CIVIL JURY TRIALS IN FEDERAL COURT

The decision between a jury trial and a bench trial in federal civil litigation can have significant implications for the procedure, timing, and outcome of a case. Although bench trials have certain perceived advantages over jury trials, such as greater efficiency, there are various reasons why parties might want a jury trial if it is available. Counsel expecting to resolve a dispute at trial should carefully examine the unique procedural and practical features of jury trials and how jury trials may be preferable to bench trials.

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There may be nothing more exciting in the practice of law than presenting a trial-ready case to a jury. But whether to present the ultimate resolution of a civil dispute to laypersons is a complex decision that counsel usually must make early in litigation, often before fully identifying all of the facts, witnesses, defenses, and themes in the case. Although discovery and pretrial dispositive motions may not differ greatly for matters tried to a jury or a judge, the differences between jury trials and bench (non-jury) trials are numerous once the parties begin pretrial preparation. Moreover, choosing a jury trial instead of a bench trial can significantly impact the procedure and outcome of a litigation.

Despite a trend among litigants towards an increased use of bench trials because of their perceived efficiencies, jury trials may be preferable in many instances. This article explores key issues counsel should consider when deciding whether to take a civil dispute to a jury and when navigating a jury trial, including:

- The circumstances in which a jury trial is available.
- The potential advantages of a jury trial over a bench trial.
- The unique procedural and practical aspects of a jury trial as compared to a bench trial.
- The role of post-trial motions in a jury trial.
- The standard of review for appeals of a jury verdict.

Search Bench Trials in Federal Court for more on federal non-jury trials.

AVAILABILITY OF A JURY TRIAL

At the outset, counsel considering whether to proceed with a jury trial must determine whether a right to a jury trial exists and ensure that the parties properly demand a jury trial.

RIGHT TO A JURY TRIAL

The Seventh Amendment of the US Constitution provides the right to a federal jury trial. Although that right is sacrosanct in criminal cases, a jury trial is not always available in civil litigation. However, because federal policy favors a jury trial on issues of fact, a jury trial typically will occur if any party wants and is entitled to it based on the nature of the claims.

Certain cases may require a bench trial, particularly those involving equitable claims for which no right to a jury exists. In some situations, it may be unclear if claims sound in equity. In these cases, district courts typically conduct a two-pronged test to evaluate whether:

- The claims were historically within the jurisdiction of English law or equity courts in 1791 (the year of the Seventh Amendment's ratification).
- The remedies that the plaintiffs seek are equitable or legal in nature.

(*Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989) (describing the two-pronged test and instructing that the second prong be given more weight than the first); *Hard Candy, LLC v. Anastasia Beverly Hills, Inc.*, 921 F.3d 1343, 1348, 1353-57 (11th Cir. 2019) (rejecting the plaintiff's argument that a claim is a legal one where a plaintiff seeks to recover a defendant's profits as a "proxy" for actual damages, and noting that the remedy of an accounting and disgorgement of profits has long been considered equitable in nature).)

Courts frequently favor a jury trial when these two prongs are in tension (see, for example, *SFF-TIR, LLC v. Stephenson*, 262 F. Supp. 3d 1165, 1234-37 (N.D. Okla. 2017) (holding that the defendants were entitled to a jury trial where the plaintiffs' breach of fiduciary claims sounded in equity under the first prong, but the remedies sought were legal in nature); *Flex Fin. Holding Co. v. OneBeacon Ins. Grp. LLC (In Re Flex Fin. Holding Co.)*, 2015 WL 1756819, at *1-3 (Bankr. D. Kan. Apr. 13, 2015) (holding that the defendants were entitled to a jury trial where they framed an issue about construction of a written contract as declaratory but sought damages), aff'd on reconsideration, 2015 WL 3638007 (Bankr. D. Kan. June 9, 2015); *Sedghi v. PatchLink Corp.*, 823 F. Supp. 2d 298, 305-07 (D. Md. 2011) (holding that the plaintiffs were entitled to a jury trial where a promissory estoppel claim sounded in both equity and law, but the "benefit-of-the-bargain" damages sought were a "classic form of legal relief") (citations omitted)).

In cases involving both legal and equitable claims, a jury may decide the legal claims and the court may decide the equitable claims (see *Goettsch v. Goettsch*, 29 F. Supp. 3d 1231, 1243 (N.D. Iowa 2014) (holding that the jury would decide the plaintiffs' breach of fiduciary duty claim and the court would decide the equitable claim of judicial dissolution, and to the extent there were common issues in the two claims, the court would decide the equitable claim drawing from the jury's conclusions on the breach of fiduciary duty claim)).

JURY DEMAND

Even where the right to a jury trial exists, a party typically must demand a jury trial before one may occur. Rule 38 of the Federal Rules of Civil Procedure (FRCP) permits a jury trial on some or all factual issues triable to a jury, but only if a party both:

- Serves the other parties with a written demand for a jury trial no later than 14 days after service of the last pleading "directed to the issue" for which a jury trial is sought.
- Properly files the written demand under FRCP 5(d).

Parties often include a jury demand in the complaint or answer (FRCP 38(b)(1) (stating that a demand "may be included in a pleading")). The written demand may identify all or a subset of issues to be tried by a jury. However, if a party has specified only certain issues in its jury demand, any other party may demand a jury trial on any remaining issues (if a jury trial is available for those issues) within either:

- 14 days of service of the demand.
- A shorter time that the court orders.

Courts must construe a general demand that does not specify the claims for which a party is seeking a jury trial to cover all issues triable by the jury. (FRCP 38(c).)

