

When the Jury Speaks *Francis J. Carney*

It really, really sucks (I know of no more appropriate word) than being on the losing side when the jury announces its verdict. Years of work, endless hours of hand-holding clients, the unfulfilled expectations... ugh. You will want to scream, cry, pull out your hair, and rend your garments, but of course you will hold it together, taking it all in with the serenity of the Buddha. And then do this:

1. **Read the special verdict carefully.** Make sure that it makes sense and is not erroneous ("informal or incomplete") on its face. As I have many times emphasized in this seminar, Rule 47(s) requires you to speak up and move to send the jury back to correct a special verdict that is incorrect on its face. Failure to do so will waive the point on appeal. *Materials V at 86; Materials IV at 32.* This means looking for inconsistent answers to the verdict interrogatories, objecting to a failure to award general damages, spotting an award of special damages not supported by the evidence, among others. Although no longer damned by Rule 47(s) if you fail to spot it immediately, watch out for the jury making deduction for comparative fault from the gross damage award. (This is the so-called "net verdict." *Materials V at 103.*)

2. **Poll the jury.** If you are on the losing side, *always* ask that the individual jurors be "polled." This involves the judge asking each of them "is this your verdict?," and is required under Rule 47(r) if counsel requests it. Occasionally, you may be surprised to learn that there are not the required six of eight in agreement with the verdict. At the very least, you will learn which— if any— of the jurors were in your camp.

3. **Make no oral motions.** You should **not** make any oral post-trial motions, such as a motion for new trial, in the courtroom after the jury has returned its verdict. No such motions

(other than under Rule 47 to correct an informal or incomplete verdict) are appropriate until a written *judgment* is entered by the court, and that may take days or weeks. *Materials IV at 35.*

The judge will ask you, "Is there anything further, counsel?" to which your reply will simply be, "No, thank you, your honor."

4. **Be Big.** When the jury has been discharged, have the courage and dignity to thank your opponent for a job well done. It is bush league— yet altogether too common— for the losing attorney to snarl something unpleasant to her opponent and stomp out of the courtroom. This does you no credit.

5. **Speak with the jurors.** Nothing in the law or the rules requires a juror to speak with you after trial, but they certainly may do so if they wish. You should ask the trial judge to give an instruction along these lines, just before discharging the jury:

Members of the jury, I again want to thank you for your service. The parties and their counsel also thank you for your hard work. Now that the trial is completed, my instructions to you about not speaking with anyone about this case no longer apply.

You are now free to speak with anyone about the trial, but you are not obligated to do so. Sometimes the attorneys or their representatives wish to speak with jurors after trial in order for them to understand how the verdict was reached, and also to help them in preparation for future trials. However, you are under no obligation to speak with the attorneys or anyone else if you do not wish to do so.

There are three reasons to speak with the jurors. First, it can help you to improve. Second, they can tell you what went right or wrong. Third, it can reveal grounds for a motion for new trial and an appeal.

As to the first and second reasons. I am somewhat skeptical of getting honest answers out of jurors as to my performance in court if I am the one asking. Not because people are dishonest, but because most people tend to want to please, do not want to hurt your feelings unnecessarily, and will often tell you what they think you want to hear. For this reason, I rarely interview jurors

myself, but have a knowledgeable paralegal do it. I found that this leads to more honest (if painful) appraisals.

As to the third reason, finding possible grounds for a post-trial motion. My opinion is that you have a duty to your clients to at least attempt some investigation if the trial went badly. There are many reported cases where grounds for new trial were discovered only because counsel interviewed the jurors after an adverse verdict and learned that there had been jury misconduct. Examples are untruthfulness during voir dire, *West v. Holly*, 103 P.3d 708 (Utah 2004) (counsel learned that juror had failed to disclose prior lawsuits and an anti-plaintiff bias during voir dire); independent research by jurors during the trial, *Carter v. Galetka*, 44 P.3d 626 (Utah 2001)(juror consulted dictionary on key definition during trial); juror conversations with others during the trial; quotient verdicts, *Day v. Panos*, 676 P.2d 403 (Utah 1984); unauthorized site views , *Redevelopment Agency of Salt Lake City v. Tanner*, 740 P.2d 1296 (Utah 1987); or making an incorrect deduction for comparative negligence, *Bishop v GenTec*, 48 P.3d 218 (Utah 2002). Had the jurors not been interviewed post-trial in these cases, none of these grounds would have been discovered.

6. Judgment Upon Verdict

Once the verdict is returned, the winner has the task of "forthwith" preparing a "Judgment Upon Jury Verdict" (a form is in the materials) in accordance with Rule 58A(a):

Rule 58A. Entry.

(a) Judgment upon the verdict of a jury. Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be forthwith signed by the clerk and filed. If there is a special verdict or a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49, the court shall direct the appropriate judgment which shall be forthwith signed by the clerk and filed.

(b) Judgment in other cases. Except as provided in Subdivision (a) hereof and Subdivision (b)(1) of Rule 55, all judgments shall be signed by the judge and filed with the clerk.

(c) When judgment entered; notation in register of actions and judgment docket. A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when the same is signed and filed as herein above provided. The clerk shall immediately make a notation of the judgment in the register of actions and the judgment docket.

(d) Notice of signing or entry of judgment. A copy of the signed judgment shall be promptly served by the party preparing it in the manner provided in Rule 5. The time for filing a notice of appeal is not affected by the requirement of this provision.

(e) and (f) [not relevant]

As you can read, the rule indicates that the *clerk* shall sign the judgment on a jury verdict, something that I have never seen. In my experience, the usual practice is that winning counsel prepares a proposed form of judgment and submits it to the judge, often getting opposing counsel to approve the form in advance but, if not, haggling it out at a hearing. Under Rule 54(d), recoverable costs are taxed by the clerk (see separate paper on this) *after* the judgment is entered, but in reality this is often agreed or determined in advance of the judgment and is a part of the judgment form itself. Procedures vary among the various judges; simply ask the clerk about your judge's preferences.

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