Legal Summit

HELPING YOU REACH THE PEAK OF YOUR PRACTICE

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DO YOU HAVE THE COURAGE TO TELL CLIENTS THE TRUTH?

by
John Day

"There are known knowns. There are things we know that we know. There are known unknowns. That is to say, there are things that we now know we don't know. But there are also unknown unknowns. There are things we do not know we don't know."

- Donald Rumsfield

Some clients don't want the truth. A number of them want re-assurance that they are "right," regardless of the reality of the situation. Others demand to know that, at the end of the day, they will prevail on their terms. And some will fire or lose confidence in a lawyer who doesn't tell them what they (think) they want to hear.

IN THIS EDITION

The best lawyers do not allow the desire to be employed in a given case, the desire of the client to hear only positive things (even if they have no basis in fact or law), or the fear of confrontation with the client to trump their knowledge and experience. These trial lawyers tell the client the truth – whether the client wants to hear it or not.

That doesn't mean that a trial lawyer should or will use the verbal equivalent of a 2" by 4" to bring the truth home (although sometimes that is necessary). Rather, she will offer opinions on the case consistent with her knowledge of the facts and the law at the time the inquiry is made.

For example, the best trial lawyers will rarely tell a client whether they will win or lose a case at an initial interview, much less put a dollar value on the resolution of the case. Why? Because they know the Donald Rumsfield quotation about the state of knowledge at a given point in time applies to litigation. First, a client may not know all the facts and there is almost certainly another side of the story. Second, the client may intentionally or otherwise omit key facts that can dramatically impact the merits and value of the case. Third, the value of almost any case changes during the course of the litigation. A plaintiff who does a poor job at her deposition hurts her case. A defendant who does an excellent job helps his position. An expert who is caught in a lie hurts the party who employs him. And on and on. The point is that things change, those changes can impact the case, and an experienced trial lawyer is comfortable explaining that to clients.

This is not to say that the best trial lawyers are wishy-washy. It is just that they know that things are not necessarily what they are represented to be. Some may call these lawyers "cynical;" I prefer the word "experienced."

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Thus, the best trial lawyers help a client understand how things can change in litigation, and promise to give a more definite opinion as their level of knowledge of the case increases. Educating our clients and managing their expectations is an important part of what we do.

Good clients, the kind of folks you want to represent, understand that. Bad clients do not. Bad clients want guarantees before factual discovery. And, when things turn out differently than represented in the initial interview, bad clients are the first to remind you of the "promises" made in that interview. Experienced trial lawyers know when a client is trying to box them in, and refuse to allow it to occur.

As information is learned in a given case, well-trained trial lawyers also tell their client the truth. They give an opinion about whether to make, accept or reject a settlement proposal, or indicate that the proposal is so within the range of reason to make it a toss-up. They give these honest opinions whether the client likes the advice or not, and explain the basis for the opinion. They will not hesitate to tell a client that the client is making a mistake by not taking a recommendation of the lawyer, but then will follow the client's wishes so long as the course of action is legal and ethical. In other words, these lawyers understand that the client is the boss, and unless the client is demanding illegal or unethical action, or the relationship between the lawyer and client has become so impaired that the lawyer cannot adequately represent the client, the lawyer yields to the client's wishes.

Of course, courage alone is not enough. Without the requisite knowledge (and candidly an appropriate level of experience), courage alone may only lead to bad advice. We will discuss more about how to arm yourself with knowledge in future editions of this newsletter.

John Day is the founder and owner of the Law Offices of John Day, P.C. where he has been practicing personal injury law for more than 30 years. His impressive credentials include hundreds of successful cases tried and won, several printed books, hundreds of articles, publications, and speeches; and many satisfied clients.

QUICK TIP

We know consecutive numbering of written discovery and Bates-numbering of document production will help to keep you well-organized as your case progresses. Likewise, numbering deposition exhibits consecutively across multiple depositions (rather than starting with Exhibit 1 with each new deposition) will also save you a lot of time as you prepare for trial.

The parties simply agree that the first exhibit in the first deposition will be "Exhibit 1," and all deposition exhibits for all deponents thereafter will bear a unique consecutive number. So, if the last exhibit in your first deposition is Exhibit 4, the first exhibit in your next deposition will be Exhibit 5.

This works most efficiently if one court reporter or court reporting firm is present for all depositions. The reporter maintains a notebook of all exhibits for all depositions, and circulates a master index to all marked exhibits at the end of each deposition. This method works equally well for hard copies or electronic copies of exhibits. It reduces the chance of making the same document an exhibit multiple times during the depositions. It avoids the confusion, especially for the jury, of having multiple documents marked "Exhibit 1." And during your trial prep, it can save you hours of time, as you need only search for testimony about Exhibit 4 – not Exhibit 4 to Smith's deposition, Exhibit 7 to Jones' deposition, and Exhibit 16 to Harris' deposition.

PRESERVING YOUR ISSUES AND RECORDS

FOR APPEAL

by
Liz Sitgreaves

For most practitioners when heading to trial or in the midst of a trial, the focus is on meeting your burden of proof and telling your client's story. An eventual appeal is not on the front of the practitioner's mind. However, in Tennessee, under the Tennessee Rules of Appellate Procedure, in civil actions, every final judgment entered by a trial court from which an appeal lies to the Supreme Court or Court of Appeals is appealable as of right. Therefore, the possibility of an appeal should at least be a glimmer of a thought during your trial. If you do end up before the Tennessee Court of Appeals or Supreme Court, you want to make sure that your issues and your record are preserved to give you the best shot on appeal.

