Legal Summit

HELPING YOU REACH THE PEAK OF YOUR PRACTICE

November 2017 | www.johndaylegal.com | www.dayontorts.com | f nashvilleinjuryattorney | t johndaylegal

WINNING DISCRETIONARY RULINGS

by
John Day

Rulings (not final judgments) by trial judges fall into three groups. There are some rulings you should always win given the facts, the law, or both. There are some you should always lose given the facts, the law, or both. Many of the decisions by a trial judge are questions of pure substantive law and will be reviewed by an appellate court *de novo.*

And then there are the discretionary rulings – the decisions made by the trial judge where the law provides that the decision will not be reversed by a reviewing court absent an abuse of discretion. This is a high standard indeed, and one almost always honored by the appellate courts.

Many, many rulings of the trial judge fall within the trial court's discretion. The best lawyers (a) know what type of rulings fall within the discretion of the trial judge; and (b) position themselves to win more of those rulings than they lose.

We leave for another day a detailed discussion about the types of trial judge decisions that will be reviewed under an "abuse of discretion" standard. Suffice it to say that virtually every decision of the trial judge other than those that address issues of pure substantive law or constitute findings of fact are reviewed under that standard. Thus, the vast, vast majority of trial judge rulings during the pretrial proceedings and a trial itself will rarely be disturbed on appeal.

So, how do you persuade the trial judge to give you the discretionary calls?

IN THIS EDITION

1. Work every day of your career to be known as a lawyer who tells the truth and is fully prepared on the law and the facts. Your reputation – good or bad – precedes you. The person you are opposing in a case today may be a trial judge in twenty years. Or her partner may be partner may be a trial judge. Thus, you have to work every day, in every case, to conduct yourself in an honorable, professional way., in and out of court.

2. Your initial and subsequent pleadings should demonstrate that you understand the facts of your case, the substantive law, and the rules of civil procedure. Any written motion or response should do the same.

3. Be prepared and candid at every pre-trial matter in the case, educating the judge on your version of the issues appropriately and succinctly.

4. Do not take unreasonable positions with your adverse counsel. Assume the judge will see every email and letter you write in the matter. Make sure your written communications not only appear to be but actually are respectful of your adverse counsel and party. This does not mean that you should be a punching bag or always yield to your adversary's requests. It means pick your fights carefully, taking positions you can clearly articulate on issues that are worth fighting over.

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5. Show up on time. (On time means early.) Don't ever make a judge or opposing counsel wait for you.

6. Be organized and prepared in all court proceedings. When it is your turn to speak, your presentation should be respectful, succinct, and focused on the issue before the court. When you are asked a question, answer it directly and honestly.

7. Do not attack opposing counsel in your argument or written submissions unless opposing counsel's conduct is the subject of the motion, and make the decision to file such a motion carefully and reluctantly. If you must file such a motion, focus on the inappropriate conduct rather than the lawyer who committed it.

8. Be respectful of the judge and the judge's staff, in the courtroom and otherwise.

9. When you are called upon to draft a proposed order, be completely accurate and honest is your submission. Remember – you are drafting the Court's order, not your client's order.

10. Do what you say you are going to do when you are say you are going to do it.

11. If you mess up, acknowledge it. Apologize, and be prepared to offer a solution to any problem your mistake may have created. Do not blame someone else. Do not say your adversary made the same mistake. Just fess up and do what you can to fix it.

12. Judges often have certain preferences about the way things should be done in his or her courtroom. Know what those preferences are and be sure to comply as much as possible.

13. When you lose a ruling, accept your loss with grace and move on.

14. When you win a ruling, accept your win with grace and move on.

15. Be fully prepared on the law and the facts. (Repeated for emphasis.)

What does the above have to do with discretionary rulings? The judge wants to make the right ruling, and when he or she is unsure – consciously or subconsciously – of the right result, he or she will naturally gravitate toward the position of the lawyer in the courtroom who has been found to be trustworthy and competent. You want to be that lawyer – the lawyer whom the judge respects and will turn to for guidance.

All of this requires that you play your "A" game every day. This is hard to do, which is why so few lawyers achieve this status. But, if you want to be a part of this elite group of lawyers, you need to commit yourself to do this hard work each day of your career.

QUICK TIP

In our last issue, we talked about consecutive numbering of written discovery for ease of reference at trial. The same can be said for document production. If a large number of documents will be produced, Bates-numbering can help create a clear trail of what was produced and when, which will in turn decrease the likelihood of confusion later in the proceedings. To avoid using the same nomenclature as your opponent (there should never be more than one document number "001"), use a naming convention that incorporates a prefix into the number, such as the name of the party: Smith001, JonesMD001.

HANDLING DIFFICULT CONVERSATIONS

WITH CLIENTS

by
Laura Baker

The titles "Counsel" or "Counsellor" are often used interchangeably with the title of "Lawyer," and rightly so, because as lawyers we not only provide legal advice, but many times, we are also called upon to show empathy and understanding when our clients face life-changing problems with no perfect solution. Many clients facing a legal problem are first-timers; they have no previous experience with a court case and the uncertainty that comes with being a litigant. Their only knowledge of the legal system comes from the experiences of friends and family, or from television shows that manage to squeeze an entire case into one 43-minute episode. In this context, explaining legal concepts to clients can be a challenge, particularly when emotions are running high. Below are some tips for handling difficult conversations with clients to foster a successful attorney-client relationship built on trust and mutual respect.

