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NAVIGATING A CIVIL BENCH TRIAL IN FEDERAL COURT

One of the most important decisions that counsel and their clients must make in many cases is whether to have a trial by jury or a trial by judge (commonly called a bench trial). Although bench trials can offer certain advantages over jury trials, including greater efficiency and flexibility, counsel should be aware of the practical and procedural nuances of a bench trial before choosing this option. Counsel should also understand the circumstances under which a bench trial might be available, even when a party has demanded a jury trial.

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In most federal civil cases, parties can choose between a bench trial or a jury trial. Although juries figure prominently in depictions of trials in popular culture and in the public imagination, bench trials are more common in federal court and are typically the preferred option in civil cases for courts and counsel alike.

Courts and counsel often have this preference because bench trials can be more efficient and easier to navigate than jury trials, in part because the judge both acts as the finder of fact and rules on matters of law and procedure. However, because of the significant impact the choice of a bench trial may have on the procedures and outcome of the case, counsel must carefully analyze various factors before deciding whether to forgo a jury trial.

This article explores:

- The circumstances in which a bench trial is available.
- The potential advantages of a bench trial over a jury trial.
- The differences in case management and discovery in a case set for a bench trial compared to a jury trial.
- Common procedures that courts use before and during a bench trial.
- The applicable standards of review when appealing bench trial decisions and judgments.

AVAILABILITY OF A BENCH TRIAL

Depending on the applicable law and jurisdiction, a bench trial may be automatic in certain cases, especially where the case entails equitable claims for which no right to a jury trial exists (for example, Federal Rule of Civil Procedure (FRCP) 38(e) (stating that there is no right to a jury trial for federal admiralty or maritime claims); see also *Cavender v. Nat'l Coll. of Naprapathic Med. (In re Cavender)*, 2017 WL 8218841, at *11 (Bankr. N.D. Ill. Nov. 27, 2017) (finding that there was no right to a jury trial for a claim of non-dischargeability in bankruptcy); *FDIC v. Sextant Dev. Corp.*, 142 F.R.D. 55, 58 (D. Conn. 1992) (finding that there was no right to a jury trial in a foreclosure proceeding)).

Even on claims for which a right to a jury trial exists, the parties in a federal case may elect to have a judge try the case instead. For example, parties may agree to waive a jury trial before any dispute arises. If the case is later litigated in a jurisdiction where pre-dispute jury waivers are valid, the court will likely uphold the parties' agreement and conduct a bench trial (see, for example, *In re Cty. of Orange*, 784 F.3d 520, 528-29 (9th Cir. 2015) (noting that unlike most other jurisdictions, pre-dispute contractual jury waivers are generally invalid under California and Georgia law unless authorized by statute)).

Aside from enforceable, contractual jury waivers, a bench trial may be available in a federal case on issues otherwise triable by a jury where:

- No party properly demanded a jury trial.
- One or more parties made a proper jury trial demand, but the parties subsequently consented to a bench trial in writing or on the record during the litigation.
- A court finds that no federal right to a jury trial exists on some or all of the issues for which a jury trial demand was made.

FAILURE TO DEMAND A JURY TRIAL

Depending on the jurisdiction and applicable law, a party may have an automatic right to a jury trial on certain claims in federal court. However, a party still must properly demand a jury trial in most cases. If a party does not demand a jury trial at all, or does not timely and properly serve and file a written jury trial demand, a bench trial will likely result, with rare exceptions. Parties who desire a jury trial should therefore demand one early on in a case.

FRCP 38 permits a jury trial on some or all factual issues triable by 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 may make the jury trial demand separately or include it in a pleading (FRCP 38(b)). In practice, a plaintiff who desires a jury trial typically makes its demand in the complaint, while a defendant typically demands a jury trial in its answer or counterclaims. However, either party can demand a jury trial in a separate document if the demand is properly served and filed within the appropriate timeframe.

Search Serving Federal Court Documents Under FRCP 5 and E-Filing in Federal District Court: The Basics for more on serving and filing documents in federal court.

