

1 THE COURT: At this time, Ladies and Gentlemen,
2 it's my responsibility to explain to you the law that
3 applies in this case, and as I previously told you,
4 it's your responsibility to apply the law as I explain
5 it to you and not to apply some other principles that
6 you think you would like to apply.

7 In applying the law as I explained to you, it's
8 important that you consider my explanation of the law
9 in its entirety. In other words, don't pick out one or
10 two of these points and focus on them to the exclusion
11 of everything else.

12 In order to fairly and accurately apply the law,
13 you've got to consider my entire explanation to you in
14 context.

15 Now, as you know, this is a suit brought by
16 Denise Crowe against Dr. Robert Marchand, and since
17 Ms. Crowe is the one who brought the suit, she's
18 sometimes referred to as the Plaintiff, so if I use the
19 term Plaintiff, I'm referring to Ms. Crowe.

20 And since Dr. Marchand is the one against whom
21 suit has been brought, he's the Defendant. So if I use
22 the term Defendant, I'm talking about Dr. Marchand.

23 Now, as you know, Ms. Crowe claims in this case
24 that Dr. Marchand was negligent in treating her because
25 he failed to properly diagnose and/or treat an injury

1 to her right wrist and hand.

2 More specifically, Ms. Crowe claims that
3 Dr. Marchand was negligent in not promptly performing
4 surgery to repair a torn ligament between the scaphoid
5 and lunate bones of her hand.

6 And Ms. Crowe is seeking to recover damages for
7 pain and suffering and for a permanent loss of function
8 in her right hand and wrist that she alleges were
9 caused by negligence on the part of Dr. Marchand.

10 And Dr. Marchand, as you know, denies that he
11 was negligent in any way, and he also disputes the
12 nature and extent of the damages being claimed by
13 Ms. Crowe.

14 Now, since Ms. Crowe is the one who is making
15 the claim, the law imposes on her the responsibility or
16 the burden of proving what she claims. It's not up to
17 Dr. Marchand to come in here and prove that he was not
18 negligent. It's up to Ms. Crowe to prove that he was
19 negligent and also to prove the damages that she
20 sustained as a result of the alleged negligence.

21 And Ms. Crowe has to prove these things by
22 what's called a fair preponderance of the evidence.
23 And I'll get to that a little bit later. I'll explain
24 to you exactly what it means to prove something by a
25 fair preponderance of the evidence.

1 But before I do that, I want to focus on the
2 things that Ms. Crowe has to prove.

3 Now, this is what's called a malpractice case.
4 A physician who professes to possess a particular skill
5 has a duty to exercise the same degree of skill in
6 treating a patient that ordinarily would be exercised
7 by other physicians possessing that skill.

8 Claims alleging that a doctor was negligent in
9 failing to exercise that degree of skill in treating a
10 patient are called malpractice claims.

11 And in order to prevail on her malpractice
12 claim, Ms. Crowe has to prove two things, or what the
13 law refers to as elements, she has to prove two
14 elements: First, she has to prove that Dr. Marchand
15 was negligent, or to put it another way, that
16 Dr. Marchand breached the duty of care that he owed to
17 Ms. Crowe.

18 The second thing that Ms. Crowe has to prove is
19 that Dr. Marchand's negligence was a proximate cause of
20 the injury or loss that Ms. Crowe is claiming.

21 And again, a little later on I'll explain to you
22 what it means-- what the term proximate cause means.

23 Now, in determining whether Dr. Marchand
24 fulfilled his duty, you are not permitted to set an
25 arbitrary standard of care on your own. Neither you

1 nor I have any expertise in the field of medicine or
2 orthopedic surgery, so we're not qualified to determine
3 what the standard of care that would be exercised by a
4 reasonably competent physician in the field would be.

5 The standard is set by the learning, skill and
6 care ordinarily possessed and practiced by others in
7 the same field at the time in question.

