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Civil LITIGATION

Publish or perish: CPLR Rule 4112

Have you ever had one of those dreams that you are winning a game show?

"Alex, let's go with 'Publish or Perish in the Courtroom' for \$1,000."

Your heart races with excitement as Alex announces: "This answer is a Daily Double!"

"Is meaningless until published," Alex says.

Your hand smashes down onto the red button as you shout: "What is a verdict?!"

The applause of the studio audience fills your dreamy ears.

Now, before you go collecting on your imaginary winnings, what does it mean to publish a verdict? The correct answer to this question could save you from the real life jeopardy of calling your carrier to report malpractice. The answer is not in the CPLR where you might expect. CPLR Rule 4112 Entry of a Verdict says:

When the jury renders a verdict, the clerk shall make an entry in his minutes specifying the time and place of the trial, the names of the jurors and witnesses, the general verdict and any answers to written interrogatories . . . [.]

The statute certainly does not help you in a real situation like this:

Say that your client is one of two defendants at trial. This is a big client. Millions of dollars are at stake. During deliberations, the jury asks for a calculator. Beads of sweat appear on the foreheads of your client and the co-defendant. The co-defendant caves and offers the whole policy to settle. You and your client remain steadfast and refuse to settle. Plaintiff's counsel reports to the court that "we are settled."



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Before the judge realizes that only one defendant has settled, the jury is called back into the courtroom and the judge tells the jury that the parties have reached a settlement. Plaintiff's counsel quickly corrects the record that a settlement was only reached with one defendant. So the judge asks the jurors if they had completed

their verdict sheet for your client. After the jury reports that they had, the judge asks to see the verdict sheet, reads it and then reports that the jury unanimously found no cause for action on behalf of your client. Before the judge thanks the jury and sends them home, the verdict sheet is entered into the minutes of the proceedings and a copy is given to the parties.

Verdict properly rendered?

So now comes the Double Jeopardy question of your career: Has the jury properly rendered a defense verdict for your client pursuant to CPLR Rule 4112?

If you answered "No," you would be correct. But, you only saved yourself from malpractice if you also turned yourself into one of those really annoying know-it-alls, and instructed the judge to properly publish the verdict, embarrassing the judge in front of all whose opinions a judge holds dear.

The confusing part is that CPLR Rule 4112 doesn't say anything about a verdict being published to be properly rendered.

So you might be rebuffed by the judge. But, hold your ground.

According to the common law upon which CPLR Rule 4112 rests, for a verdict to be 'rendered' it must be properly published and that means three very specific things: (1) that the verdict be published by having been declared in open court by the jury (not the judge); (2) that the parties be permitted to, or that they waive, polling of each juror as to their verdict (i.e., asking that each juror publish the verdict individually); and (3) that the verdict be entered by the clerk of the court in the minutes of the proceedings.

So, in our imaginary trial, you would have had to insist that the judge return the verdict sheet to the foreman. Even though the judge had already read the verdict sheet to everyone, the foreman must still read the verdict sheet out loud, in open court.

You must then make sure that the judge offers to have the jury polled so that the losing party cannot later invalidate the verdict by claiming that s/he was deprived of the right to poll the jury. Polling requires that each juror verbally assent to the verdict which had been read aloud. It is not enough for the judge to look at the verdict sheet and report that all the jurors signed the verdict sheet.

It is not enough for the judge to globally ask the whole panel if they all agree to the verdict. After the jury has been polled, or polling has been waived, then the judge can have the verdict sheet marked and filed with the minutes of the trial proceedings.

Absent the fulfillment of each of these

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elements, a verdict is not published and no verdict has been rendered. You cannot enforce a judgement for the defense. You cannot collect on a bill of costs. You can-

not compel the plaintiff to sign a stipulation of discontinuance. In fact, your client could be looking at a brand new trial. And that would make any trial lawyer wish they were dead.

So, remember: Publish or perish!

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