Although a jury trial demand need not specify the factual issues for which a jury trial is requested, if a party has specified only certain issues in its jury trial demand, any other party may serve a written demand for a jury trial on the remaining issues (if those issues are triable by a jury) within either:

- 14 days from service of the initial jury trial demand.
- A shorter time that the court may set.

(FRCP 38(c).)

The failure to properly (and timely) serve and file a written jury trial demand generally waives the right to a jury trial (FRCP 38(d)). However, a party may file a motion for a jury trial later in the case on any issue for which the party could have demanded a jury trial. A court has discretion to grant or deny this type of motion (FRCP 39(b); see, for example, *Winter Enters., LLC v. W. Bend Mut. Ins. Co.*, 2018 WL 1522119, at *5-6 (S.D. Ohio Mar. 28, 2018); *Fidelity & Deposit Co. of Md. v. A-MAC Sales & Builders Co.*, 2006 WL 3802180, at *1-3 (E.D. Mich. Dec. 21, 2006)).

A party that is uncertain at the preliminary stages of a case about whether a jury or bench trial would be appropriate should consider demanding a jury trial to avoid waiving the right, but only if it believes the other parties would be amenable to stipulating to a bench trial at a later date if a bench trial becomes preferable.

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Even if no party has made a jury trial demand or no right to a jury trial exists for a certain claim (for example, because the claim sounds in equity), the court may in its discretion either:

- Empanel an advisory jury to try the issue under FRCP 39(c)(1). The court may adopt or reject the jury's findings in whole or in part (see, for example, *Miles-Hickman v. David Powers Homes, Inc.*, 613 F. Supp. 2d 872, 879 (S.D. Tex. 2009)).
- Allow a jury to hear the issue with the parties' consent under FRCP 39(c)(2), which has the same effect as if a jury trial had been a matter of right, unless:
  - the case is against the United States; and
  - a federal statute provides for a bench trial.

CONSENT TO WITHDRAW A JURY TRIAL DEMAND

If a party properly demands a jury trial on issues for which there is a federal right to a jury trial, a jury must try the case unless all parties later consent to withdraw the jury trial demand (FRCP 38(d); FRCP 39(a); see, for example, *SEC v. Jensen*, 835 F.3d 1100, 1106-08 (9th Cir. 2016)).

To properly withdraw the jury trial demand, all parties or their attorneys must file a written stipulation or stipulate on the record that all parties consent to a bench trial on the issues for which a jury trial was previously demanded (FRCP 39(a)(1)). Once the parties have properly withdrawn the jury trial demand, a bench trial may occur.

Notably, if one party properly demands a jury trial on issues triable by a jury, other parties may rely on that demand without filing their own. As a result, if the party who made the jury trial demand later changes its mind, the other parties must still consent to withdrawing the jury trial demand. (See *Jensen*, 835 F.3d at 1106-08 ("It does not matter whether the party that filed for waiver was the same party that demanded a jury in the first place; other parties are entitled to rely on the original jury demand, and need not file their own demands.") (internal quotations omitted).)

NO FEDERAL RIGHT TO A JURY TRIAL

A bench trial may result despite a proper jury trial demand if the court finds that there is no federal right to a jury trial on some or all of the issues for which a jury trial demand was made. The court may make this finding *sua sponte* or on motion by one or more of the parties. (FRCP 39(a)(2).)

Additionally, if a party demands a jury trial on an issue for which there is no right to a jury trial, courts have found that the party may unilaterally withdraw the jury trial demand without consent from the other parties (see *FN Herstal SA v. Clyde Armory Inc.*, 838 F.3d 1071, 1089 (11th Cir. 2016), *cert.* denied, 137 S. Ct. 1436 (2017); *Branta, LLC v. Newfield Prod. Co.*, 2017 WL 1435882, at *7-8 (D. Colo. Apr. 24, 2017)).

POTENTIAL ADVANTAGES OF A BENCH TRIAL

When deciding between a jury trial and a bench trial, counsel should weigh various factors, including the level of need for:

- Efficiency and flexibility in the trial process.
- A sophisticated trier of fact, given the complexity of the issues raised in the case.
- Judicial guidance or participation during the trial.