8 The test to be applied in determining whether
9 Dr. Marchand was negligent in treating Ms. Crowe is
10 whether he exercised the same degree of diligence and
11 skill that would have been exercised under the same or
12 similar circumstances by a reasonably competent
13 orthopedic surgeon who treats hand and wrist injuries,
14 to put it another way, the test of whether Dr. Marchand
15 performed in accordance with the established standard
16 of care expected of a reasonably competent orthopedic
17 surgeon who treats hand and wrist injuries.

18 Now, as I said, since we have little knowledge
19 regarding the practice of orthopedics, the standard has
20 to be determined from the testimony of experts, or more
21 specifically, in this case, the testimony of physicians
22 who have such knowledge and are qualified to tell us
23 what the standard of care is, what the standard is that
24 would be adhered to by a reasonably competent
25 orthopedic surgeon who treats hand and wrist injuries.

1 And expert testimony is required not only to
2 show the requisite standard of care to be followed in
3 the diagnosis and treatment of such injuries but also
4 to demonstrate that the Defendant in this case,
5 Dr. Marchand, deviated from that standard of care and
6 that the deviation caused the injury or damages that
7 are being claimed by Ms. Crowe.

8 If Dr. Marchand did not exercise the degree of
9 diligence and skill required by the applicable standard
10 of care, then he would be negligent.

11 On the other hand, if he did comply with or
12 adhere to the applicable standard of care, then he
13 would not be negligent even though the result may not
14 have been a good result.

15 Compliance with the standard of care does not
16 necessarily require that a doctor take only one
17 specific action in a particular case. It leaves room
18 for the exercise of some discretion on the part of the
19 doctor or some judgment as to which of several possible
20 alternative and acceptable courses of conduct might be
21 appropriate.

22 What is required, as I said, is that the action
23 taken must be something that a reasonably competent
24 doctor in the field might have done under the same or
25 similar circumstances.

1 In other words, as long as a doctor exercises
2 the applicable degree of care, he's not negligent for
3 choosing between differing but accepted methods of
4 treatment.

5 Furthermore, in determining whether the
6 physician was negligent, his judgment must be
7 considered in light of all of the facts and
8 circumstances that confronted him at the time of the
9 treatment.

10 A physician should not be judged liable on the
11 basis of facts that he could not have known at the
12 time. The test is whether the treatment given was
13 consistent with the treatment that a reasonably
14 competent, in this case, orthopedic surgeon would have
15 given at the time under the conditions as they then
16 existed.

17 The test isn't what hindsight may reveal what
18 could have been done or what should have been done in
19 light of subsequent events. The test is what was done
20 at the time that the treatment was rendered and under
21 the circumstances as they then existed.

22 And as I indicated, the mere fact that an injury
23 occurs or a good result is not achieved does not
24 necessarily establish that a doctor was negligent.

25 A doctor isn't expected to guarantee a good

1 result or a cure. What the doctor is expected to do is
2 to exercise the same degree of diligence and care that
3 is generally exercised by other physicians in the
4 field.

5 I'm going to turn to the question of damages.
6 I've tried to explain to you what Ms. Crowe has to show
7 in order to establish that Dr. Marchand was negligent,
8 or to put it another way, that he's liable for any
9 injuries or losses that she may have sustained, and
10 that brings us then to the question of damages.

11 And I want to make it clear that, in discussing
12 damages, I am not meaning to suggest in any way that
13 you should or should not find Dr. Marchand negligent.
14 That's up to you. I'm simply discussing damages so
15 that, if you do find that Dr. Marchand is negligent,
16 you will understand the principles that apply in
17 determining how to go about calculating the amount of
18 damages that ought to be awarded to Ms. Crowe.

19 And damages, like any other element of a case,
20 must be proven. And the burden of proving damages,
21 like the burden of proving negligence, is on the
22 Plaintiff or the party who is claiming the damages.

23 And damages, like negligence, have to be proven
24 by a fair preponderance of the evidence. So what is a
25 fair preponderance of the evidence? What Ms. Crowe has

1 to prove is that Dr. Marchand was negligent, and she
2 has to prove what injuries or losses she sustained as a
3 result of the negligence or that were proximately
4 caused by the negligence of Dr. Marchand.

