Trial Law TIPS

Roy D. Wasson's TIP #35

Roy D. Wasson is board certified in Appellate Practice with extensive courtroom experience in more than 750 appeals and thousands of trial court cases, civil, criminal, family and commercial. AV-rated.

Moving for Mistrial or Rolling the Dice? Having Your Cake and Eating It Too

Introduction

Has this ever happened to you? The trial is humming along, jurors are nodding appropriately at the testimony of your witnesses (who showed up on time and testified as you expected), rolling their eyes at the D.A.'s witnesses and comments, and even old Judge What's-His-Name is ruling generally correctly (for a change). You already are starting to think about how nice it will be when the verdict is paid when, out of the blue, the D.A. bursts your balloon with some shenanigans.

It may be a defense witness blurting out something about your client being cited in the accident. Perhaps someone

Wasson & Associates, Chartered
28 West Flagler Street, Suite 600 Miami, FL 33130
(305) 372-5220 roy@wassonandassociates.com

points to the empty chair at defense table and suggests that you already settled with the party most culpable. The highly-insured defendant may take the stand and tug on the jurors' heartstrings with some testimony about his young and financially-strapped company.

Of course, this has happened to you; it has happened to all of us. I meant, has this happened to you in the last week or so? (Several hands raised among the crowd) What did you do about it? Other than whimpering pitifully to yourself while bruising your shin by kicking the leg on counsel table, I mean. Did you object? Did you ask the court for a curative instruction? Did you move for a mistrial?

Like a fighter pilot engaging an unexpected target in hazy conditions at Mach 1.5 speed, we all have decisions to make—legal and strategic—in deciding how to handle surprise situations like this in the heat of battle at trial. While the D.A.'s tactic may have been extremely unfair and potentially prejudicial, when you think that the jury is going your way anyway, you may choose to ignore the issue, pretend it doesn't concern you and hope for a good verdict nonetheless. Why dignify the matter by showing the jury that it riles you? Or you may decide to wait until the jury is excused and take the matter up with the trial court. What relief should you ask for in such a case?

An objection may be sustained, and the jury be instructed to "disregard" the adverse testimony or argument. But what good does that do you? It's like the old adage about instructing the jury to disregard the smell, once the skunk has been thrown into the jury box. Not much can be done to erase the effect of many D.A. tactics. But don't forget the whining and complaining your appellate lawyer will do if you make the "wrong" choice and fail to preserve something for appellate review.

Well, now there is a way to preserve the record, protect your client from the ill effects of such tactics, and let the jury

return that correct verdict that you hope they are planning in spite of the error. Here's how.

B. Motions for Mistrial with Ruling Reserved:

The best way to "cover your bases" in one of these situations is to move for a mistrial but ask the court to reserve ruling on the motion until after the jury returns its verdict. "If the verdict cures the error, the court will save the expenditure of additional time, money and delay associated with a new trial." *Ed Ricke & Sons, Inc. v. Green*, 468 So. 2d 908, 909 (Fla. 1985). While the motion for mistrial was made during closing arguments during the *Ed Ricke & Sons, Inc.*, case, the Supreme Court has subsequently held that such a procedure of requesting a mistrial with a reservation of ruling can be invoked at any stage in the trial, even during opening statements.

In *Ricks v. Loyola*, 822 So. 2d 502 (Fla. 2002), the D.A. made an improper "empty chair" argument during opening which implied that the plaintiff had settled with another doctor whose malpractice had contributed to the plaintiff's injuries. The plaintiff's attorney moved for a mistrial, with ruling to be reserved. The trial court agreed to reserve ruling and proceeded with a six-day trial, after which the jury returned a defense verdict.

The trial court then granted a mistrial, but the Fourth District reversed on appeal. Holding that: "the interests of judicial economy were not served by a reservation of ruling based on these circumstances," the Fourth DCA erroneously reinstated the defense verdict. However, on conflict review to the Supreme Court of Florida, the Fourth District's decision was reversed. The Supreme Court held that "when a motion for mistrial is made, it is within a trial court's discretion to determine whether it is the best use of the judicial resources to let the case go to the jury to see if the verdict cures the need for a new trial . . . ." 822 So. 2d at 506.