EFFICIENCY AND FLEXIBILITY

A bench trial can typically proceed more quickly than a jury trial because in a bench trial:

- The court may allow more flexibility on the start and end times each day with minimal breaks. By contrast, a jury trial requires lengthy breaks and a more structured daily schedule.
- The court may permit the parties to dispense with verbal opening and closing statements entirely and instead rely on written submissions.
- The parties may argue evidentiary disputes and other trial-related motions on the record in open court, rather than requiring the court and counsel to hold sidebars on issues that must be argued out of the jury's earshot.
- The parties can avoid the time and expense of performing jury-related tasks, such as:
  - drafting *voir dire* questions;
  - conducting *voir dire* motion practice;
  - managing the jury selection process itself;
  - employing jury consultants to conduct pretrial research or research on prospective jurors during *voir dire*; and
  - drafting jury instructions for the trial opening and conclusion.
- The court can reserve evidentiary and legal issues for its final decision and avoid slowing down the trial, instead of having to decide issues in real time to submit the case to the jury.

Bench trials may also afford the court and the parties more flexibility in terms of:

- **Scheduling.** A bench trial can be spread out over multiple days or weeks to accommodate the schedules of the court, the parties, or the witnesses, and avoids concerns about jurors' individual schedules. Conversely, a bench trial can be expedited or truncated if the court and the parties elect to sit for longer days or take fewer breaks.
- **Phasing and bifurcation.** Dispositive issues can be tried and decided separately from ancillary issues that arise before or during a bench trial, which may become irrelevant once the court resolves core issues in the litigation. Similarly, the parties can try the liability and damages phases separately (with separate discovery phases if appropriate), without requiring multiple jury selections. (See below *Case Management and Discovery in a Bench Trial*.)
- **Ordering evidence.** In a bench trial, the parties can present witnesses and evidence out of order to accommodate scheduling or timing constraints. For example, if the plaintiff is presenting its case in chief but the defendant's expert is available on only a certain day or at a specific time before the plaintiff rests, the judge can hear the expert's testimony out of order. By contrast, presenting an expert witness out of order in

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a jury trial might confuse the jury about the party, evidentiary burden, and issue to which the expert's testimony relates.

Counsel should be aware that although a bench trial may be more efficient and flexible than a jury trial, pretrial submissions in a bench trial are often more voluminous and time-consuming, and may require more court filings (see below *Pretrial Procedures* and *Post-Trial Submissions and Judgment*).

SOPHISTICATED TRIER OF FACT

Parties may prefer having a sophisticated, single trier of fact rather than a jury of laypersons in certain cases, such as those involving complex factual issues. To determine whether a case is better suited to a bench trial on this basis, counsel should consider whether the trial will involve:

- Complex scientific or financial information.
- Dense, detailed, or voluminous evidence.
- Issues that might inflame or prejudice a jury (for example, financial crimes or fraud).
- Extensive expert testimony on complicated issues.

Parties may opt to present these types of matters to a judge who has the capacity and bandwidth to process complex issues, complicated or dry testimony, or voluminous and dense evidence. However, if the assigned judge has a reputation for being impatient or inattentive to details or mundane minutia, these considerations may instead favor a jury trial.

To help assess whether a bench trial before a specific judge is preferable to a jury trial, counsel should:

- Closely review the judge's individual rules and the jurisdiction's local rules, particularly those on bench trial procedures.
- Speak with any colleagues and peers who have litigated before that judge because insights from both bench and jury trials may inform the decision on how to proceed.
- Review the judge's past decisions, including any findings of fact and conclusions of law in other bench trials.
- If possible, observe the judge at a hearing or bench trial in a different case to gather information on the judge's style, mannerisms, and procedures.
- Read any rankings or reviews of the judge in online and print publications.