If a party does not properly and timely serve and file a jury demand, the party waives the right to a jury trial (FCRP 38(d)). However, a party may file a motion for a jury trial later in the case if the party could have demanded a jury trial at the FRCP 38 deadline (FRCP 39(b)). The court has discretion to grant or deny this motion (*Winter Enters., LLC v. W. Bend Mut. Ins. Co.*, 2018 WL 1522119, at *5-6 (S.D. Ohio Mar. 28, 2018); see also, for example, *Fid. & Deposit Co. of Md. v. A-MAC Sales & Builders Co.*, 2006 WL 3802180, at *1-3 (E.D. Mich. Dec. 21, 2006)).

By contrast, a court may convert a jury trial to a bench trial only if either:

- All parties stipulate to a bench trial.
- The court determines *sua sponte* or on motion that there is no federal right to a jury trial on some or all of the issues for which a jury trial was demanded.

(FRCP 39(a).)

Counsel should consider demanding a jury trial even when it is not yet clear that a jury trial is preferable, unless counsel believes that other parties would not be amenable to stipulating to a bench trial later on should counsel desire one. Waiting to request a jury trial through a later motion is another alternative, but that option is risky given that the outcome is entirely discretionary.

Counsel should keep in mind that if a party demands a jury trial for an issue for which a right to a jury trial exists, other parties may rely on that demand and need not file a separate demand (see *SEC v. Jensen*, 835 F.3d 1100, 1106-08 (9th Cir. 2016)). Therefore, the party that made the initial demand may be locked into a jury trial even if it later desires a bench trial.

POTENTIAL ADVANTAGES OF A JURY TRIAL

There are numerous perceived advantages of a bench trial over a jury trial, such as greater efficiency in the trial process and having a more sophisticated trier of fact resolve the dispute. Although these advantages may suggest that a bench trial is preferable in certain cases, there are numerous reasons for parties to consider a jury trial, including:

- A potentially lower cost.
- A faster verdict.
- A common sense, non-legal perspective.

COST

Because jury trials often involve fewer pretrial submissions than bench trials, a jury trial may result in lesser costs in certain cases. For example, parties generally must present live witness testimony in jury trials, eliminating the need for preparing and submitting detailed pretrial direct examination declarations (and rebuttal evidence, if the court allows).

Additionally, no proposed findings of fact or conclusions of law are necessary in jury trials, whereas many courts require these submissions in bench trials both before trial and again in an updated form at the end of trial to account for the evidence received. These submissions can range from dozens to hundreds of pages in complex cases and represent significant costs.

SPEED

The speed within which a jury returns a verdict is nearly always faster than the time it takes for the court to issue a decision in a bench trial. Following bench trials, parties frequently marshal the evidence and arguments in post-trial submissions, a process that may stretch weeks or even months after the trial concludes. By contrast, when evidence is presented to a jury, the jury typically deliberates immediately after the parties rest and returns a verdict within hours or days.

LAYPERSON PERSPECTIVE

Many attorneys believe that judges are more sophisticated triers of fact than juries and better able to analyze complex factual disputes, such as those involving mechanics, patents, or financial markets. However, federal juries also can bring a wealth of experience and knowledge to the deliberation process, as well as the common-sense perspective of laypersons.

Courts have been quick to praise jurors' capabilities and wisdom (see, for example *SFF-TIR, LLC*, 262 F. Supp. 3d at 1195 ("I think [jurors are] a lot more capable of understanding issues than [they are credited]. ... And sometimes they bring a heavy dose of common sense. ... I believe in the wisdom of groups and they do a good job.") (citations omitted); *Burgess v. Codman & Shurtless, Inc.*, 2016 WL 9175471, at *3 (E.D. Tenn. Sept. 1, 2016) ("We trust jurors to use their personal experiences and sensibilities to value the intangible harms such as pain, suffering, and the inability to engage in normal activities.")). Courts have also noted that experts in their "essential role as teachers to the jury" can explain complex concepts and assist jurors in assessing complicated factual disputes such that a bench trial does not necessarily offer greater fairness in complex cases (*SFF-TIR, LLC*, 262 F. Supp. 3d at 1237).

UNIQUE ASPECTS OF A JURY TRIAL

Several procedural and practical differences exist between jury and bench trials, including:

- The court's timing for ruling on pretrial motions.
- The pretrial submissions that may be required.
- The *voir dire* process and juror research.
- The proposed jury instructions and verdict form.
- The need to address any juror misconduct.
- The need to manage other jury-related issues and logistics.
- The manner of presenting evidence to a jury as opposed to the court.

PRETRIAL MOTIONS

Parties may submit pretrial motions regardless of whether the dispute is being tried before a jury or a judge. Federal judges have inherent authority to manage trials before them, including the ability to rule on dispositive and evidentiary issues before trial (see *Luce v. United States,* 469 U.S. 38, 41 n.4 (1984) (noting that the court's inherent authority to manage trials includes *in limine* rulings); *In re Kvassay*, 2019 WL 545673, at *10 (B.A.P. 9th Cir. Feb. 11, 2019) (appeal pending) (noting the court's inherent authority to decide a summary judgment motion before trial)).

Pretrial motions take various forms, including:

- Summary judgment motions to reduce the issues, claims, or defenses to be presented to the jury.
- Motions *in limine* to address the evidence that the jury can receive.
- *Daubert* motions to exclude or limit the scope of expert testimony.

While these motions are also available in bench trials, the court's timing for issuing a ruling may differ in jury trials. These motions are particularly critical in jury trials because they help to avoid prejudicing or confusing jurors.