5 Now, Defendant's negligence is said to be the
6 proximate cause of a Plaintiff's injury or damages when
7 the injury or damages are the natural and probable
8 consequence of the negligence.

9 A Defendant's conduct is not considered a
10 proximate cause of a Plaintiff's injuries or damages
11 unless but for the Defendant's negligence the injury or
12 the damages would not have occurred. It is a "but for"
13 test that is part of the proximate cause issue.

14 In order to be regarded as a proximate cause, a
15 Defendant's conduct doesn't have to be the sole cause
16 of the injury or damages, but it must be a substantial
17 contributing factor in producing that injury or those
18 damages.

19 In other words, there has to be a reasonable
20 connection between what the Defendant did and the
21 injury or loss that was sustained by the Plaintiff in
22 order to satisfy the proximate cause requirement.

23 In this case, the damages sought by Ms. Crowe
24 are called compensatory damages. And as the name
25 suggests, compensatory damages are designed to

1 compensate a Plaintiff or reimburse a Plaintiff for an
2 actual loss or injury that the Plaintiff has suffered
3 as a result of a Defendant's improper conduct.

4 And the measure of compensatory damages,
5 generally speaking, is the amount that will fairly and
6 adequately compensate the Plaintiff for those injuries
7 or losses that were proximately and directly caused by
8 the Defendant's negligence.

9 Compensatory damages may be awarded only for
10 actual losses or injuries that are proximately caused
11 by the Defendant's conduct or negligence.

12 In this case, Ms. Crowe seeking compensatory
13 damages for physical injuries that she claims were
14 caused by Dr. Marchand's negligence and for both past
15 and future pain and suffering resulting from those
16 injuries.

17 Now, it's difficult to measure damages in the
18 form of bodily injuries or pain and suffering in terms
19 of money. You can't add up-- it's not like a situation
20 where you may have bills or lost wages, where you can
21 quantify the amount of the bill or the amount of the
22 lost wages and simply add them up.

23 When you're talking about things like pain and
24 suffering or physical injury, you're talking about
25 things that are somewhat subjective.

1 But you can't guess or speculate as to what you
2 think is fair and adequate compensation for this type
3 of injury. You've got to base your determination on
4 what the evidence, in your judgment, shows is fair and
5 adequate compensation for the injuries or losses that
6 have been proven by the evidence.

7 And a determination as to what amount ought to
8 be awarded is entirely up to you. Now, Mr. Tarro made
9 some suggestions to you as to how he suggested you
10 might go about calculating those amounts, and he made
11 it clear that these were only suggestions on his part,
12 and I want to underscore that. You're not obliged to
13 accept the method that he suggested.

14 The determination for damages for subjective
15 things like pain and suffering and personal injury is
16 entirely up to you to make using whatever means you
17 think is appropriate for measuring the compensation
18 that would be fair and adequate for those injuries and
19 that pain and suffering that has been proven by the
20 evidence.

21 In determining what the damages, if any, ought to
22 be awarded to Ms. Crowe for physical injury, you may
23 consider whether she has proved that-- you may and
24 should consider the nature and extent of that injury
25 and the degree to which it may have prevented her from

1 engaging in her usual activities.

2 In addition, you may consider any pain and
3 suffering that the evidence shows Ms. Crowe experienced
4 as a result of that injury.

5 If you find that Dr. Marchand knew or should
6 have known the kind of physical therapy performed by
7 Lori Lind and that the therapy caused Ms. Crowe to
8 experience some additional pain and suffering, then
9 Dr. Marchand would be responsible for any damages
10 attributable to that additional pain and suffering.

11 In determining what damages, if any, should be
12 awarded to Ms. Crowe for physical injury, you may
13 consider whether she has proved that her injury is
14 permanent or that it will have continuing effects in
15 the future.

