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The risks and rewards of bench trials

WHY CHOOSE A BENCH TRIAL, THE DIFFERENT APPROACH REQUIRED IN A BENCH TRIAL, AND HOW TO HANDLE POST-TRIAL MATTERS

As we deal with the COVID-19 pandemic, there is much uncertainty in our civil-justice system. It is unlikely there will be civil jury trials for the remainder of 2020 in Los Angeles County, with limited prospects in other venues. Looking ahead to 2021, fears will linger regarding how to effectively bring cases to adjudication. Arbitration is an option, but we suggest a bench trial. In February of this year, we did just that; we waived jury and successfully litigated a three-week bench trial.

How to waive jury

In order to consensually waive jury in a civil trial, all parties must consent. (Cal. Const. Art. I, § 16; Civ. Proc. Code § 592.) The waiver must be unequivocal. (See *DiPirro v. Bondo Corp.* (App. 1 Dist. 2007) 62 Cal.Rptr.3d 722.) This can be accomplished by written stipulation filed with the court or via oral consent made in open court and entered in the minutes. (Code Civ. Proc., § 631, subd. (f)(2),(3).)

The waiver can be made by an attorney with client consent. However, it is advisable to obtain a signed written waiver from the client prior to informing the court of the waiver. Although there is a split concerning whether client approval is required in a personal-injury case, it is best practice to get written authority from the client. (See *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404.)

The waiver should be fully explained to the client and an executed file copy retained. An exemplar of a waiver form can be obtained from the authors.

It is important the client executes the waiver after the lawsuit has been filed. (See *Grafton Partners L.P. v. Superior Court* (2005) 36 Cal.4th 944 [holding that a jury waiver is only valid when executed after the lawsuit has been filed].) In *Grafton*, the California Supreme Court held that Code of Civil Procedure section 631 "presupposes a pending action" and that "only persons who already are parties to a pending action may enter into a waiver of jury trial as provided by the statute."

Waiver can also be accomplished by indicating nonjury trial on a case management statement. (Judicial Counsel Forms, form CM-110, q. 5; also see Code Civ. Proc., § 631, subd. (f)(4) [waiver if jury not demanded at time case first set for trial].)

Strategically waiving the jury

A jury trial is waivable at any stage of the proceeding, assuming defense also consents. From a strategic standpoint, consider announcing waiver on the first day of trial, in open court, without giving prior notice to opposing counsel. Defense will be caught off guard. Further, it may give opposing counsel additional incentive to stipulate to the waiver, due to concern that the judge may feel slighted if they object.

If defense objects to a bench trial, ask the clerk to determine if defense timely deposited its jury fees. (Code Civ. Proc., § 631, subd. (b).) These fees are due on or before the date scheduled for the initial case management conference. Failure to timely deposit fees can result in a jury trial waiver. (Code Civ. Proc., § 631, subd. (f)(5).)

The trick is deciding whether to waive jury before or after the judge rules on motions in limine. Given that a judge in a bench trial will be more inclined to admit disputed evidence, as discussed below, take note of what important evidence each side is trying to exclude.

Those wanting to exclude damaging evidence, such as an inaccurate traffic collision report, should consider allowing the judge to first make in limine rulings before waiving jury. In this manner, the judge will look at disputed evidence with greater

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scrutiny, given her role as an evidentiary gatekeeper.

Also consider waiving jury prior to deliberations concerning videotaped deposition designation in lieu of live testimony. (Code Civ. Proc., §§ 2025.220, 2025.620, 2025.340, subd. (m).) This is a tedious process of counter-designations and objections. As discussed below, rules of evidence are relaxed in a bench trial. Therefore, much of this testimony will come into evidence. To stay in the judge's good graces, waive jury before going through the deposition designation process, so that the judge doesn't have to go through voluminous transcripts with a fine-tooth comb.

Regardless, the waiver needs to be announced before voir dire. Do not waste the court's time and resources to impanel a jury only to subsequently request a bench trial.

Factors to weigh in waiving a jury

Trial by jury is a foundational aspect of our justice system, and the decision to waive it should not be taken lightly. (See *Mut. Bldg. & Loan Ass'n of Long Beach v. Corum* (1934) 220 Cal. 282 [reversible error to improperly deny right to jury].)