Summary Judgment Motions

Regardless of whether a case is going to a jury or a judge, the substance of a summary judgment motion generally does not differ. A party may move for summary judgment and the court may grant the motion "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law" (FRCP 56(a)). Parties may move for summary judgment within 30 days of the close of discovery or as the court otherwise orders (FRCP 56(b)).

The timing of the court's decision on a summary judgment motion may differ depending on whether the case is set for a jury trial or a bench trial. In jury trials, courts almost always decide a summary judgment motion before trial in an effort to narrow the issues that a jury must decide, whereas in bench trials, a court may sometimes rule on a summary judgment motion after the trial has started, and sometimes, even after the trial has ended.

Search Motion for Summary Judgment: Motion or Notice of Motion (Federal) and Motion for Summary Judgment: Memorandum of Law (Federal) for sample motion papers that parties can use to exclude evidence from a federal civil trial, with explanatory notes and drafting tips.

Search Summary Judgment: Overview (Federal) for more on summary judgment under FRCP 56.

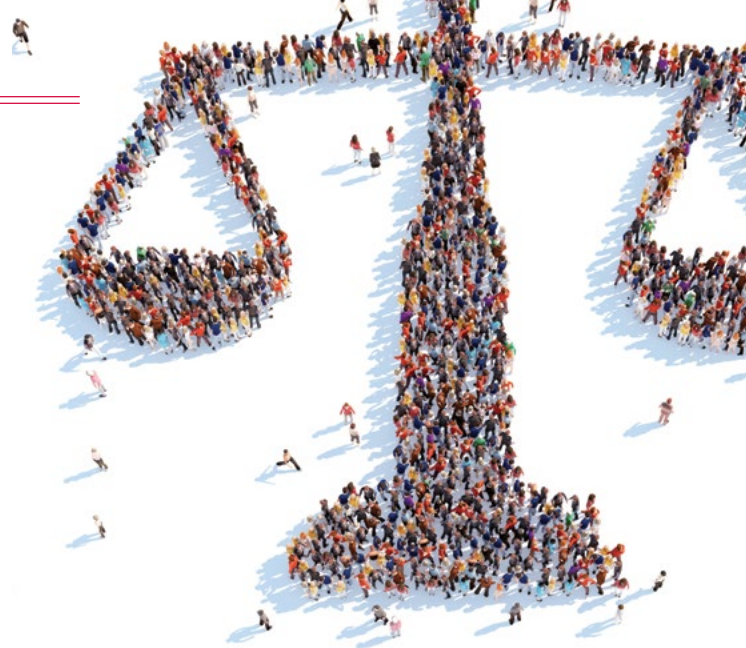
Motions *In Limine*

A party may bring a motion *in limine* to exclude, limit, or include evidence before it is offered at trial. As with summary judgment motions, motions *in limine* are another type of "gatekeeping" motion that allows a court "to rule on evidentiary issues in advance of trial in order to avoid delay and ensure an even-handed and expeditious trial and to focus on the issues the jury will consider" (*Goldman v. Healthcare Mgmt. Sys., Inc.*, 559 F. Supp. 2d 853, 858 (W.D. Mich. 2008)). Motions *in limine* are especially important in jury trials to avoid tainting a jury with inadmissible evidence (see *Figgins v. Advance Am. Cash Advance Ctrs. of Mich., Inc.*, 482 F. Supp. 2d 861, 865 (E.D. Mich. 2007)).

Common grounds for seeking to preclude or limit evidence include prejudice, hearsay, or lack of relevance under the Federal Rules of Evidence (FRE) (see, for example, *Burgess v. Codman & Shurtless, Inc.*, 2016 WL 9175471, at *1-2, *3-4 (E.D. Tenn. Sept. 1, 2016) (denying a motion to exclude the plaintiff's loss of earning capacity evidence based on deposition testimony that the plaintiff was retired at the time of the alleged injury because it created "a question of fact as to the issue of such damages" and related "to the weight of the evidence rather than to admissibility," and granting a motion to exclude use of a witness's drug-related felony conviction for impeachment because it "would serve little purpose" and could tempt the jury to improperly focus on the witness's conviction rather than the substance of her testimony)).

Parties may also bring motions *in limine* to set limits on the damages or remedies sought (see *Daniel v. Garcia*, 2019 WL 1324235, at *5 (E.D. Mich. Mar. 25, 2019) (allowing evidence of the plaintiff's negligence to be admitted at trial so that the jury could consider allocating fault in its damages award)).

A party may bring a motion in limine to exclude, limit, or include evidence before it is offered at trial. Motions in limine are especially important in jury trials to avoid tainting a jury with inadmissible evidence.



Parties may bring motions *in limine* before trial as well as during trial, if issues arise and the motion is deemed timely. However, in a jury trial, courts generally prefer to decide these motions before trial where possible to streamline the introduction of evidence and to limit or eliminate the need for breaks or sidebars to rule on the motion outside the presence of the jury.

Search Motion in Limine: Motion or Notice of Motion (Federal) and Motion in Limine: Memorandum of Law (Federal) for sample motion papers that parties can use to exclude evidence from a federal civil trial, with explanatory notes and drafting tips.

Search Evidence in Federal Court: Overview for more on the admissibility and exclusion of evidence in a federal civil case, including precluding evidence for prejudice, hearsay, or lack of relevance under the FRE.