INCREASED JUDICIAL GUIDANCE OR PARTICIPATION

Unlike jury trials, bench trials allow a judge to openly provide feedback and direction on issues of interest throughout the trial. For example, in a bench trial, a court can guide a party's case presentation strategy by:

- **Being more transparent about the issues the court believes are dispositive.** This transparency may help the parties identify relevant materials early on and direct the orderly and efficient presentation of evidence. For example, the court may state at the outset what factual issues it believes are dispositive, and on which issues it will likely be willing to hear evidence. This feedback allows the parties to tailor their cases in chief and defenses to what the court believes are the most important factual inquiries (and anything else the parties believe must be established in the record for a potential appeal). It may also streamline case management and discovery in the case (see below *Case Management and Discovery in a Bench Trial*).
- **Clarifying confusing testimony as it occurs.** Some judges rarely interject in fact or expert witness questioning or cross-examination during a jury trial. However, during a bench trial, these judges may be more inclined to ask a witness clarifying questions to help the court decide an issue that depends on the witness's testimony.
- **Permitting specific and focused briefing on key issues.** Many judges allow or require the parties to brief specific factual or legal issues before or after a bench trial, enabling the parties to focus on issues of concern to the court. Some judges also may request proposed orders or proposed findings of fact and conclusions of law to assist in deciding the matter. These submissions are another avenue for the parties to direct the court's attention to specific arguments or evidence in the case.

CASE MANAGEMENT AND DISCOVERY IN A BENCH TRIAL

A court's case management and discovery procedures are generally the same regardless of whether a case is set for a bench or jury trial. However, when a case is set for a bench trial, the court can often address earlier on in the case material factual issues that may resolve or dispense with the need to consider time-consuming and potentially costly ancillary issues.

If a case is set for a bench trial and key factual issues exist that, if resolved, would shorten and streamline the litigation, the parties should consider requesting staged or staggered (bifurcated) discovery. This type of motion typically asks the court to limit discovery to a narrow, dispositive issue and stay all other discovery in the case until the parties or the court resolve that issue.

Depending on how the court or the parties resolve a dispositive issue, the need for any additional discovery may be eliminated (see, for example, *Loreaux v. ACB Receivables Mgmt., Inc.*, 2015 WL 5032052, at *3-4 (D.N.J. Aug. 25, 2015)). Similarly, if the resolution of factual issues earlier in the case would eliminate other tangential issues or facilitate settlement discussions, the parties should consider asking the court to bifurcate discovery.

Search Motion for Separate Trials (Bifurcation) Under FRCP 42(b) for more on bifurcated trials and discovery.

PROCEDURAL CONSIDERATIONS IN A BENCH TRIAL

Although bench trials and jury trials are procedurally similar in many ways, the most obvious difference is that, in a bench trial, the court and the parties avoid the jury selection process and the types of issues that arise when dealing with jurors, such as scheduling concerns, the need for longer and more structured breaks, and the general unpredictability.

More nuanced differences may also exist between the two types of trials in the procedures governing:

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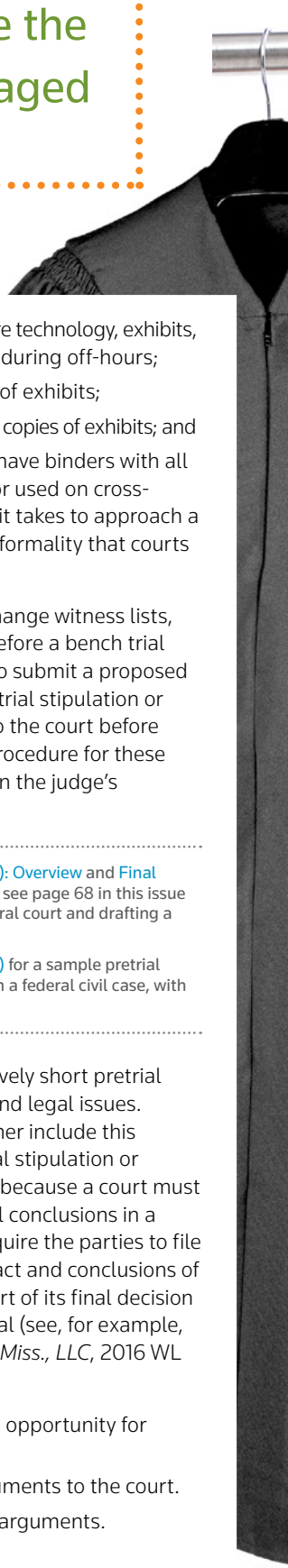
If a case is set for a bench trial and key factual issues exist that, if resolved, would shorten and streamline the litigation, the parties should consider requesting staged or staggered (bifurcated) discovery.



