NAVIGATING THE FEDERAL TRIAL

2013 Edition

Robert E. Larsen

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2013

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ISBN 978-0-314-62128-3

About the Author

Robert E. Larsen is a United States Magistrate Judge for the Western District of Missouri, a position he has held since 1991.

Judge Larsen graduated from the University of Missouri at Kansas City, School of Law, in 1973, and began his legal career working as a staff attorney in the Criminal Division of the United States Department of Justice in Washington, D.C. In 1976, Judge Larsen transferred from Main Justice in Washington to the United States Attorney's Office for the Western District of Missouri as an Assistant United States Attorney, and spent the next 15 years representing the federal government in both criminal and civil cases pending before the district court and court of appeals. His supervisory positions within the U.S. Attorney's office included Chief of the Criminal Division, Attorney-in-Charge of the Organized Crime Drug Task Force, First Assistant United States Attorney, and Senior Litigation Counsel.

Judge Larsen is a frequent speaker at continuing legal education programs, serves as a master for two inn-of-court programs, and teaches as an adjunct professor at the University of Missouri at Kansas City, School of Law.

Preface

Several years ago, I was attending the opening session of a conference on federal practice during which the panel discussion focused on one question:

> With so few cases going to trial in district court, from where will come our next generation of competent federal trial lawyers?

Panelists observed that the decline in trials in criminal cases was largely due to the impact of the then-mandatory Federal Sentencing Guidelines, which were driving many defense lawyers to rush their clients into the prosecutors' offices to sign cooperation agreements in hope of receiving some relief from the more severe provisions of the Guidelines. In civil cases, panelists opined that a myriad of factors had contributed to the declining docket: the high cost of federal litigation, the general complexity of litigating in federal court given the procedural and local rules of court, the success of mandatory alternative-dispute-resolution programs, business entities' increased use of arbitration agreements to avoid litigation, and the increased willingness of district judges to resolve civil cases through summary judgment. Whatever the causes, the consensus of opinion among the panelists was the same—federal trials are rare and they could become an "endangered species."[1]

At about the same time, I was asked to serve as a master to our local bar association's inn-of-court, a highly successful trial advocacy program designed to introduce new lawyers to seasoned members of the bar, including judges, and to acquaint them with the traditions and practicalities of local litigation. Historically, the inn-of-court had been run by state-court practitioners and judges, and therefore I was something of an oddity since I had never set foot inside a state courtroom, much less practiced law in one. Almost immediately, I was struck by the significant differences, some legal and some practical, between state and federal trial practice in our community.

These observations led me to write this book on federal trial practice. It is my attempt to bridge the gap for the new lawyer between that which you learned in law school and what you need to

[1] See Judge Frederic N. Smalkin and Frederic N.C. Smalkin, The Market for Justice, the "Litigation Explosion" and the "Verdict Bubble": A Closer Look at Vanishing Trials, 2005 FED. CTS. REV. 8 (2005) for a discussion of the decreasing number of trials in federal court and the underlying reasons for the decline. The article may be accessed through the law review website at http://fclr.org/2005fedctslrev8.htm.

know to litigate in federal district court. It combines legal information with trial tips on the practical aspects of federal litigation along with illustrations to demonstrate how the principles play out in the real world. The illustrations are based on three hypothetical cases (i.e., a diversity case arising from an automobile accident, an employment discrimination action alleging sexual harassment and retaliation, and a prosecution for being a felon in possession of a firearm). You will find both illustrations fully set forth as attachments at the end of the book.

The material in this book is presented in a question-and-answer format. I chose this approach to clearly frame the issue and then address it for the reader, and also to help the reader locate and return to specific information as the need might arise before or during trial. I outlined the material because, in my experience, outlining tends to organize material in a logical sequence both visually and mentally.

The book is divided into 13 chapters representing the major components of pretrial, trial, and post-trial practice in the order in which they are usually encountered by a litigator: pretrial preparation, jury instructions, motions in limine, voir dire, opening statement, direct and cross-examination, evidentiary foundations for exhibits, computerized and computer-generated evidence, character and related evidence, evidentiary foundations for various types of witness testimony, closing argument, the Federal Rules of Evidence along with an edited version of the Advisory Committee Notes, and appellate standards of review.

One final thought: the best way to learn to try federal cases is to do it. If you have time and your law partners are amenable, contact the clerk of the federal district court or the Federal Public Defender in your community and ask how your name may be added to the list of attorneys for appointments to criminal cases under the Criminal Justice Act. You can start out with a small case and soon you will be appearing before a federal judge, a jury, or both. Good luck.

Author's Introduction to the 2013 Edition

With each edition of *Navigating the Federal Trial*, I have included a new chapter, added new sections to already existing chapters, and provided summaries of additional case law to illustrate the legal propositions set forth in the book. For the new customer, my hope has been that the book will provide an easily understood, practical and helpful resource for trying a federal case; for the returning customer, I have hoped that each new edition will provide significant added value over prior editions to justify its purchase.

The 2013 edition has a new chapter on the appellate standards of review. This is a difficult topic for many practitioners to understand because there are inconsistencies among the circuits about the application of certain standards; there are inconsistencies even within some circuits about the application of certain standards; the appellate courts frequently employ multiple standards when resolving a single issue on appeal which can create confusion if the opinion is not well written; the appellate courts often state the applicable standard but then do little to explain its application in the subsequent resolution of an issue; and finally, there is no single, controlling variable that serves as a focal point for and controls the analysis of an issue under review. Granted, the presence or absence of an objection will determine whether an issue is reviewed for abuse of discretion or plain error, but after that the analyses can and do take off in different directions. For example, abuse of discretion focuses on the trial judge's action while de novo totally ignores the trial judge's action and reviews the issue anew; and although plain and harmless error both include an element questioning whether the alleged error affected substantial rights, plain error requires the *complaining party* to establish that the error *did* affect substantial rights, while harmless error requires the *prevailing party* to establish that the error *did not* affect substantial rights, and none of the remaining standards even mention substantial rights as an element. In an effort to bring some clarity to this topic, I have focused on the most recent decisions from the appellate courts and divided the standards into manageable parts (e.g., abuse of discretion in general and abuse of discretion in evidentiary rulings; plain error in criminal cases and plain error in civil cases; plain error in criminal jury instructions and plain error in civil jury instructions; and harmless error for non-constitutional issues and harmless error for constitutional issues).

Additionally, the 2013 edition contains 17 new sections on legal issues that frequently arise in federal cases, both civil and criminal. For

example, in the chapter on jury instructions, there are new sections discussing instructions dealing with a "missing witness," a party's "consciousness of guilt" and "flight," and the propriety of jury nullification. The chapters on opening statement and closing argument include new sections dealing with the use of PowerPoint presentations. The chapters on direct and cross-examination and witness testimony have new sections addressing whether lay and expert witnesses may perform demonstrations or experiments in the courtroom, and may testify about out-of-court demonstrations or experiments. Finally, I have added over 200 new case examples illustrating the principles discussed in the various chapters of the book.

Whether you are a new or returning customer, I hope you will find the 2013 edition of *Navigating the Federal Trial* to be a valuable resource in your federal practice.

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