Daubert Motions

A common pretrial motion that can be critical in a jury trial is a *Daubert* motion to exclude or limit the scope of expert testimony that is not reliable or relevant and does not meet certain evidentiary requirements (FRE 702; see *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)). *Daubert* challenges are often accompanied by motions or arguments under FRE 403 that the expert's testimony is irrelevant or likely to confuse the jury. Generally, parties may make *Daubert* challenges based on the expert's:

- Purported expertise and qualifications.
- Methodology.
- Conclusions.

Courts analyzing a *Daubert* motion must ensure that the expert, whether basing an opinion on professional studies or personal experience, utilizes the appropriate intellectual rigor expected in the relevant field (see *Beastie Boys v. Monster Energy Co.*, 983 F. Supp. 2d 354, 362-65 (S.D.N.Y. 2014) (holding that it was appropriate to instruct the jury that an expert's testimony was relevant only to damages, and that the expert could not opine on "likelihood of confusion" because his conclusions were not relevant to the Lanham Act liability standard and his methodology of testing consumer perception, which was to poll coworkers at his office, did "not pass the laugh test")).

Although judges in bench trials often reserve decision on *Daubert* motions until their decision on the merits, in jury trials they must decide *Daubert* motions before the evidence is presented to the jury.

Search Experts: Daubert Motions for more on the grounds for making a *Daubert* motion and the role of *Daubert* motions in a jury trial.

OTHER PRETRIAL SUBMISSIONS

There are a number of pretrial submissions unique to jury trials that the parties typically must prepare and submit (either separately or jointly) to the court, including:

- Proposed jury questionnaires and *voir dire* questions (see below *Jury Selection*).
- Opening statement demonstratives (see below *Opening Statement*).
- Proposed final jury instructions and verdict forms (see below *Final Jury Instructions and Verdict Form*).

Courts commonly require parties to submit these documents simultaneously with deposition designations, exhibit lists, witness lists, and related stipulations, often as part of pretrial memoranda explaining the parties' claims and defenses and highlighting key legal disputes (see below *Introducing Evidence*).

JURY SELECTION

Voir dire refers to the process of questioning prospective jurors about their backgrounds and potential biases for jury selection in a case. In federal court, the district court judge or magistrate judge typically conducts *voir dire* on behalf of the parties, often using a questionnaire that the parties prepare and agree to in advance. Civil juries can have between six and 12 jurors (FRCP 48(a)).

Search Jury Selection in Federal Court for more on conducting *voir dire*.

During *voir dire* questioning, members of the trial team may be able to simultaneously conduct online research to uncover additional information about the potential jurors to aid in the decision to challenge or consent to the selection of a juror. That research can be a useful tool if time and the court allow for it.

For example, in *Lewis v. American Sugar Refining, Inc.*, the defendants discovered after trial that a juror had previously posted comments on social media that allegedly demonstrated anti-corporate bias. After analyzing the juror's responses during *voir dire*, which included statements that the juror could put aside his experience as a union representative and be fair, the court noted that "it would not be unreasonable to expect ... a union representative might have sympathies that were pro-worker and even anti-corporation," but that the defendants did not challenge the juror during *voir dire* on these grounds. The court also stated that the "ability to be objective and fair does not require the absence of personal views outside of the case." Based on this analysis, the court refused to order a new trial

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because of the social media posts. (325 F. Supp. 3d 321, 333-35 (S.D.N.Y. 2018).) However, had counsel discovered the juror's social media posts during jury selection, counsel may have seen the opportunity to exercise a valid challenge against that juror.

When conducting juror research, counsel should keep in mind that many ethical rules prohibit counsel and parties from having any contact with potential or existing jurors before and during trial (see ABA Standing Committee on Ethics & Prof'l Responsibility, Formal Op. 466, Lawyer Reviewing Jurors' Internet Presence (Apr. 24, 2014)). Therefore, counsel must generally limit any online or social media research of jurors to publicly accessible sources, and cannot connect with or "friend" potential or existing jurors to view non-public social media content or information.

In some jurisdictions, counsel must also ensure that any online research or social media tools used do not alert the juror to the fact that counsel is viewing the juror's account because the alert may constitute unethical and impermissible juror contact (see, for example, 2017 NYSBA Social Media Ethics Guidelines, No. 6.B and cmt., at 30-32 (May 11, 2017)).

In sum, when considering online research of jurors, counsel can avoid pitfalls by:

- Determining under the applicable court, chambers, part, ethical, or judge's rules whether counsel must notify the court before conducting research of potential or existing jurors.
- Ensuring that any social media or online platforms that counsel intends to use to conduct the research will not identify who is viewing the juror's profile or account or otherwise alert the juror.
- Limiting all research to publicly available sources, such as the public-facing content of a Facebook or Instagram account.
- Not attempting to "friend" or "follow" a potential or existing juror.

Search Social Media: What Every Litigator Needs to Know for more on researching jurors on social media.

Another tool that can assist counsel before and during *voir dire* is the mock jury trial. Counsel can use mock juries to test theories, defenses, demonstrative exhibits, or reactions to complex facts or concepts, among other things. In high-stakes litigation, parties may engage jury consultants before trial to conduct mock trials with focus groups or mock jurors. Jury consultants can also assist in:

- Preparing witnesses.
- Drafting the jury questionnaire and *voir dire* questions.
- Researching jurors during *voir dire*, with the court's awareness and permission as appropriate.
- Creating demonstrative exhibits for use at trial.

Search Mock Jury Exercises for more on using mock jury exercises and jury research programs.

JURY INSTRUCTIONS

Before trial, each party typically submits to the court and the other parties written proposed jury instructions and a proposed verdict form. Additionally, many judges have their own standard pretrial or preliminary jury instructions that they read to the jury, which are separate from the substantive jury instructions.

