

Trials May Be Vanishing, But Post-Trial Appellate Issues Still Abound

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Much has been written about the vanishing trial in the last decade.¹ But even if infrequent, trials are one of the most fertile birthplaces for appellate issues. In the last of this series on the four stages of a case when appellate issues arise—the pleading stage, the discovery stage, the dispositive motion stage, and at trial—I discuss key appellate issues that arise at and after trial, and the successful litigator’s resulting “do’s and don’ts” list to preserve those issues for appeal.

Jury Instructions. One of the most frequent and promising appellate issues arising from a trial relates to jury instructions. A claim of instructional error on the ground that the trial judge gave an erroneous instruction or improperly refused to give a particular instruction is reviewed for an abuse of discretion. But, appellate courts view the evidence in the light most favorable to the appellant, assuming that the jury might have believed the tendered evidence if the correct instruction had been given. In other words, a lower showing of prejudice can be made—unless the evidence at issue was cumulative—where the appellant establishes error. But, an appellant cannot challenge an instruction that it requested, even if the claim is that the jury misunderstood or misapplied it. Moreover, appellant must preserve its claim of error clearly. This provides the key takeaway for trial counsel—proposing an alternative instruction is not sufficient to preserve the claim that the trial judge erred in giving the original instruction; rather, trial counsel must object to the erroneous instruction in addition to or separate from proposing an alternative one.

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Evidentiary Rulings. Another significant area of trial-related appeals is the admission or exclusion of evidence, including through motions in limine—the claim that the trial judge erred in excluding or admitting documentary or testimonial evidence at trial, including by evaluating a proposed expert’s skill, experience, or training. Such rulings are reviewed for an abuse of discretion, and reversal is only possible with a showing that it is reasonably probable that the appealing party would have secured a more favorable result absent the evidentiary error. Trial counsel’s most important task here is to secure a ruling, especially where the trial judge takes motions in limine under submission or defers a ruling until a certain stage of the trial.

Even if no reasons are given, an actual ruling to exclude or admit certain evidence is a prerequisite to an appeal.

Rulings Regarding The Verdicts. The trial judge’s rulings on a motion for directed verdict, for judgment notwithstanding the verdict, and for a new trial are all reviewed for substantial evidence. That is to say, viewing the evidence in the light most favorable to appellant, the appel-

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late court evaluates whether or not the verdict is supported by substantial evidence. This necessarily anticipates the existence of some contradictory evidence, and requires a showing that the weight of the evidence does or does not support the verdict. Trial counsel's most important contribution to a successful appeal in this arena is to preserve and obtain rulings on objections to evidence, and to document thoroughly in the motion or opposition the properly admitted evidence that supports or contradicts the verdict.

Awards. Where a party decides—for strategic, practical, or other reasons—not to challenge the entire verdict but only the relief, such as a damages award, they face a heavy burden. Damages awards can be overturned as excessive only if they shock conscience and suggest that, instead of relying on actual evidence in awarding relief, the jury was driven by passion, prejudice, or corruption. Similarly, a damages award may be deemed inadequate if it is unconscionable and without evidentiary justification. In the punitive damages arena, the award must also be consistent with federal due process concerns based on the defendant's degree of reprehensibility, the ratio between compensatory and punitive damages, and the relationship between punitive damages and defendant's financial condition. In this regard, trial counsel should be mindful of the verdict form, providing step-by-step directions for the calculation of damages based on fact-finding, or opposing a much-too-detailed verdict form, depending on which side they represent.

Notwithstanding the growing concern that they are an endangered species, trials—and errors in the course of trial—appear to be as much a certainty in the law as death and taxes are said to be in life.² Given this, trial counsel must be pro-active in objecting to jury instructions, persistent in securing evidentiary and other rulings, timely in moving for post-judgment relief, and discriminating in identifying claims of error for appeal. Otherwise, trials may well be here to stay, but post-trial appeals may become what we lament as all but extinct.

(ENDNOTES)

- ¹ Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*; Robert P. Burns, *What Will We Lose If the Trial Vanishes?* (Faculty Working Paper 5, 2011), available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1004&context=facultyworkingpapers>.
- ² John M. Lande, *Shifting the Focus From the Myth of "The Vanishing Trial" to Complex Conflict Management Systems, or I Learned Almost Everything I Need to Know About Conflict Resolution From Marc Galanter*, 6 *Cardozo J. Conflict Resolution* 191 (2005), available at <http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1267&context=facpubs>.

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