- Pretrial matters, such as the final pretrial conference and pretrial submissions.
- The trial process and evidentiary issues.
- Post-trial submissions.

PRETRIAL PROCEDURES

As in a jury trial, at the close of discovery and after rulings on dispositive motions (if any), a court preparing for a bench trial typically holds a final pretrial conference.

During the conference, the court and the parties may discuss whether the trial will be held over consecutive days or will be spread out, with days or even weeks between trial days. The court typically sets the trial start date, determines the amount of time appropriate and necessary for receiving the evidence, and blocks additional days or weeks accordingly. The court may also set the start and finish times of each trial day. However, once trial begins, the schedule in a bench trial is often more flexible than a jury trial because the court can elect to conduct the trial for longer hours without worrying about jurors' schedules (see above *Efficiency and Flexibility*).

Other issues that may arise or that the parties may wish to address during the final pretrial conference include:

- **Pretrial submissions.** If it is not already clear from the judge's individual rules or the court's local rules, the court may explain what pretrial submissions it expects to receive, in what form, and when. The types of pretrial submissions required in a bench trial typically differ from those in a jury trial, and may include items like:
  - written direct testimony (see below *Eliciting Witness Testimony*); and
  - statements on the parties' factual and legal positions.
- **Evidentiary procedures.** In addition to addressing specific issues surrounding witnesses, exhibits, and deposition designations (see below *Trial and Evidentiary Procedures*), the parties should seek the court's guidance on certain evidentiary logistics, such as:
  - how the court prefers the parties to display exhibits;
  - what technology will be permissible and available through the court to display exhibits, and what technology the parties must bring themselves;
  - whether the parties may store and secure technology, exhibits, and other materials at the courthouse during off-hours;
  - whether the court wants paper copies of exhibits;
  - whether witnesses can be handed paper copies of exhibits; and
  - whether the court wants witnesses to have binders with all potential exhibits that will be offered or used on cross-examination. This helps save the time it takes to approach a witness with each piece of evidence, a formality that courts may require in jury trials.

As in a jury trial, parties typically must exchange witness lists, exhibit lists, and deposition designations before a bench trial begins. In most cases, the parties must also submit a proposed final pretrial order (sometimes called a pretrial stipulation or pretrial statement) and other documents to the court before the trial begins. The timing, content, and procedure for these pretrial submissions may vary depending on the judge's preferences and the court's local rules.

Search Final Pretrial Order Under FRCP 16(e): Overview and Final Pretrial Order Under FRCP 16(e) Checklist or see page 68 in this issue for more on final pretrial conferences in federal court and drafting a final pretrial stipulation.

Search Final Pretrial Order Under FRCP 16(e) for a sample pretrial stipulation that counsel can use as a guide in a federal civil case, with explanatory notes and drafting tips.

In bench trials, some courts require a relatively short pretrial memorandum that summarizes the facts and legal issues. These courts may require the parties to either include this pretrial memorandum as part of the pretrial stipulation or submit it as a separate filing. Alternatively, because a court must make factual findings separately from legal conclusions in a bench trial (FRCP 52(a)(1)), some courts require the parties to file before trial detailed proposed findings of fact and conclusions of law that the court can edit and adopt as part of its final decision or that the parties can supplement after trial (see, for example, *56th St. Inv'rs, Inc. v. Worthington Cylinders Miss., LLC*, 2016 WL 866660, at *1 (E.D. Va. Mar. 7, 2016)).

These pretrial submissions are an excellent opportunity for counsel to:

- Highlight strong evidence and legal arguments to the court.
- Explain weaknesses in evidence or legal arguments.

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- Set the stage for a case.
- Help ensure that written direct testimonies, cross-examination outlines, and exhibit lists are complete.

