knowledge or skill or the failure to exercise this degree of care, Ms. Conkling suffered injuries that would not otherwise have been incurred.

Expert witnesses have testified regarding the standard of care to be exercised in this case. You should use this testimony to guide you in your determination of the standard of care to be applied in this case.

When determining the standard of care that Dr. Gazda owed to Ms. Conkling, you should understand that the duty imposed by law on every person providing medical care is to exercise that degree of care which would be expected of a reasonably prudent health care provider under similar circumstances.

In this particular case, Dr. Gazda is a specialist in psychiatry, acting as a mental health professional. Mental health professionals include psychiatrists and psychologists. A physician who holds himself or herself out to be a specialist is bound to bring to the discharge of his or her professional duties that degree of skill, care, and learning ordinarily possessed by specialists of his or her kind at the time. Keep in mind that a specialist is not required to have the knowledge of a specialist in another field.

1. Method of Treatment

In this case, the Plaintiff has alleged two counts of medical malpractice. The first count alleges that Dr. Gazda used an incorrect mode of psychotherapy for Ms. Conkling in the course of treatment.

To hold a physician liable for medical malpractice, it must be shown that the course which he or she pursued was against the course recognized as correct by reasonably prudent practitioners in the profession. A physician is not required to be infallible in his or her diagnosis and treatment, but rather is required to exercise such care, skill, and learning as you find from the evidence is required to meet the standard

of an ordinary careful, skillful, and prudent physician in the specialty. The conduct of Dr. Gazda here in connection with his diagnosis and treatment of Ms. Conkling is to be judged by what he saw and knew or ought to have seen and known at the time of his care of Ms. Conkling. Dr. Gazda is not to be judged by what may have developed or come to light subsequent to his treatment of Ms. Conkling.

If there were alternate courses of treatment available to Dr. Gazda, any one of which is medically acceptable and proper under the circumstances that existed at the time in question, there is no negligence in using one rather than the other. The duty of care does not require a physician to guarantee a good result. Thus, if you find that under the circumstances of this case Dr. Gazda met the standard of his profession, then he was not negligent regardless of the result of his treatment of Ms. Conkling.

If you conclude that Dr. Gazda did in fact deviate from the applicable standard of care with regard to the mode of treatment used with Ms. Conkling, you should then determine whether Ms. Conkling's damages were a proximate result of Dr. Gazda's negligence.

2. Breach of Medical Confidence

Plaintiff's second count of medical malpractice alleges that Dr. Gazda was negligent in disclosing confidential information regarding Ms. Conkling to Barbara Mayhew-Belatski at the Howard Crisis Service on September 4, 1992. The principles of medical malpractice that I have just outlined apply with equal force to this claim of negligence as they do to the claim regarding the mode of treatment just discussed.

If you conclude that Dr. Gazda did in fact deviate from the applicable standard of care in disclosing confidential information, you should then determine whether Ms. Conkling's damages were a proximate result of Dr. Gazda's negligence.

Proximate Cause

A breach is of no legal significance unless it is the proximate cause of damage. A proximate cause of damage is defined as a cause which, unbroken by any intervening cause, produces the damage, and without which the damage would not have occurred.

This does not mean that the law recognizes only one proximate cause of injury or damage, consisting of only one factor or theory, or the conduct of only one person. On the

contrary, many factors or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damage; in such a case, each may be a proximate cause. If any one of them played a substantial part in bringing about or causing the injury and was attributable to Dr. Gazda, then you should find Dr. Gazda liable and calculate the amount of damages.

Aggravation of Pre-Existing Condition

In an action for damages for personal injuries caused by negligence, the injured person, such as the Plaintiff, Sara Ann Conkling, is entitled to recover full compensation for all damages proximately resulting from the Defendant's act or acts, even though her injuries may have been aggravated by reason of her pre-existing mental condition, or became more serious than they would have had the Plaintiff been in robust mental health. Dr. Gazda cannot invoke the previous condition of the Plaintiff for the purpose of avoiding liability or reducing the damages for which he may be liable. The right of a person suffering from a disease, who is injured by reason of the negligence of another, to recover for all damages proximately resulting from a negligent act includes the right to recover for any

aggravation of that pre-existing condition.

When such pre-existing condition is shown, the rule is that the Defendant is subject to liability for harm to the Plaintiff even if the underlying physical or mental condition of the Plaintiff is not known to the Defendant and the Defendant's act or acts make the injury greater than that which a reasonable person in Defendant's position should have foreseen as a probable result of his conduct. Under this rule, which as sometimes been referred to as the "Thin Skull" Doctrine, tortfeasors take their victims as they find them.