16 And if so, if you find that she has proven that
17 to your satisfaction, award damages in such amount as
18 is consistent with what the evidence shows will be the
19 nature, extent and duration of those future injuries or
20 that future pain and suffering that she is likely to
21 experience as a result of the injury.

22 If you find that Ms. Crowe's injuries are
23 permanent in nature or that she will experience
24 continued pain and suffering for the rest of her life,
25 then in calculating the amount of damages to be

1 awarded, you may consider how long she is likely to
2 live.

3 And as counsel indicated, there is in evidence a
4 life expectancy table that gives the average life
5 expectancy of individuals at different ages and taken
6 by gender, but you don't have to worry too much about
7 sorting through that table because the lawyers in this
8 case have agreed that, under that table, Ms. Crowe has
9 a life expectancy of 39.2 years. So if you get to that
10 point, you may consider her life expectancy to be 39.2
11 years.

12 I've told you that the-- what it is that
13 Ms. Crowe has to prove both in order to establish that
14 Dr. Marchand is liable and, if so, to establish the
15 amount of damages to which she would be entitled. And
16 I've told you that she must prove those things by a
17 fair preponderance of the evidence.

18 So that brings me to the question of: What is a
19 fair preponderance of the evidence? What is meant by
20 proving something by a fair preponderance of the
21 evidence?

22 Well, basically it means to prove something by
23 the greater weight of the evidence, or to put it
24 another way, to prove that something is more probably
25 true than not true.

1 And as Mr. Tarro started to say when he was
2 stepping into my domain there, if any of you are
3 familiar with criminal cases and the standard of proof
4 in a criminal case, you know that in a criminal case,
5 the prosecutor must prove a Defendant guilty beyond a
6 reasonable doubt. Well, this isn't a criminal case,
7 and the standard of proof is not proof beyond a
8 reasonable doubt but whether it's proof by a fair
9 preponderance of the evidence or greater weight of the
10 evidence.

11 And the best way that I know to illustrate what
12 is meant by proving something by a fair preponderance
13 of the evidence is to ask you to envision in your
14 mind's eye the scales of justice. You've all seen I'm
15 sure the caricature of a blindfolded lady justice
16 holding the scale in front of her that has the two
17 counterbalancing arms. Well, that's kind of the scale
18 I'm talking about.

19 In order to determine whether the Plaintiff has
20 proven a particular element of her case or a particular
21 fact necessary to establish her case by a fair
22 preponderance of the evidence, what you should do is
23 search through all of the evidence that's been
24 presented to you, the testimony of the witnesses,
25 what's in the exhibits, search through all those bits

1 of evidence and take the bits of evidence that tend to
2 support the Plaintiff's position on that particular
3 point, put all those bits of evidence on the
4 Plaintiff's side of the scale and then search through
5 and pick out all the bits of evidence that tend to
6 contradict the Plaintiff's position and tend to support
7 the Defendant on that point, put all those bits of
8 evidence on the Defendant's side of the scale.

9 Then see what's happened to the scale. If,
10 after you go through that process, you determine that
11 the scale tips in favor of the Plaintiff, then the
12 Plaintiff has proven that particular point to you by a
13 fair preponderance of the evidence.

14 Why? Because the evidence in the Plaintiff's
15 favor outweighs the contrary evidence, it outweighs the
16 evidence in the Defendant's favor on that point.

17 On the other hand, if after you go through that
18 process, you conclude that the scale tips in favor of
19 the Defendant or that the scale is evenly balanced, it
20 doesn't tip one way or the other, then the Plaintiff
21 has failed to prove that point to you by a fair
22 preponderance of the evidence because her evidence does
23 not outweigh the contrary evidence.

24 So that's what's meant by proving something by a
25 fair preponderance of the evidence.

1 Now you know what it is that the Plaintiff has
2 to prove and you know the standard of proof that you
3 must apply in making that determination. So the next
4 question is: How do you go about deciding whether the
5 Plaintiff has proven these things by a fair
6 preponderance of the evidence?