Pretrial Jury Instructions

The judge's preliminary instructions to the jury often include:

- Instructions relating to juror conduct at trial, such as:
  - whether the jurors can take notes;
  - limitations or bans on social media use or news consumption during trial;
  - prohibitions on conducting independent research or discussing the case with others;
  - directions to keep an open mind until all evidence has been received and the court has instructed the jury on the law prior to deliberation; and
  - directions that any communications with the court should occur through written notes (courts typically have juror notes marked as evidence and read into the record, and

respond to them on the open record in court or in writing, often after consulting with counsel).

- Explanations of the meaning of:
  - direct and circumstantial evidence; and
  - objections and how the jury should respond to them.

Final Jury Instructions and Verdict Form

Perhaps the two most important documents for the jury at the conclusion of trial are:

- **The final jury instructions.** Sometimes referred to as "requests to charge" or "jury charges," the final jury instructions:
  - set out the legal standards that the jury must apply to their fact determinations;
  - explain the law that the jury must apply in reaching decisions on liability and remedy;
  - explain how the jury should view and use the evidence;
  - explain what evidence and information the jury may and may not consider; and
  - include relevant legal definitions.
- **The verdict form.** A verdict form guides the jury on how to reach a verdict and, where appropriate, determine damages for each party.

Many jurisdictions have model or pattern jury instructions on specific claims and defenses that often include model verdict forms. When drafting proposed jury instructions and verdict forms, counsel should:

- Use any model documents available in the jurisdiction and tailor them to the facts of their case.
- Research any available jury instructions and verdict forms from past trials before the same judge.

The substance of final jury instructions and the verdict form are typically disputed, argued, and finalized outside the presence of the jury before trial begins, in part because how the law is presented to the jury may influence the presentation of evidence during trial (see, for example, *Beastie Boys*, 983 F. Supp. 2d at 365-66 (noting that a determination of the law on burden of proof for obtaining damages under the Lanham Act was relevant to the jury instructions); *Rocky Brands, Inc. v. Red Wing Shoe Co.*, 2009 WL 10679619, at *6-7 (S.D. Ohio Dec. 9, 2009) (setting parameters on how the plaintiff could argue certain legal standards to the jury and what the court would instruct the jury if the plaintiff chose to introduce a non-binding standard)).

Once the jury instructions and verdict form are finalized, the judge usually reads the final jury instructions to the jury and into the record. The court then provides to the jury a copy of the final instructions to consult during deliberations and the final verdict form to complete during deliberations.

Unless the parties stipulate otherwise, a civil jury verdict must be unanimous and returned by a jury of at least six members (FRCP 48(b)). All jurors must deliberate and participate in reaching the verdict, unless the court dismisses a juror for good cause (FRCP 48(a); *Davis v. Velez*, 797 F.3d 192, 209-11 (2d Cir. 2015) (finding good cause for dismissal where a juror did not attend the fourth day of deliberations to go to the doctor)). After the jury reaches a verdict, the verdict form is typically read into the record and marked as evidence.

Search Proposed Jury Instructions (Federal) for a form for proposed jury instructions, with explanatory notes and drafting tips, and Drafting Jury Instructions and Verdict Forms for more on key issues and considerations when preparing civil jury instructions and verdict forms.

JUROR MISCONDUCT

Although courts presume that jurors will follow the court's instructions (see *Questar Pipeline Co. v. Grynberg*, 201 F.3d 1277, 1287 (10th Cir. 2000)), jurors do not always do so. Juror misconduct has the potential to undo extensive trial preparation work by resulting in a mistrial or a successful appeal. Counsel should consider immediately raising any known juror misconduct to the court during trial, because the misconduct may warrant a motion for a mistrial if it tainted the rest of the jury or it may compel other remedial measures, such as removal of the offending juror.

When litigating a jury trial, counsel should be cognizant of common types of juror misconduct, such as:

- Juror misuse of the internet and social media during trial, including to conduct independent research. With the advent of and accessibility to mobile phones and particularly social media applications, this type of juror misconduct during trial or deliberation now occurs more frequently. (See *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 739 F. Supp. 2d 576, 609 & n.215 (S.D.N.Y. 2010) (discussing the "recurring problem" and consequences of jurors' social media and internet use).)
- Independent research by jurors through means other than the internet and social media (see, for example, *Mayhue v. St. Francis Hosp. of Wichita, Inc.*, 969 F.2d 919, 925-26 (10th Cir. 1992) (affirming an order requiring a new trial after the jury foreperson wrote out definitions that differed from the applicable law in the jury instructions, brought them into deliberations, and read them to other jurors); but see *Starbuck v. R.J. Reynolds Tobacco Co.*, 102 F. Supp. 3d 1281, 1303 (M.D. Fla. 2015) (finding that a juror's unauthorized consultation of a dictionary was not grounds for a new trial)).
- Jurors consulting non-jurors on the evidence, possible outcome, or deliberations during trial (see, for example, *People v. Neulander*, 162 A.D.3d 1763, 1766-68 (4th Dep't 2018) (overturning a conviction and ordering a new trial because a juror exchanged text messages about the trial with friends and family during the trial despite the court's instruction not to engage in third-party communications)).
- Jurors ignoring or impermissibly interpreting jury instructions (see, for example, *Olivas v. City of Hobbs,* 50 F. App'x 936, 938-42 (10th Cir. 2002) (ordering a new trial after the district court denied the jury's request to define the phrase "planting

evidence," and the jury provided a note with the verdict including its own definition of the phrase that did not reflect the plaintiff's theory of liability)).

