

## Sungaila in Law360: My Strangest Day In Court: Arguing From the Gallery

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PRACTICES Appellate

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Unless major motions are being argued, appellate lawyers are usually silent observers at trial who collaborate on legal strategy, conduct legal research during court breaks, and craft jury instructions, verdict forms and major motions once trial has ended for the day. But as I discovered in one high-profile trial, this is not always the case. In this one instance, I couldn't be a silent observer, even though that meant making my argument from the audience section.

I had attended each day of the multiple-week civil trial, taking copious notes and forwarding helpful case citations to trial counsel in real time to respond to arguments being made by the plaintiff's counsel. I played a significant role in crafting arguments to limit and exclude testimony by a key plaintiff's expert, and as a result paid particularly close attention to the hearing outside the presence of the jury at which portions of the expert's testimony were excluded.

Then came time for closing argument. ...

[The plaintiff's lawyer] began his argument. Among other things, he argued that our client was not trustworthy and a liar, juxtaposing pictures of former President Richard Nixon and the Vietnam War on PowerPoint slides with pictures of our client. Our trial counsel objected. I made a note for him to clarify for the record, outside the presence of the jury, the timing of the slides and counsel's assertion that our client was a liar, to fully demonstrate the prejudice from these slides. The argument continued.

The plaintiff's lawyer moved on to discuss the expert's testimony, referring to excerpts from her purported trial testimony, which appeared on even more PowerPoint slides. ...

Something did not look right. In fact, it looked like some of the purported trial testimony had never been heard by the jury. Instead, excluded testimony from the admissibility hearing had been included on the slides. I flipped through my notes from the testimony at the expert admissibility hearing. Yep. The jury had never heard some of this testimony, because the judge had excluded it. I quickly scribbled a note and sent it up to trial counsel: "Not Evidence. Object Now. Mistrial. Ask for all slides."

Trial counsel objected and asked for a hearing outside the presence of the jury, at which he more fully explained his objections and sought a mistrial, or at the very least a curative instruction. ...

The plaintiff's counsel objected, arguing that the slides — which he had just shown to the entire packed courtroom, to many audience members he himself had invited — remained privileged and confidential work product. ... There was no way I could stand by and let this go the wrong way.

In a scene better suited for day-time television, I leapt up to object and argue from the audience section. Opposing counsel swiveled around. The trial judge, who was aware of my presence and role in the case, looked only mildly surprised and then turned his full attention to my argument. I

reiterated the concerns made by trial counsel and explained that we needed the slides, which were certainly not confidential once they had been broadcast to the entire courtroom, to be able to determine the extent of prejudice to our client. We got the slides.

Excerpted from *Law360*. To read the full article, click [here](#).