7 Well, as I told you at the beginning of the
8 case, you have to base that decision solely on the
9 evidence that has been admitted during the course of
10 this trial, not on anything else, not on something you
11 may have heard or seen outside of the courtroom, not on
12 anything that the lawyers may have said. You've got to
13 base it on the evidence that has been admitted.

14 And that evidence, as you know, comes from two
15 principal sources. Obviously, the testimony of the
16 witnesses and the contents of the exhibits that will go
17 with you into the jury room when you begin your
18 deliberations.

19 And as to the testimony of the witnesses, your
20 principal task is to assess the credibility of the
21 witnesses, or to put it another way, to determine how
22 much weight the testimony of each witness deserves on
23 that scale.

24 And in making that judgment, there are a number
25 of factors that you ought to consider. One is the

1 opportunity or lack of opportunity the witness had to
2 have accurately observed or known the facts about which
3 the witness testified. In other words, was the witness
4 in a good position to have accurately seen, heard or
5 otherwise learned the facts that, that witness related
6 to you?

7 The second factor is the witness' memory. Even
8 though a witness may have been in a good position to
9 have accurately learned the facts that the witness
10 testified about, you have to ask yourself whether the
11 witness seemed to have a clear and accurate memory of
12 what it is that, that witness saw or heard.

13 There's been some time that has elapsed since
14 these events occurred, and you should consider the
15 accuracy of the witness' memory in determining how much
16 weight to give to that witness' testimony.

17 A third factor is the witness' appearance on the
18 stand. One reason that we generally do not allow
19 somebody to tell you what some witness outside of the
20 courtroom which you've never seen may have told them is
21 that it deprives, first of all, the attorneys of the
22 opportunity to cross-examine the witness, and more
23 importantly, it deprives you of the opportunity to
24 observe the witness and size the person up and make
25 some kind of a judgment as to whether you think this is

1 a person whose testimony deserves a great deal of
2 weight on that scale.

3 Another fact to take into account is the
4 probability or improbability of the witness' testimony.
5 Just because a witness takes the stand and testifies
6 with respect to a particular point, you don't have to
7 accept that testimony just because nobody else may have
8 contradicted it. You can ask yourselves whether what
9 the witness had to say is simply incredible or highly
10 improbable, and if so, you can reject that testimony or
11 you can give it less weight than you otherwise might.
12 That's up to you to decide.

13 And another factor you can take into account is
14 whether the witness has a stake in the outcome of the
15 case. Now, of course that doesn't mean that simply
16 because a witness may have some interest in the outcome
17 of the case, that you ought to automatically reject or
18 discount that witness' testimony because, by the very
19 nature of most civil cases, the people who are
20 witnesses are the people who are involved in the case
21 and generally have some stake in the outcome.

22 But it is a factor that you can take into
23 account in determining how much weight to give to a
24 witness' testimony. Does the witness have something to
25 gain or lose here? And particularly, when you weigh

1 that witness' testimony against the testimony of
2 another witness who may be completely disinterested and
3 has no stake in the outcome.

4 Another thing you can consider is whether or not
5 a witness may, on a previous occasion, have made some
6 statements that are materially inconsistent with what
7 the witness testified to at trial. There were a number
8 of occasions during this trial when each lawyer tried
9 to show that a witness had said something different
10 previously in the course of a deposition than what the
11 witness testified to at trial.

12 Now, it's up to you to decide, first of all,
13 whether you think that on some prior occasion the
14 witness did say something that was different from the
15 witness' testimony, and I should say significantly
16 different because obviously you don't express something
17 you say the same way in the same words every time you
18 talk about something, but if you think the witness said
19 something on a previous occasion that was significantly
20 different than what they said at trial, you can
21 consider that in determining how much weight to give to
22 that witness' testimony.

23 Keep in mind, too, that it's not the number of
24 witnesses who testify on any side of a particular point
25 that governs, but rather, it's the quality of the

1 testimony or the weight to be given to that testimony.