- **Listen to your client.** The fact of the matter is that most cases resolve without the need for a trial. That leaves some clients feeling like they never had an opportunity to have their day in court to tell their story and be heard. Let them tell their story to you.

- **Avoid arguing with your client.** Allow your client to speak without interruption, without judgment, and without arguing the facts with them. Telling your client why certain facts do not matter, or why they are unhelpful to the case, can put the client in a defensive position. If the client feels like they are defending themselves to you, they are less likely to trust (and take) your advice when it matters. Instead, hear the client out, express empathy for their situation, pause, and then provide your advice. (To be clear, sometimes you need to talk to clients about bad facts because they affect the client's case, or the decision at hand. In such cases, take care to discuss the bad fact in a kind, respectful, and empathetic way acknowledging the unfairness of the situation).

- **Put it in writing.** Not every client communication needs to be in writing. But, sending an email or letter after a difficult conversation that outlines the issue at hand and the options for moving forward can help diffuse emotions and allow a client to visualize the problem and make an informed decision. Bonus tip: have a non-lawyer in your firm read the email or letter and point out any revisions that can be made to make the material easier for a client to understand.

- **Schedule phone calls to discuss difficult topics.** No one likes to be caught off guard with bad news. When feasible, allow your clients the courtesy of a heads up that you need to discuss an important decision in the case with them and schedule a time to have the conversation so they can be mentally prepared to have open, honest, and direct communication with you. When possible, give them time to make the decision.

- **Let clients know they aren't alone.** Nothing seems more unfair than when something bad happens to you and only you. Clients feel the same way. When discussing a troublesome issue in the client's case, let them know that other clients have faced the same thing. This not only reassures the client that, while the circumstance may be unfair, they aren't being treated differently than other people in a similar situation, but also lets the client know that you have experience with the problem and how to address it.

Laura Baker is a shareholder with The Law Offices of John Day, where she has spent more than 11 years representing clients in personal injury and wrongful death cases across the State of Tennessee.

DID YOU KNOW?

Each issue of Legal Summit will be available for viewing at **www. johndaylegal.com/newsletters**. If there is a topic you would like us to address in a future issue, email us at newsletter@johndaylegal.com and we will make an effort to do so.

APPELLATE WRITING:

STANDARDS OF REVIEW CAN MAKE OR BREAK YOUR BRIEF

by
Liz Sitgreaves

When I was a law clerk for a judge on the Tennessee Court of Appeals, I frequently saw briefs in which litigants failed to incorporate the standard of review into both the argument as well as the statement of the issues on appeal. The substantive law is a critical component of any brief, but the lens through which the appellate courts will review the decisions of the trial court is the standard of review. Simply stating that the "trial court erred" without any link to the applicable standard of review not only fails to meet the requirements of the Rules of Appellate Procedure, but it also can result in a less than persuasive brief. Therefore, to be an effective appellate practitioner, you should be familiar with the various standards of review and how they apply to each of the issues that you are raising on appeal.

A concise statement of the applicable standard of review for each issue on appeal is required under the Tennessee Rules of Appellate Procedure. Tenn. R. App. P. 27(a)(7)(B). Rule 27 also provides that the standard of review can be in the discussion of the issue or under a separate heading placed before the discussion of the issue. I would encourage you to incorporate the standard of review both into the required statement of the issues at the beginning of the brief and in the headings throughout your argument section.

Tennessee Rule of Appellate Procedure 13(d) provides that unless otherwise required by statute, review of findings of fact by the trial court in civil actions shall be *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings, unless the preponderance of the evidence is otherwise. For civil jury trials, Rule 13(d) states that findings of fact by the jury shall only be set aside only if there is no material evidence to support the verdict. Issues of law are reviewed *de novo* with no presumption of correctness. *Nelson v. Wal-mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999). The other most common standard of review to be aware of is the abuse of discretion standard. An excellent discussion of the abuse of discretion standard is contained in the Tennessee Supreme Court's decision in *Lee Medical, Inc. v. Beecher,* 312 S.W.3d 515, 524 (Tenn. 2010). Evidentiary rulings of a trial court are reviewed under this abuse of discretion standard. Another important standard of review to be aware of is the standard for reviewing a trial court's determination of the credibility of a witness. A trial court's credibility determination will be given great weight and absent clear and convincing evidence to the contrary, appellate courts will not reevaluate the appellate court's decision. See *Wells v. Tenn. Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999); *Randolph v. Randolph,* 937 S.W.2d 815, 819 (Tenn. 1996).

Knowledge of these standards of review is also useful when evaluating whether or not to appeal the lower court's ruling. It also will assist you in discussing the pros and cons and the likelihood of success of an appeal with your client. Many clients believe an appeal means an automatic fresh bite at the apple (or in the legal world, a "*de novo*" review), but as lawyers we know that is often not the case.

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The Law Offices of John Day, P.C., with offices in Brentwood and Murfreesboro, serves plaintiff personal injury and wrongful death clients across the state of Tennessee in truck and car wrecks, medical malpractice, products liability, premises liability and other tort cases. Our highest honor is to be called to assist other lawyers in pursuing cases outside their practice area, or which require the investment of time or money beyond their comfort zone. Referral fees are paid in accordance with the Rules of Professional Conduct.

To discuss a case referral, call John Day at (615)742-4880 or email referral@johndaylegal.com. To request a free copy of our book about the process and ethics of case referrals, email referral@johndaylegal.com, ask for a copy of "Win Win," and give us your contact information. It will be sent by return mail.