As in jury trials, courts conducting bench trials typically require the parties to submit before trial any motions *in limine* to address known evidentiary or legal issues, including any *Daubert* motions to exclude experts (see *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993)). However, unlike in jury trials, courts in bench trials may reserve ruling on motions *in limine* until they issue a written decision on the law and facts after trial. Courts often proceed in this order because judges, unlike juries, are considered sufficiently sophisticated to disregard evidence later in their analysis if they ultimately determine that the evidence was irrelevant or otherwise inadmissible.

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

Search Evidence in Federal Court: Overview for information on the arguments counsel may use to exclude evidence through a motion *in limine*.

TRIAL AND EVIDENTIARY PROCEDURES

One of the most significant procedural differences between a bench trial and a jury trial is that a court may elect to reserve decision when evidentiary challenges occur in a bench trial, rather than rule on them when they arise as is typical in a jury trial.

Reserving judgment on evidentiary objections may help the trial proceed more efficiently and afford the court time for a more careful review of the proposed evidence before issuing a final decision. The parties should determine if the court prefers to address evidentiary issues when they arise or at another set time, such as the start of the next trial day.

In addition to the evidentiary matters addressed at the final pretrial conference (see above *Pretrial Procedures*), it is also critical for counsel to determine:

- Whether the court prefers the parties to submit witness affidavits or declarations in lieu of live direct testimony and, where live testimony is required, how the court prefers to handle the order of the witnesses and gaps between witnesses.
- How the court prefers the parties to move documents or data into evidence.
- How the court wants the parties to present deposition designations at trial.
- Whether the court wants to eliminate opening statements and closing arguments.

Eliciting Witness Testimony

In place of live direct testimony at a bench trial, some judges require or allow parties to submit written witness affidavits or declarations containing each fact or expert witness's direct or rebuttal testimony (see, for example, *Kislin v. Dikker*, 2017 WL 3405533, at *7 (S.D.N.Y. Aug. 7, 2017); *Chevron Corp. v. Donziger*, 2013 WL 5548913, at *1-2 (S.D.N.Y. Oct. 7, 2013)).

This practice allows counsel to forgo drafting direct examination outlines and preparing witnesses for live direct testimony, while still subjecting the witness to live cross-examination and live or written redirect or rebuttal testimony (see, for example, *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 960 n.125 (C.D. Cal. 2015), aff'd *sub nom. Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017) and 674 F. App'x 654 (9th Cir. 2017); *Wax NJ-2, LLC v. JFB Constr. & Dev.*, 111 F. Supp. 3d 434, 437 (S.D.N.Y. 2015)).

Typically, counsel must draft written statements from each testifying witness, often months before the trial begins. A court may set a staggered schedule for written direct testimony. For example, it may allow the party with the burden of proof to serve its written direct testimony first, and then submit rebuttal or reply declarations after the opposing party submits its fact and expert witness statements. Unless the parties agree to waive cross-examination, the witness typically must appear in court to enter the direct testimony into evidence and submit to cross-examination at trial. If the judge's individual rules do not address this scenario, the parties should raise it at the pretrial conference to confirm the court will accept written testimony without the witness's presence in court to swear to it (see above *Pretrial Procedures*).

It is critical for counsel to accurately estimate the length of a witness's testimony to gauge when the next witness should be in the courthouse and ready to take the stand. However, counsel and witnesses should nonetheless prepare for the court to take witnesses out of order if timing or scheduling requires it.

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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, including guidance on organizing trial evidence, evaluating and filing trial-related motions, preparing the final pretrial order, jury instructions, and verdict forms, drafting opening statements and closing arguments, using jury consultants and mock juries, and selecting a jury. It features a range of continuously maintained resources, including:

- Corporate Counsel Trial Readiness Checklist
- Proof Matrix
- Experts: Daubert Motions
- International Litigation: Admissibility of Foreign Evidence at Trial in the US
- Mock Jury Exercises
- Motion for Judgment as a Matter of Law: Overview (Federal)
- Motion for a New Trial: Overview (Federal)
- Motion for a Mistrial (Federal): Memorandum of Law
- Renewed Motion for Judgment as a Matter of Law Under FRCP 50(b): Motion or Notice of Motion
- Post-Judgment Motion Comparison Chart
- Issue Preservation Checklist