In most instances, you do not designate your issues for appeal when filing a notice of appeal. This is not the case if you are appealing from a case tried before a jury. In that instance, Tennessee Rule of Appellate Procedure 3(e) mandates that:

> [N]o issue presented for review shall be predicated upon error in the admission of exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for new trial.

Failure to raise these issues in your motion for new trial will result in those issues being treated as waived. Tenn. R. App. Proc. 3(e); see also *Waters v. Coker*, 229 S.W.3d 682, 689 (Tenn. 2007) (citing *Boyd v. Hicks*, 774 S.W.2d 622, 625 (Tenn. Ct. App. 1989)) (stating "any ground not cited in the motion for new trial has been waived for the purposes of appeal"). Additionally, if you are filing a statement of the evidence in lieu of a transcript, Tennessee Rule of Appellate Procedure 24(c) provides that upon the filing of a statement of the evidence, the appellant shall simultaneously serve on the appellee a "short and plain declaration of the issues the appellant intends to present on appeal."

It should also be common knowledge among practitioners that issues cannot be raised for the first time on appeal. The jurisdiction of the courts of appeal is appellate only and they consider only those issues that are timely brought to the attention of the trial court. See *Mallicoat v. Poynter*, 722 S.W.2d 681, 682 (Tenn. Ct. App. 1986).

Equally as important is making sure that you made your objections during the trial and did not invite the error that you are now questioning on appeal. "A party who invites or waives error, or who fails to take reasonable steps to cure an error, is not entitled to relief on appeal." *Grandstaff v. Hawks*, 36 S.W.3d 482, 488 (Tenn. Ct. App. 2000) (citing Tenn. R. App. 36(a), cmt. (a)). If you fail to make a "timely and specific" objection to evidence, you are precluded on appeal from challenging the admission of that evidence. Id. (citing *Ehrlich v. Weber*, 88 S.W. 188, 189 (Tenn. 1905); *Pyle v. Morrison*, 716 S.W.2d 930, 936 (Tenn. Ct. App. 1986); Tenn. R. Evid. 103(a)(1)). Further, parties should make sure to make an offer of proof in compliance with Tennessee Rule of Evidence 103 if the trial court's ruling is one excluding evidence. The Rule states: "In case the ruling is one excluding evidence, the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context." Tenn. R. Ev. 103(a)(2).

Keeping these few rules and considerations in mind during your trial and thereafter, will make sure that you are in the best position when heading to the appellate courts and hopefully let you hang on to your verdict (or challenge an unfortunate ruling)!

Liz Sitgreaves is an associate at the Law Offices of John Day, P.C., where she practices appellate law in addition to personal injury and tort litigation. She is former law clerk to Judge Frank G. Clement on the Tennessee Court of Appeals.

THE USUAL STIPULATIONS

IN DEPOSITIONS

by
Brandon Bass

Often in depositions, the court reporter will either ask counsel if they want to agree to "the usual stipulations," or copy template text into the transcript without any discussion that the rules have somehow been changed. Be wary about agreeing to any change from the Rules of Civil Procedure, no matter how characterized. You may give your adversary time to delay objections until it is too late for you to fix any problems.

Under Tenn. R. Civ. P. 32.04(3)(A), competency objections must be made if the grounds could have been "obviated or removed if presented at the time." That includes any objection that there has not been a sufficient foundation laid for the witness's testimony.

Beyond competency, the Rules of Civil Procedure provide that any other objection must be made if it "might be obviated, removed, or cured if presently promptly [...]." Tenn. R. Civ. P. 32.04(3)(B). Thus, objections to the foundation for deposition exhibits must also be made.
If you are taking a deposition and receive an objection based on competency or foundation, you can paper the record with evidence of the deponent's qualifications. You can dive in as much detail into the witness's background as time and the facts will allow. You can introduce summaries of the witness's qualifications, like a resume or curriculum vitae, as exhibits to the deposition. For exhibits, you can detail the creation of the exhibit, the data or equipment used, and the witness's familiarity with it.

There is good reason to shortcut foundation when possible - this minutiae is almost certainly uncompelling to a jury. Boring details are the "belt and suspenders" for foundation, but nobody wants to hear them if it is avoidable.

If objections based on competency or foundation are reserved for trial, however, you will receive no notice during the deposition that there is any concern about some of your questions. You will not find out until the deponent is long gone that your adversary believes additional foundation should have been laid. You lose that opportunity to "obviate or remove" the bases for any objections by exploring minutiae with the deponent.

Of course, reasonable litigators commonly stipulate to admissibility rather than waste the court's time with needless foundation testimony. Compromise should come, though, while you still have time to address any issues on your own. The Tennessee Rules of Civil Procedure give you time by default, and litigators should beware of "usual stipulations" that discard that protection.

Brandon Bass is a shareholder with The Law Offices of John Day, where he has more than 15 years of experience successfully representing clients in hundreds of injury cases including medical negligence, product liability, child sexual abuse, tractor-trailer and other commercial vehicle accidents.

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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.