So if you find that any underlying condition of Ms. Conkling was made worse by negligent conduct on the part of Dr. Gazda, Ms. Conkling is entitled to receive such sums as will adequately and fully compensate her for the enhancement and aggravation of the pre-existing condition. The Defendant is not responsible for those injuries which would have resulted purely from the original condition. However, Defendant must pay in damages for such part of the condition as his negligence cause, and if there can be no apportionment, or if it can or cannot be said with certainty that the condition would have existed apart from the injury, then the Defendant is responsible for all of the damages sustained. In other words,

where the Plaintiff's injuries and damages cannot be apportioned or divided from any injuries related solely to the underlying, pre-existing condition, then the Defendant is deemed to be responsible for all such injuries and damages that you find the Plaintiff to have suffered.

Comparative Negligence

As part of its defense to the suit brought by Ms. Conkling, Dr. Gazda claims the defense of comparative negligence. Dr. Gazda claims that Ms. Conkling was herself negligent because she failed to give complete information to his secretary on September 2, 1992; failed to call him at home that evening, or to be available either at 9:00 or 11:00 the next morning; and failed to make adequate efforts to honor their agreement that she would contact him if she had thoughts of suicide.

You need only consider Ms. Conkling's comparative negligence, if any, if you find that Dr. Gazda was negligent. If you do find that Dr. Gazda was negligent, and that such negligence was a proximate cause of injury to Ms. Conkling, then you must consider whether Ms. Conkling was also negligent in a manner which was a proximate cause of injury to her.

Just as Plaintiff bore the burden of proof in showing that Dr. Gazda was negligent, so here Dr. Gazda bears the burden of proving by a preponderance of the evidence that Ms. Conkling was also negligent. The elements of Dr. Gazda's claim are essentially the same as for Ms. Conkling's claim of negligence. Thus, in order for you to conclude that Ms. Conkling was comparatively negligent, Dr. Gazda must prove each of the following elements, by a preponderance of the evidence:

1. That Ms. Conkling had a duty to act with reasonable and ordinary care, defined as that care which a reasonable, prudent person would exercise under substantially similar circumstances in order to avoid injury to themselves;
2. That Ms. Conkling failed to act with such reasonable and ordinary care; and
3. That Ms. Conkling's failure to use ordinary care was a proximate cause of the injuries she suffered.

Should you conclude that both Dr. Gazda and Ms. Conkling were negligent, and that the negligence of both contributed to the injuries suffered by Ms. Conkling, then it will be your job to ascribe a percentage of responsibility to each of the parties. That is, you must determine what percentage of the negligence is attributable to Dr. Gazda, and what percentage is attributable to Ms. Conkling. Those percentages must add up to

100 percent.

If you find both Dr. Gazda and Ms. Conkling negligent, and you find that Ms. Conkling's negligence is 50% or less, then she is entitled to recover from Dr. Gazda. Once you have made this determination, then you must determine the amount of damages, if any, incurred by Ms. Conkling. To calculate the damages, multiply the total amount of Ms. Conkling's damages by the percentage of Dr. Gazda's negligence. The result is the amount of damages you should award Ms. Conkling.

If Ms. Conkling's negligence is more than 50%, then Ms. Conkling is not entitled to recover from Dr. Gazda.

Damages

As explained above, the Plaintiff has made claims against the Defendant for medical malpractice and breach of medical confidence. If you decide for the Defendant on the question of liability, you will have no occasion to consider the question of damages.

The fact that I am about to instruct you as to the proper measure of damages should not be considered as intimating any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given

for your guidance, in the event you find in favor of the Plaintiff by a preponderance of the evidence in the case in accordance with the other instructions.

In reaching your verdict in this case, you must carefully consider the evidence presented against the Defendant. You may assess damages against the Defendant only if you find the Defendant liable under at least one of the theories I have outlined above.

Recall that if you find Ms. Conkling to have been comparatively negligent, then you will have to apply to your determination of the damages in this case the principles of comparative negligence I discussed a moment ago.

1. Compensatory Damages

In an ordinary case such as the one before you, damages are awarded on a theory of compensation. An award of compensatory damages is intended to put the Plaintiff in the same position she was in prior to the incident in question. Thus, Ms. Conkling is entitled to recover for all damages that are a natural consequence of such negligence that you find, including such items as past and future medical expenses, past and future pain and suffering, and past and future loss of

earnings.