When preparing witnesses for live testimony at a bench trial, counsel should instruct the witness that:

- The judge may interrupt counsel conducting direct or cross-examination and ask the witness a question directly, which the witness should answer as appropriate.
- When counsel is conducting the examination, the witness should face counsel and address any answers to counsel, rather than the judge.
- The witness should provide direct and non-argumentative responses, especially to any questions that the judge poses.

As in a jury trial, it is critical for counsel to accurately estimate the length of a witness's testimony to gauge when the next witness should be in the courthouse and ready to take the stand. However, counsel and witnesses should nonetheless prepare for the court to take witnesses out of order if timing or scheduling requires it.

If a witness ends early but the next witness is not yet available, some courts may allow counsel to play or read deposition designations into the record to fill these gaps (see below *Entering Deposition Designations into the Record*).

Entering Exhibits into the Record

How and when parties enter exhibits into the record at a bench trial, and when parties may argue any objections to exhibits, vary depending on the judge.

For example, a judge who permits parties to submit direct testimony through written affidavits or declarations may require the party offering the testimony to move all exhibits referenced in the affidavit or declaration into the record at the same time it offers the written direct testimony at trial. Alternatively, the court may prefer that counsel enter in all evidence after live cross-examination or redirect of a witness. In cases where exhibits are presented during live direct testimony, some courts may prefer that the parties enter an exhibit into evidence as it is shown to a witness, while other courts may prefer that the parties enter all relevant exhibits at the end of a specific witness's testimony. Counsel should ascertain the court's exact preferences during the pretrial conference (see above *Pretrial Procedures*).

To determine whether to file or store the exhibits at the trial's conclusion, counsel should consult the district court's local rules and the judge's individual rules. Some courts may require the parties to file all trial exhibits, while other courts prohibit parties from filing them absent a court order and instead require the parties to keep them (for example, S.D.N.Y. and E.D.N.Y. L. Civ. R. 39.1(a)).

Entering Deposition Designations into the Record

The procedure for entering deposition designations into the record during a bench trial also varies by judge.

For example, some judges require counsel to read the deposition questions into the record, and then have a paralegal or other support staff enter the witness box and read the deponent's responses so that a court reporter can take down the exchange for the trial record. Other judges require the parties to play the deposition testimony, if recorded, in open court. Some judges simply receive the deposition designations and note their receipt in the trial record or require the parties to file them on the docket before trial (see, for example, *Armenian Assembly of Am., Inc. v. Cafesjian*, 746 F. Supp. 2d 55, 74 (D.D.C. 2010)).

A court may require parties to mark and offer as evidence the designated transcript portions. A court may also opt to either rule on any objections to the designations before the parties present the testimony at trial or reserve ruling until after trial.

Search Preparing for Trial in Federal Court for more on deposition designations.

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Presenting Opening Statements and Closing Arguments

Many judges dispense with opening statements in bench trials because of the extensive pretrial submissions that they often require. A judge typically familiarizes herself with these submissions before the bench trial begins and therefore does not require the same overview of a case that would benefit a jury.

However, some judges may grant a party's request to provide an opening statement or presentation. If a court allows opening statements, counsel should keep them concise and limit any theatrics that might be more appropriate when attempting to engage a jury. Counsel should also expect that a judge may be likely to interrupt counsel's presentation and direct counsel to address the issues that the court believes are the most critical. Accordingly, counsel giving an opening statement in a bench trial should be prepared to deviate from a scripted presentation.

Similarly, many judges preclude counsel from offering closing arguments at the end of bench trials. Instead, courts are more likely to request additional written submissions that incorporate the testimony elicited at trial and reference only the admitted evidence. If a court permits closing arguments, counsel should consider whether using charts or demonstratives might help the court process all of the evidence that was presented at trial, as in a jury trial.