A limited award – no grand slam

Because a judge will be the sole fact-finder in a bench trial, it is unlikely a judge will award a record-setting judgment. This is the number one consideration before waiving jury. No grand-slam verdict is likely. Judges are public officials aware of their reputation within the legal community, as well as with the electorate.

The job of a judge is to be impartial and make rulings based upon reason and law, not based on passions. While every judge, just like ever juror, is different, the smart play is to assume a seasoned judge will award a compromised judgment.

But a bench trial may also hedge against downsides. Judges are experienced litigators, who may be better equipped to afford appropriate probative weight to unfavorable facts. Examples would include damaging personal evidence against the plaintiff, like felony convictions, intoxication, or sub-rosa evidence.

Another common example would be an adverse police report that may not be as complete or as accurate as a full expert reconstruction. Lay people often give undue weight to officer testimony. A seasoned judge is often better equipped to weigh this evidence, in order to ensure you get a fair result.

Selecting the judge

In a bench trial, the judge is the ultimate and sole decider as to the weight of evidence, witness credibility and questions of fact and law. (Code Civ. Proc., § 631.8, subd. (a) ["The court as trier of the facts shall weigh the evidence."].) So, it's important to have faith in the judge before considering waiving jury.

Do your homework. Check listservs, email, and call or text fellow trial attorneys to get insight on the judge. A favorable judicial resume would include civil experience, plaintiff work, and trial experience.

Gathering judicial information can be difficult when answering ready for trial in a master calendar court, like the downtown Los Angeles personal-injury hub affording only 30 minutes to decide whether to keep or challenge a selected trial judge. (Code Civ. Proc., § 170.6.) It is good practice to have resources available at your office so staff can do a quick research, as soon as provided with the judge's name.

The goal is to receive a fair, knowledgeable, seasoned judge to be the trier of fact.

Jury pool

Another factor to consider is the potential jury pool. Before answering ready for trial, do some research on jury verdicts at the courthouse where the accident occurred. The Presiding Judge tends to keep cases venued where the accident occurred.

More recently there is a trend of large verdicts coming out of historically conservative venues, such as Van Nuys, Alhambra and Pasadena. Most jury consultants agree that fair jury panels can come out of the most "conservative" jury venues. But if there are significant concerns about a venue which has less than stellar historic jury verdicts, it may be worth considering waiving jury. A good judge with favorable reviews will likely award a more fair result than a conservative jury.

Efficiency

Generally speaking, a bench trial is cheaper, faster and more easily managed than a jury trial. There are no concerns about juror scheduling conflicts, illness or failure to appear, which may require the court to go dark and extend trial time. Nor will there be time-consuming voir dire and jury deliberation. Expensive juror consultants are not necessary in a bench trial.

Judges also usually have shorter hours each day for jury trials than for bench trials, So you will get more accomplished each day during a bench trial, again expediting the proceeding. The trial itself should also proceed quicker without the need for sidebars and in-chambers conferences.

The judge in a bench trial may be more accommodating for scheduling conflicts of witnesses, which inevitability arise in any trial. In a jury trial, a judge demands uninterrupted testimony in order to efficiently manage the jurors' time. The judge in a jury trial will not look favorably on a request to end early one day or extend time another day to accommodate witnesses' schedules. This could result in key witnesses being unable to take the stand or having to use videotaped deposition testimony in lieu of live testimony.

But in a bench trial, if there is a gap in testimony, the judge may actually appreciate a short break in the proceedings, where she can recuse herself to chambers to work on other matters. So if a case has multiple witnesses, particularly those from out of state, or practicing medical doctors who are on-call, or in-demand experts who are constantly engaged in multiple cases, think about waiving jury in order to ensure their appearance.

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A trial without a jury also means no jury fees. And if the other side does not waive jury, they are responsible for all jury fees. (Code Civ. Proc., § 631, subd. (e), Los Angeles Superior Court Rule 2.19 (e).)

Juror competence

Highly technical evidence may be difficult for laypeople to appreciate. This is particularly true for accident reconstruction, biomechanical, and complex causation testimony. After each side is done parading their scientific experts onto the stand for long hours of exam and cross exam, the jury may simply lose interest and confidence in the experts' testimony and disregard the entire costly analysis. A judge, however, will have more experience with technical evidence and may be able to better understand and appreciate it.