LOGISTICAL CONSIDERATIONS

Counsel should consider logistical issues in jury trials that do not necessarily arise in bench trials, such as:

- **Breaks.** Jurors typically take set breaks, including lunch. A court may therefore require a break when a witness is mid-testimony. In addition to possibly disrupting the flow of testimony or a rousing cross-examination, these breaks may result in an extended trial period.
- **Scheduling.** Similarly, although counsel and the court may be willing to power through longer hours to finish a witness's testimony or conclude the trial expeditiously, a jury trial typically follows a rigid daily eight-hour schedule or shorter, which may result in an extended trial period. The court may also shorten a trial day to accommodate a juror's schedule if the case has advanced sufficiently and the juror's absence is important and understandable.
- **Evidentiary disputes.** During a bench trial, the parties are free to launch into evidentiary disputes without pause if a line of questioning elicits impermissible hearsay or a party has not laid the proper foundation for a document. However, in a jury trial, the parties must carefully signal the need to raise evidentiary disputes with the court to avoid prejudicing the jury in any way, and request either a sidebar or that the court give the jury a break so the issue can be discussed in open court outside the jury's presence. These disputes, particularly those that require clearing the jury from the courtroom, can add to the length of the trial.
- **Separate juries for bifurcated trials.** If a party anticipates separate or bifurcated trials under FRCP 42(b), such as to separately try the issues of liability and damages, counsel should carefully assess whether a jury trial is preferable before requesting one. Bifurcation without delay may not pose any major issues, but if the parties anticipate a long wait between bifurcated phases, the court may require that different juries hear different phases of the bifurcated trial. If the parties desire the same fact-finder, counsel should raise the issue with the court as early on in the case as possible. (For more information on bifurcated trials, search Motion for Separate Trials (Bifurcation) Under FRCP 42(b) on Practical Law.)

PRESENTATION OF EVIDENCE TO A JURY

Counsel should review the applicable rules and procedures and consider best practices to effectively communicate with the jury and make a compelling evidentiary presentation, including how to:

- Prepare a clear opening statement.
- Properly introduce evidence to the jury.
- Deliver a strong closing argument.

Opening Statement

Many judges dispense with opening statements in bench trials because the court is already familiar with the case through the extensive pretrial submissions parties typically must provide to the court. By contrast, opening statements are critical in jury trials. The first real opportunity for jurors to understand the parties' case is through the opening statement. A strong opening statement provides a roadmap of the proceedings for the jury.

Many judges dispense with opening statements in bench trials because the court is already familiar with the case through the extensive pretrial submissions. By contrast, opening statements are critical in jury trials. The first real opportunity for jurors to understand the parties' case is through the opening statement.

When preparing an opening statement, counsel should make sure to:

- Confine the statement to what the parties will elicit at trial to avoid providing an adversary with the opportunity to exploit in front of the jury any promises of evidence or testimony that never materializes.
- Describe key witnesses and testimony.
- Set out what the party expects to prove at trial.
- Be clear, concise, and as short as possible.

Some courts discourage the use of demonstrative exhibits in the opening statement, but they can be an effective tool for educating the jury at the outset. Parties considering using demonstratives in the opening statement should address doing so in advance with the court and opposing counsel to limit any interruptions in front of the jury.

Search Opening Statements and Closing Arguments in Civil Jury Trials for more on the key issues surrounding opening statements in federal court.

Introducing Evidence

The primary evidence presented at most jury trials is in the form of witness testimony and documents (for example, a key contract or a relevant social media post or email). In some cases, the parties may show the jury tangible evidence like machinery, patented or consumer products, or even edibles or fluids.

Counsel may need to prepare the following when introducing evidence to a jury:

- **Stipulations.** The parties may introduce agreed-on facts to the jury in the form of stipulations.
- **Deposition designations.** For parties or unavailable witnesses, deposition testimony may be read into the record or, if recorded, played for the jury. Before trial, counsel must exchange with opposing counsel deposition designations, which are excerpts of deposition testimony transcripts or portions of video that counsel intends to use at trial, often along with trial witness and exhibit lists. This provides time for the parties to raise any objections and for the court to rule on them before trial, outside the presence of the jury. (For more information on deposition designations, search Preparing for Trial in Federal Court on Practical Law.)
- **Witness lists.** Courts routinely expect parties to disclose before trial the witnesses they intend to call. Particularly in a jury trial, courts commonly ask for the following day's lineup at the end of a trial day, and expect upcoming witnesses to be ready to take the stand as each previous witness finishes testifying to avoid keeping the jury waiting. A witness list usually includes:
  - a brief description of the testimony or topics on which each witness will testify;
  - the estimated length of each witness's testimony; and
  - the order in which the parties intend to present witnesses.
- **Exhibits.** In jury trials, exhibits will almost always be identified before trial and pre-marked. By the time a jury trial begins, the court has typically ruled on any challenges to exhibits, such as at the pretrial conference or through a decision on a motion *in limine*. Because courts usually prefer to resolve evidentiary disputes before trial to prevent delays and avoid wasting jurors' time, courts typically will bar any evidence not previously disclosed and marked for admission, except for impeachment documents, which parties can use only to directly contradict a witness.

Closing Argument

As with opening statements, many judges preclude counsel from offering closing arguments at the end of bench trials. However, the closing argument is critical in a jury trial because it aids the jury in piecing together the evidence and reaching a determination on liability and damages. The closing argument should fulfill the promises made in the opening statement and arm the jury with the evidence and arguments that support the outcome sought.