2 So you can have only one witness who testifies
3 on one side of an issue and two or three witnesses who
4 testify in opposition. That doesn't necessarily mean
5 that you should find the facts to be as claimed by the
6 two or three witnesses. If you find that the single
7 witness was a very credible witness, and the two or
8 three witnesses for whatever reason are not so
9 credible, you may find the facts to be as related by
10 the single witness.

11 You've heard testimony during this trial from
12 doctors who were allowed to express their opinions
13 about the applicable standard of care and the quality
14 of the treatment rendered by Dr. Marchand. And they
15 were allowed to express their opinions because
16 preliminary questioning indicated that they had
17 sufficient knowledge in the field that their opinions
18 would be of help to you in deciding this case.

19 Ordinarily we don't allow witnesses to express
20 opinions. We limit witnesses to relating the facts and
21 we leave it to you to draw whatever conclusions you
22 think are appropriate.

23 But when dealing with a technical field like
24 medicine and orthopedic surgery, the law considers that
25 it's helpful to you to listen to what individuals

1 trained in the field may have to say in the hope that,
2 that will help you then to reach a decision.

3 Testimony from such individuals is sometimes
4 called expert opinion evidence. You should apply the
5 same test of credibility to the testimony of expert
6 witnesses that you apply to the testimony of any other
7 witness, the same factors that I previously mentioned.

8 And you ought to carefully consider the
9 testimony of an expert witness. But you are not
10 required to accept that testimony, and in fact, in many
11 cases, you can't accept the testimony of every expert
12 because their testimony may be different and they have
13 different opinions, so you're going to have to choose
14 which one you think is the better opinion.

15 And so in making that decision, as I say, you
16 not only apply the same tests that you would apply to
17 the testimony of any other witness, but you also should
18 look at the witness' qualifications, the accuracy of
19 the facts upon which the witness' opinion is based and
20 any other factors that you think are helpful in
21 deciding how much weight to give to that expert's
22 opinion.

23 As I said, you'll have the exhibits with you in
24 the jury room. Keep in mind that, like the testimony
25 of the witnesses, the exhibits are just tools to be

1 used by you in deciding the facts in the case. In
2 other words, you don't have to accept what's in every
3 exhibit at face value. You should evaluate the
4 exhibits in the context of all of the evidence that's
5 been presented and give each exhibit the weight that
6 you think it deserves.

7 Now, I've told you that you can only consider
8 the evidence that's properly before you, but that
9 doesn't mean that, in reaching your decision, that you
10 are strictly limited to the testimony of the witnesses
11 or the contents of the exhibits.

12 You are permitted to draw such conclusions or
13 inferences that may be reasonable from the evidence
14 that's been presented to you and in light of your
15 common sense and experience in everyday life.

16 To put it another way, any fact in the case that
17 must be proven can be proven in one of two ways: It
18 can be proven by direct evidence; that is to say, the
19 testimony of a witness who claims to have directly
20 observed the fact in question or the introduction of
21 the exhibit that maybe the thing itself, or it can be
22 proven by what's called circumstantial evidence.

23 And proving something by circumstantial evidence
24 simply means to prove by the direct evidence two or
25 more facts from which the existence or nonexistence of

1 another fact may be reasonably inferred. And let me
2 give you, again, an example that I hope will illustrate
3 more clearly what I'm struggling to tell you.

4 Suppose on some winter night before you go to
5 bed, you look out of the window and the ground is bare.
6 The following morning, you wake up and you look out the
7 window and there's a foot of snow on the ground. If
8 someone asks you whether it snowed last night, your
9 answer would be yes, I would think.

10 Now, if you had to come into court to prove that
11 it snowed last night, how would you go about doing
12 that? There are probably two ways you could do it.
13 One way would be to find someone who was awake and
14 looking out the window when snowflakes were falling.
15 That person could testify that he or she saw the
16 snowflakes falling.

17 That would be an example of proof by direct
18 evidence, the testimony of an individual who directly
19 observed the fact in question.

20 If you couldn't find someone who was awake when
21 the snowflakes were falling, you could testify as to
22 two facts that you directly observed, first of all,
23 before you went to bed, the ground was bare; second,
24 when you woke up in the morning, there was a foot of
25 snow on the ground.