Because the decision whether to reserve ruling is a discretionary call, some trial judges will test your sincerity by threatening to rule on your motion immediately, asking you to "fish or cut bait." If the judge presses you to say whether you want a ruling immediately because he will not reserve until after the verdict, my advice is to go ahead and say yes. If the judge is in agreement with your position, that the D.A.'s stunt deserves a mistrial, you will either have your motion granted immediately or the judge may well wait—notwithstanding his blustering—until after the verdict. If the judge disagrees with your position, his ruling is going to be a denial of mistrial either now or later, so there is no harm from asking for ruling on your motion.

Above all, do not be intimidated into withdrawing your motion for mistrial out of fear that the judge will grant it immediately and waste the time and effort you have put into the case thus far. My bet is that nine times out of ten the judge is inclined to deny your motion under those circumstances and is just hoping to get you to withdraw the motion so there is nothing for him or her to decide. When and if the judge does deny your motion (after you make it clear that you are not withdrawing it) it would not hurt to renew the motion after the adverse jury verdict (if you are so unlucky) as you had originally requested. Who knows? Maybe after reflection the judge will change his or her mind.

Grounds For and Timing of Motions for Mistrial

Although stated in various formulations, the gist of when a mistrial is necessary is a situation where merely sustaining your objection to prejudicial evidence or argument, and even instructing the jury to disregard same, will be insufficient to cure the prejudice from the error. *See, e.g., Nadler v. Home Ins. Co.,* 339 So. 2d 280, 281 (Fla. 3d DCA 1976). In the criminal cases, the standard for granting a mistrial is frequently stated as being only in cases of error "so sinister that neither rebuke nor retraction will cure the prejudice." However stated, it is clear that mistrial is a remedy

of last resort. "Whether a trial court should grant a mistrial is within that court's discretion, and a mistrial should not be granted unless an ***absolute legal necessity*** to do so exists." *Ratley v. Batchelor*, 599 So. 2d 1298, 1302 (Fla. 1st DCA 1991).

Motions for mistrial are usually subject to the "contemporaneous objection rule" applicable to other sorts of trial court errors. *See, e.g., Garbutt v. LaFarnara*, 807 So. 2d 83 (Fla. 2d DCA 2001). But some cases have applied that rule with flexibility. One good decision demonstrating some flexibility in what constitutes "contemporaneous" is *White v. Consolidated Freightways Corp.*, 766 So. 1228 (Fla. 1st DCA 2000). That was case in which the plaintiff had filed suit against three defendants, one of whom made improper comments during opening statements. The Plaintiff waited until all four openings had been completed and the jury had left the courtroom until moving for a mistrial. The trial court tried to strong-arm the parties into agreeing to a curative instruction. Plaintiff's counsel disagreed that a curative instruction would be sufficient, but the mistrial was denied and a curative instruction was given, so the plaintiff appealed.

On appeal, the defendants argued that the motion for mistrial was not contemporaneous because plaintiff waited until all the opening statements had been concluded. In a decision reflecting utmost common sense, the First District held: "By delaying the motion for mistrial until the jurors had left the courtroom, appellant's counsel avoided further emphasis of the objectionable comments." 766 So. 2d at 1233.

Thus, the courts sometimes recognize that the prejudice will be compounded by you jumping up and objecting at the instant of an erroneous argument or prejudicial comment from a witness. However, the cases are not always uniform in permitting objections to be delayed, so I would counsel you speak up sooner, rather than later.

Stipulating to Reserve Objections and Motions

One alternative I've seen work in connection with opening and closing argument is to reach an agreement (on the record) with opposing counsel that any objections may be reserved until after the lawyer is finished speaking, then made on the record at sidebar. If you reach such an agreement, make sure it is express and blessed by the trial judge in the presence of the court reporter. Then you will solve the problem of alienating a jury and having appellate counsel blame you for not winning the appeal.

Conclusion

Motions for mistrial coupled with requests to reserve ruling until after the verdict can conserve precious judicial resources by allowing the jury to do the right thing notwithstanding the error. Of course, when and if the verdict is returned and it is not to your liking, don't forget to remind the judge to rule on that reserved motion. Like the supersonic fighter pilot coming out of a roll through thick cloud cover, may your aim be true and you hit your target. Above all,

Keep Tryin!

Roy

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