When preparing a closing argument, counsel should:

- **Reference only admitted evidence.** Counsel should not reference stricken testimony or excluded documents. Doing so carries the risk of:
  - eliciting an objection from opposing counsel and a reprimand from the court;
  - breaking counsel's flow and connection with the jury at a critical juncture; and
  - the court possibly declaring a mistrial.
- **Focus on the facts.** Because the court will instruct the jury on the law, a closing statement should focus on the ultimate determinations of the facts at issue and how the facts apply to the law, liability, and damages.
- **Aim to be engaging and even dramatic.** Juries expect closing statements to be exciting, as it is the part of trial they are most familiar with from popular culture and cinema. It can be particularly effective for counsel to:
  - use demonstrative exhibits and evidence in the closing argument; and
  - recite powerful and concise testimony to make points relevant to the outcome.
- **Be clear, crisp, and concise.** As with the opening statement, the closing statement should not drag, especially given the jury's likely eagerness to deliberate.

Because the court may not permit a break between the last witness's testimony and the closing argument, counsel should draft or outline the closing argument in advance to the extent possible.

Search Opening Statements and Closing Arguments in Civil Jury Trials for more on the key issues surrounding closing arguments in federal court.

FEDERAL TRIAL TOOLKIT

The Federal Trial Toolkit available on Practical Law offers a collection of resources to assist counsel with preparing for and conducting a civil trial in federal court. It features a range of continuously maintained resources, including:

- Final Pretrial Order Under FRCP 16(e): Overview
- Admissibility of Evidence in Federal Court Flowchart
- Motion for Continuance of Hearing or Trial
- Corporate Counsel Trial Readiness Checklist
- Scheduling Order Under FRCP 16(b)
- Issue Preservation Checklist
- Post-Judgment Motion Comparison Chart

POST-TRIAL MOTIONS

Post-trial motions (also called post-judgment motions) can play an important role both during and after a federal jury trial. Examples of post-trial motions include motions for:

- Judgment as a matter of law.
- A new trial.
- Costs and fees.

Search Post-Judgment Motion Toolkit for a collection of resources to assist counsel with preparing, drafting, serving, and filing post-trial motions in federal civil litigation.

MOTION FOR JUDGMENT AS A MATTER OF LAW

A motion for judgment as a matter of law under FRCP 50 provides a party with the opportunity to challenge the sufficiency of the evidence in a civil jury trial both before a jury deliberates (pre-verdict motion) and after a jury reaches, or fails to reach, a verdict (renewed motion). To preserve the ability to bring a renewed motion for judgment as a matter of law after the jury reaches a verdict under FRCP 50(b), a party must move for judgment as a matter of law before the case is submitted to the jury (FRCP 50(a)). To avoid waiving any argument regarding the sufficiency of the evidence on appeal, a party must seek judgment as a matter of law at both points.

A party can move for a pre-verdict judgment as a matter of law after the presentation of evidence and any time before the case is submitted to the jury if the evidence is not sufficient for a reasonable jury to find for a party on a particular claim or defense and the adverse party has been fully heard on the issue during a jury trial (FRCP 50(a)(1)). A successful pre-verdict motion for judgment as a matter of law results in either:

- A judgment against a plaintiff or defendant on a claim or defense.
- A judgment on issues that may not be wholly dispositive of a claim or a defense.

(FRCP 50(a)(1); 1993 Advisory Committee's Note to FRCP 50(a)(1).)

If the court does not grant the pre-verdict motion, the case is considered submitted to the jury, and the movant may then file a renewed motion for judgment as a matter of law. A party must file a renewed motion for judgment as a matter of law no later than 28 days after:

- Entry of judgment that adjudicates all of the parties' rights and claims.
- The jury is discharged, if the motion addresses an issue that the jury did not decide in their verdict.

When ruling on a renewed motion for judgment as a matter of law, the court may:

- Enter judgment on the verdict, if the jury returned a verdict.
- Order a new trial.
- Set aside the jury's verdict and direct entry of judgment as a matter of law.

(FRCP 50(b).)

Although post-trial motions for judgment as a matter of law face a high burden, courts occasionally grant them (see, for example, *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 735-38 (9th Cir. 2019); *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 118 (2d Cir. 2001)).

Search Motion for Judgment as a Matter of Law: Overview (Federal) for more on the framework governing pre- and post-verdict motions for judgment as a matter of law under FRCP 50.

MOTION FOR A NEW TRIAL

A court may grant a new trial on any or all issues, claims, or defenses in a civil jury action "for any reason" available at common law in federal court (FRCP 59(a)(1)(A)).

Examples of jury-related grounds on which courts have considered granting new trials include:

- Alleged errors in jury selection and deliberations, such as:
  - improper striking of jurors (*SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 474, 489 (9th Cir. 2014));

- improper compromise verdicts (*Reider v. Philip Morris USA, Inc.*, 793 F.3d 1254, 1260 (11th Cir. 2015)); and
- outside influence, access to improper information not introduced at trial, or independent investigation by a juror (*Atl. Research Mktg. Sys., Inc. v. Troy*, 659 F.3d 1345, 1358-61 (Fed. Cir. 2011); *Anderson v. Ford Motor Co.*, 186 F.3d 918, 920-21 (8th Cir. 1999)).

- Inconsistent verdicts, including inconsistencies among the jury's special verdict answers (*Tolbert v. Queens Coll.*, 242 F.3d 58, 74-75 (2d Cir. 2001)).
- A jury verdict that was "contrary to the great weight of evidence" (*Watts v. Great Atl. & Pac. Tea Co.*, 842 F.2d 307, 310-11 (11th Cir. 1988)).