Counsel should also be aware that some courts may schedule closing arguments for a date after post-trial submissions are due (see below *Post-Trial Submissions and Judgment*). In these cases, the closing arguments may occur weeks or months after the bench trial concludes.

Search Opening Statements and Closing Arguments in Civil Jury Trials for guidance on how to effectively deliver an opening statement and a closing argument in federal court, including information on making and responding to objections during opening and closing and the timing and order of the presentations.

POST-TRIAL SUBMISSIONS AND JUDGMENT

To aid the court in making the required separate factual findings and legal conclusions in a bench trial (FRCP 52(a)(1)), some courts require the parties after trial to submit proposed findings of fact and conclusions of law or to supplement proposed findings of fact and conclusions of law that were submitted before the trial began (see, for example, *Parham v. CIH Props., Inc.*, 208 F. Supp. 3d 116, 121-22 (D.D.C. 2016); *56th St. Inv'rs, Inc.*, 2016 WL 866660, at *1; see above *Pretrial Procedures*).

In these post-trial submissions, counsel should:

- Reference only admitted testimony and evidence.
- Concentrate on issues that the court signaled interest in during trial.
- Address other issues only to the extent necessary to preserve them for appeal.

Search Post-Judgment Motion Toolkit for a collection of resources counsel can use to prepare, draft, serve, and file a variety of post-judgment motions in federal civil litigation.

APPEALS OF DECISIONS AND JUDGMENTS ISSUED IN A BENCH TRIAL

As in a jury trial, a party may appeal a court's decision in a bench trial when permitted. The applicable standard of review on appeal depends on the type of ruling at issue.

An appellate court applies a *de novo* standard of review to a district court's conclusions of law after a bench trial (see *Connelly v. Blot*, 712 F. App'x 258, 259 (4th Cir. 2018); *Merck Sharp & Dohme Corp. v. Amneal Pharm. LLC*, 881 F.3d 1376, 1384 (Fed. Cir. 2018)). Under this standard, an appellate court gives no deference to the district court's legal conclusions and reviews these issues from the same position as the district court as if brought to the court for the first time.

However, an appellate court uses a clear error standard of review when considering a district court's findings of fact (FRCP 52(a)(6); see *Connelly*, 712 F. App'x at 259; *Merck Sharp & Dohme Corp.*, 881 F.3d at 1384). Under this standard, an appellate court gives significant deference to the district court's findings of fact and will affirm the factual findings if they are plausible given the entire record, even if the appellate court would have weighed the evidence differently (see *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985); *Guzman v. Hacienda Records & Recording Studio, Inc.*, 808 F.3d 1031, 1036 (5th Cir. 2015)).

The clear error standard requires the appellate court to afford additional deference to the district court's factual findings when they are based on credibility determinations. This is because the district court had the opportunity to observe the witness's demeanor and tone of voice during his testimony. Given this heightened deference, an appellate court will almost always affirm credibility findings on appeal unless they are internally inconsistent or extrinsic evidence contradicts them. (FRCP 52(a)(6); see *Guzman*, 808 F.3d at 1036.)

When appealing an issue involving a mixed question of law and fact after a bench trial, counsel should consult case law in the relevant jurisdiction to determine the appropriate standard of review, as the standard varies among the federal circuit courts of appeal (see, for example, *Lyda Swinerton Builders, Inc. v. Oklahoma Sur. Co.*, 877 F.3d 600, 615 (5th Cir. 2017) (noting that mixed questions are reviewed *de novo*); *Fed. Hous. Fin. Agency for Fed. Nat'l Mortg. Ass'n v. Nomura Holding Am., Inc.*, 873 F.3d 85, 138 n.54 (2d Cir. 2017) (noting that mixed questions are reviewed either *de novo* or for clear error depending on whether the question is predominantly legal or factual); *Alpha Painting & Constr. Co. v. Del. River Port Auth. of Pa. & N.J.*, 853 F.3d 671, 682-83 (3d Cir. 2017), as amended (Apr. 26, 2017) (reviewing mixed questions for clear error except that the district court's choice and interpretation of legal issues remain subject to *de novo*, or plenary, review)).

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