1 You prove those two facts by direct evidence,
2 and from those two facts, it is certainly reasonable to
3 infer that it snowed last night. That would be an
4 example of proof by circumstantial evidence, proving
5 the existence by direct evidence of two facts from
6 which the existence of the third fact may be reasonably
7 inferred.

8 Now, either method of proof is acceptable, but
9 in order to prove any fact in a case like this, whether
10 it's by direct evidence or circumstantial evidence, the
11 proof must be by a fair preponderance of the evidence.

12 And a word of caution I should add about proof
13 by circumstantial evidence is that there's a big
14 difference between proof by circumstantial evidence,
15 which is permissible, and guessing or speculating,
16 which is not permissible.

17 And the difference is, first of all, in order to
18 prove something by circumstantial evidence, you must
19 establish the underlying facts by the direct evidence
20 and, secondly, the inference that you draw from those
21 facts must be a reasonable inference.

22 So in my example, if someone asks you if it's
23 going to snow next Tuesday night, it would not be
24 reasonable to infer from those two facts that it would
25 or would not snow next Tuesday night.

1 Now, I've told you that it's entirely up to you
2 to determine the facts in this case, and you shouldn't
3 interpret anything that you think I may have said or
4 done during the course of this trial as expressing any
5 opinion on my part as to what the facts are.

6 You shouldn't be concerned with what you might
7 think my opinion is on the facts because it's up to you
8 and you alone to determine the facts in the case.

9 There have been times during the trial when the
10 lawyers have objected. It's their job to object if
11 they think that evidence that's being offered doesn't
12 conform with the requirements of the rules of evidence,
13 they have a duty to object.

14 And you shouldn't hold it against the lawyers or
15 their clients that they may have had occasion to object
16 during the trial, nor should you give the evidence any
17 less weight if I admitted it over objection. In other
18 words, if I admitted the evidence, you consider it for
19 whatever value you think it has, and you shouldn't
20 discount it simply because one of the lawyers may have
21 objected to it.

22 I hope that it goes without saying that neither
23 bias in favor of any person or group or cause or
24 prejudice against any person or group or cause or
25 sympathy of any type should play any role whatsoever in

1 your decision in this case.

2 Your job is, first of all, to look at the
3 evidence objectively, to determine from that evidence
4 what the facts are and to apply those facts the law, as
5 I have explained it to you.

6 That's all that either side in this case has any
7 right to expect.

8 All right. I'm going to ask the lawyers to
9 approach the sidebar briefly so that they can tell me
10 whether they think that I have forgotten to tell you
11 something I should have told you or misstated something
12 that I did tell you, so if you'll bear with us one
13 moment, please.

14 (Discussion at sidebar)

15 THE COURT: Does the Plaintiff have any
16 objections?

17 MR. TARRO: The Plaintiff has no objections.

18 MR. CARROLL: No objection.

19 MR. TARRO: Are you going to give them a verdict
20 sheet?

21 THE COURT: Yes, the Clerk has them.

22 I will check with you before we send them to the
23 jury room.

24 MR. TARRO: Okay.

25 (End of discussion at sidebar)

1 THE COURT: All right. Ladies and Gentlemen, in
2 order for you to return a verdict in this case, all
3 seven of you must agree as to what that verdict ought
4 to be.

5 You cannot return a verdict in favor of either
6 the Plaintiff or the Defendant unless you are unanimous
7 in your decision.

8 There are a couple of things that you should
9 keep in mind when you begin your deliberations. First
10 of all, you ought to approach the deliberations with an
11 open mind, and you ought to listen to what your fellow
12 jurors have to say if they should disagree with you,
13 and you should be humble enough to change your opinion
14 if, after listening to what they have to say, you
15 become convinced that they're correct and you're
16 incorrect. There's no shame in changing your mind.
17 And you ought to be prepared to do that if you think
18 it's appropriate.