A party generally must make a motion for a new trial within 28 days of the entry of judgment (FRCP 59(b)). The failure to timely seek a new trial may foreclose certain arguments on appeal, including evidentiary arguments and the ability to request a new trial on appeal.

Like judgments as a matter of law under FRCP 50(b), FRCP 59(a) essentially allows the district court to set aside the jury's verdict on a party's claim or defense. Courts have held that the standard governing new trial motions is more lenient than the standard governing motions for judgment as a matter of law (see, for example, *Jennings v. Jones*, 587 F.3d 430, 439 (1st Cir. 2009)).

Search Motion for a New Trial: Overview (Federal) for more on motions for a new trial under FRCP 59(a).

MOTION FOR COSTS AND FEES

In certain matters, prevailing parties may move after a jury verdict for:

- Prejudgment interest.
- Statutory costs.
- Attorneys' fees.

The availability of these additional remedies usually is established by statute. Even in jury trials, the court typically decides whether a party is entitled to interest, costs, or fees. (See, for example, *Irwin Indus. Tool Co. v. Worthington Cylinders Wis., LLC*, 747 F. Supp. 2d 568, 584-98 (W.D.N.C. 2010).)

APPELLATE REVIEW OF JURY VERDICTS

A jury's factual findings are afforded great deference on appellate review (*Browning v. President Riverboat Casino-Missouri, Inc.*, 139 F.3d 631, 634 (8th Cir. 1998) (stating that appellate review of a jury verdict is "extremely deferential")). Courts are generally reluctant to overturn jury verdicts given "the sanctity of the jury process" and undertake review "with special care" (*VHT, Inc.*, 918 F.3d at 736).

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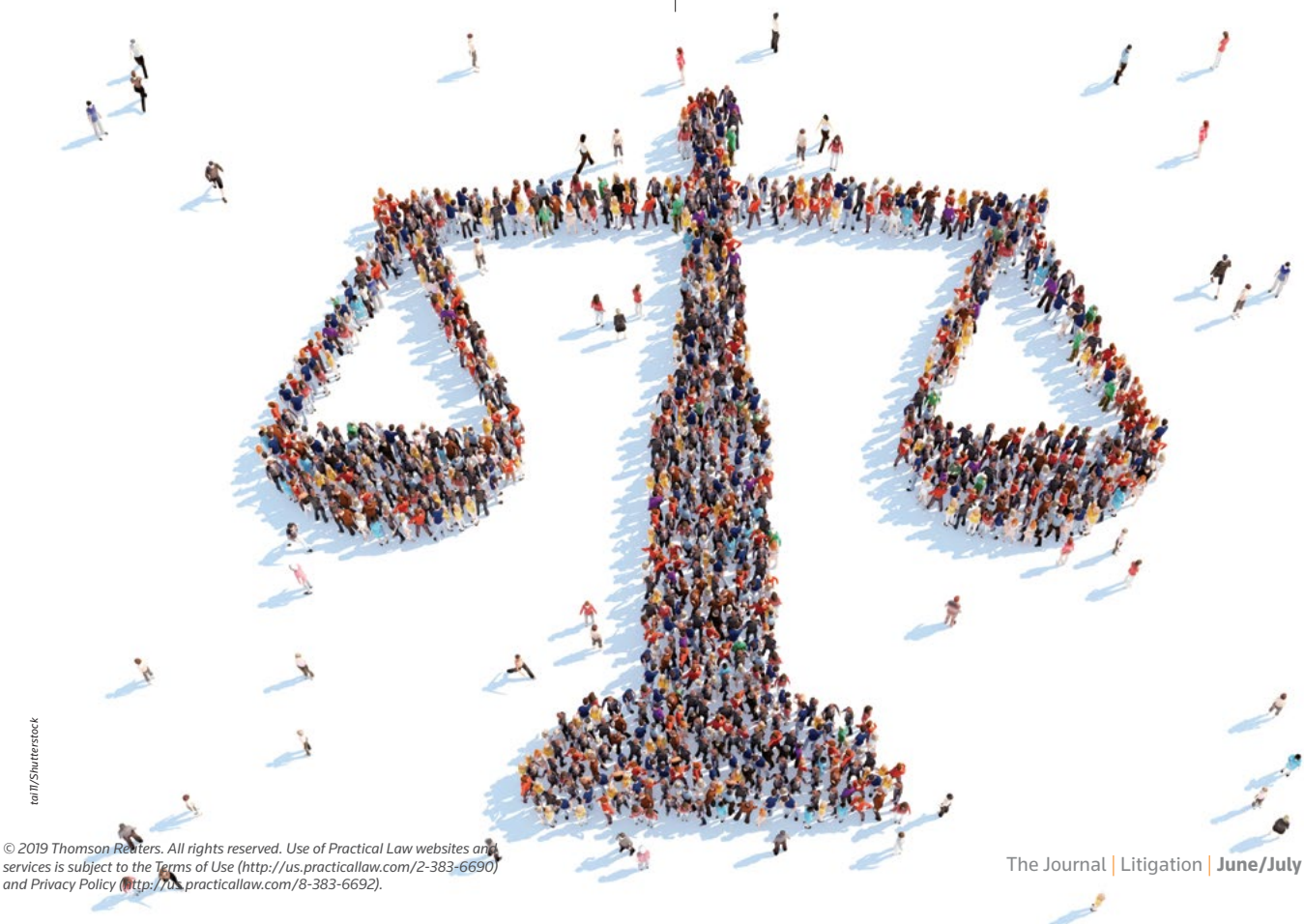

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