As with the other elements of her claim, the burden is on Ms. Conkling to prove by a preponderance of the evidence the amount of damages which she has suffered. Where the amount of Plaintiff's damages are capable of being calculated in dollars and cents, such as medical expenses and lost earnings, Ms. Conkling must demonstrate the amount of her losses in dollars and cents. However, where Plaintiff's claimed damages may not be reduced to dollars and cents, such as with assertions of pain and suffering, Ms. Conkling need not demonstrate the exact dollar and cent value of her injury. Nonetheless, Plaintiff is still required to submit to the jury evidence of such a quality that the jury is capable of reasonably estimating the extent of Plaintiff's loss. Under no circumstances may you award damages that are speculative or conjectural. You are further instructed that any natural feelings of sympathy for Ms. Conkling must be set aside during your deliberations. Such feelings are not properly a factor for your consideration in this matter.

2. Medical Expenses

In this case, the Plaintiff has made a claim that she

incurred expenses for medical care as a result of the claimed negligence or breach of confidence of Dr. Gazda. If you find by a preponderance of the evidence that Dr. Gazda is liable for such damages, then you should award Plaintiff the reasonable and necessary medical expenses that she incurred. These include all doctor's bills, hospital bills, pharmacy bills, and other bills of a medical nature which are a proximate cause of Dr. Gazda's acts.

3. Lost Earnings

Ms. Conkling is entitled to be compensated for all lost earnings to date that you find were caused by the injuries resulting from Dr. Gazda's negligence or breach of confidence. As with the other elements of her case, Ms. Conkling must prove such lost wages by a preponderance of the evidence. Such damages are limited to what you find to be reasonably probable from Plaintiff's injuries. You may take into account Ms. Conkling's age, employment history, past earnings record, business and professional experience, skill or ability in her work or professional, and all the contingencies to which her occupation would be liable.

You should keep in mind that a certain injury to one

person may have entirely different consequences than to another. The evidence in each individual case must justify the award.

4. Mental Anguish

Plaintiff in this case alleges that she suffered mental distress as a result of Dr. Gazda's conduct. If Ms. Conkling has proved such injury by a preponderance of the evidence, then I instruct you that you may make an award of damages to compensate Plaintiff for this element.

The measure of damages awarded to Ms. Conkling for emotional distress should be equivalent to reasonable compensation for any pain, discomfort, fears, anxiety, humiliation and other mental and emotional distress suffered by her which was proximately caused by Dr. Gazda. No definite standard is prescribed by law by which to fix reasonable compensation for emotional distress. Nonetheless, in making an award for emotional distress you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in light of the evidence.

5. Damages in Lieu of Interest

If you award damages to the Plaintiff in compensation for the injuries she sustained, you may also award damages to her in lieu of interest for the money she otherwise would have been able to earn if the money had been timely paid to her. The amount awarded in lieu of interest shall not exceed twelve percent (12%) per year, the legal rate of interest in Vermont, and this amount should be calculated from April 5, 1995 through the date of your award.

6. Collateral Source Rule

You are not to concern yourself with any benefit or payments which you think the Plaintiff has received as a result of her injuries. It is not of any consequence or relevance to the case before you whether her medical bills have been paid or by whom, or whether she has recovered from any other source. Furthermore, you may not consider whether any damages you may award will go to the Plaintiff to reimburse others.

7. Mitigation of Damages

The law imposes a general duty to mitigate or minimize damages. What this means is that a person who has been injured

has a duty to take protective or preventive measures in an effort to reduce the harm or prevent its further increase.

The burden is on Dr. Gazda to prove Plaintiff's failure to mitigate by a preponderance of the evidence. If you find damages for Ms. Conkling, but you also find that she could reasonably have avoided some of the damages she claims to have suffered, then you should reduce your award, if any, by an amount equal to those damages that Ms. Conkling could have avoided.

8. No Exemplary Damages

In fixing the amount of your award, if any, you may not include in, or add to, an award, any sum for the purpose of punishing the Defendant, or to serve as an example or warning to others. Nor may you include in any award any sum for court costs or attorney's fees.

9. Avoidance of Duplication of Damages

You have been instructed on a number of items or elements of damages. You may award damages to Ms. Conkling for each item or element of damages which she has established, but you should be careful not to award damages for one item or element

which duplicates an award for another item or element. Your award in all respects must be fair and reasonable in light of all the evidence that you find worthy of belief and reasonable inferences to be drawn from it.

10. Taxation of Judgment

If you should conclude that the plaintiff is entitled to an award of damages, you shall not consider the possible tax consequences of your verdict.

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. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to 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 have been permitted to take notes during the trial for use in your deliberations. You may take these notes with you when you retire to deliberate. They 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 form of special verdict has been prepared for your convenience. You will take this form to the jury room.

Each of the interrogatories or questions on the special 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.

Communications with the Court

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 touching the merits of the case otherwise 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 touching the merits of the case.

Bear in mind also that you are never to reveal to any person-- not even to the Court --how the jury stands, numerically or otherwise, on the questions before you, until after you have reached a unanimous verdict.