19 On the other hand, you also have to keep in mind
20 that you each have an independent responsibility to
21 vote for the verdict that you believe is the correct
22 verdict based on the facts as you understand them and
23 the law as I've explained it to you, and you should
24 have the courage to stick to your convictions.

25 If, after listening with an open mind to what

1 the other jurors have to say, you remain convinced that
2 you're correct and they're incorrect, you should have
3 the courage to stick to your convictions even if you're
4 the only one on your side of the issue.

5 Now, I know that those two things sound like
6 they're in conflict, and I guess to some extent they
7 are, but my experience has been over the years that in
8 the vast majority of cases, jurors are able to reach a
9 unanimous verdict without violating either of those two
10 principles, and I'm confident that you will be, too.
11 But if not, we'll cross that bridge when we get to it.

12 When you get into the jury room, the first thing
13 you need to do is select a foreman or forelady who will
14 have the responsibility of, one, moderating the
15 deliberations to ensure that everyone who wishes to
16 speak has a reasonable chance to do that.

17 The foreman or forelady will also have the
18 responsibility of completing and signing the verdict
19 form. It's just a one-page document. It just involves
20 checking the applicable box or inserting the applicable
21 amount.

22 And once the jury has reached a unanimous
23 decision, the foreman or the forelady should fill that
24 out and bring it back with you into the courtroom. The
25 Clerk will take it from you at that time.

1 The other thing the foreman or forelady might be
2 called upon to do is to communicate with me if it's
3 necessary for you to do so.

4 If you have any questions or problems, I'll
5 certainly try my best to help you to the extent that I
6 properly can, and I emphasize the word "properly"
7 because, as I've told you, it's up to you and you alone
8 to decide the facts in the case, so I can't help you in
9 deciding what the facts are. That's something that you
10 have to do on your own, and I think you'll find that
11 collectively the memory of all seven of you will pretty
12 much enable you to decide what the facts are.

13 But if there's anything else that-- any other
14 problem you're having, if I can help you, what you
15 should do is have the foreman or forelady write a brief
16 note telling me what the problem or the question is,
17 give it to the security officer who will be outside
18 your door, he'll give it to me, I'll discuss it with
19 the attorneys and I will try to respond as quickly and
20 helpfully as I can.

21 I don't mean to suggest that I expect any notes
22 from you. Most jurors don't send me notes, but if-- it
23 may be comforting to know that if you do have a
24 problem, that you can ask for help.

25 You'll have the tape-recording of my charge to

1 you in the jury room. Listen to it. I know there's a
2 lot of new material there, and it may be helpful to go
3 over it again. But again I emphasize, don't focus on
4 one part of the charge and forget about the rest.
5 You've got to consider the entire explanation in its
6 entirety.

7 As far as your hours are concerned, they're
8 pretty much whenever you want them to be. If you have
9 not reached a verdict by the end of the day and you
10 wish to stay late, we can arrange that. We would like
11 a little advance notice, though, so we can arrange for
12 staffing of the building beyond our usual adjournment
13 time of 4:30. I'll have the Clerk check with you
14 midafternoon just to find out.

15 If you don't reach a verdict today and you don't
16 want to stay late, you can come back tomorrow and
17 resume your deliberations.

18 There's no deadline for your decision. You take
19 whatever time you think is necessary to fairly decide
20 this case, and whatever time that is, is up to you.

21 One other thing I should mention is, if you
22 should need to send me a note about anything, please
23 don't indicate what the status of your-- any straw
24 votes you may have taken. We don't want to know that
25 you're 5-2 for this or for that. Just tell me what the

1 question or the problem is.

2 All right. Is there anything further before the
3 jury is sent out, counsel?

4 MR. TARRO: Nothing further, Your Honor.

5 THE COURT: All right. I'll have the security
6 Officer come forward and the Clerk will administer the
7 oath.

8 (Court Security Officer Sworn)

9 THE COURT: All right. Ladies and Gentlemen,
10 this case is in your hands. You may return to the jury
11 room and begin your deliberations.

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