Also, a judge in a bench trial will likely be less stringent in their application of evidence rules. In a bench trial, there is less risk that arguably inadmissible evidence could mislead or confuse the fact finder. This is because the fact finder is the judge, who is better suited to evaluate all the evidence and give probative weight to presented facts.

So questions of admissibility in a bench trial will typically result in admission of said evidence. This alleviates concerns about the admission of often challenged evidence, such as life care plans or liability animations. Chances are it is all coming in, which generally favors plaintiffs, who have the burden of proof and spend time and money to create demonstratives.

This also helps ensure the plaintiff will get to tell her full story and have her day in court. That is one of the most important duties of a trial attorney: Get the evidence to the fact finder.

Finally, recognize that a judge's knowledge can also be a two-edged sword. If the case does not have objective evidence, understand a judge will likely be less sympathetic to your arguments. Things like objective MRI findings and quantifiable past earning statements have extra importance in a bench trial. A bench trial is not the place to test out a novel theory of causation in a mild-TBI case.

The audience of one prefers hard facts

An important difference between a bench and a jury trial is the audience. This distinction is most apparent in opening and closing statements. While a jury may deliberate based upon their passions, a judge will rely on hard facts.

In a bench trial, focus on special damages and refrain from overly emotive speech. Blackboard strong special damage figures, such as a life-care plan and loss of earnings, as applicable. Special damages are easier to quantify than general damages and should be a focus of the case. This may seem counterintuitive to those accustomed to jury trials, where general damages are the driving factor in obtaining large awards.

Specifically focus on surgeries, both past and future. These are hard facts, not general expressions of pain and suffering. Treating providers are key, as they are often considered more objective than paid experts. Examine treating providers concerning past procedures, pain, hardware, inconvenience, and recovery time. Ask in-depth questions about every step of every procedure performed, every debridement, every piece of hardware implanted, and keep a running list for closing argument. Consider the use of medical illustrations to visually show past and future procedures.

Experts should do the same concerning future recommended surgeries. Argument should be focused on ensuring the judgment will afford the plaintiff full compensation for future medical treatment. Anyone would be hard-pressed to deny such relief.

If the case lacks significant past and future special damages, but instead has a greater focus on general damages or punitive damages, a bench trial is not the best option.

Finally, keep in mind a judge wants to be entertained. Don't be boring. Use demonstratives, animations and slide shows. If the case is worked up with a focus on special damages, you will be rewarded by your judge.

Real-time insight into the fact finder's deliberations

During a bench trial, similar to a default prove-up hearing, the judge will likely ask questions of witnesses. This can afford invaluable insight into the leanings of the judge during the trial. This process starts on day one.

Consider filing an informative trial brief, even if not required. Help educate the judge on the issues, without being argumentative. Debating and sulking about losing a motion in limine could have ramifications far beyond that one motion. Efforts at persuasion start the second you enter the courtroom.

Pay attention to the judge's questions and comments. Is she asking one side's experts more questions than the other? Is she taking notes and paying attention to your witnesses' testimony? In a bench trial, one can better gauge the fact finders' sentiment. Use this invaluable information to evaluate settlement discussions during trial and to tactically manage your case.

Finally, remember that etiquette is key in a bench trial. Use objections wisely and think twice before asking to be heard on an issue. The judge who is deliberating over your objections will also be composing the judgment, so best practice is to stay in her good graces.

Post-trial considerations

Because the judgment in a bench trial will likely be a compromised resolution, it is less likely the defense will appeal. Or if it does, there is far less risk of a successful appeal due to the deference given to a trial judge's discretion, particularly if there is a well-written statement of decision, as discussed below, to lay the proper foundation for the judgment. Similarly, the risk of a successful remittitur in a bench trial is virtually non-existent. Therefore, reducing the risk of appeal or remittitur will save considerable time and money.

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The judgment and statement of decision

At the close of a bench trial, the judge will issue a tentative decision. It will include monetary figures for the judgment and a factual analysis of how it was arrived at. (Cal. Rules of Court rule 3.1590 (a).) The tentative can be announced orally in open court and entered in the minutes, or by written statement filed with the clerk. (*Ibid*.)

This tentative decision is not binding. (Cal. Rules of Court rule 3.1590 (b).) However, it is the basic framework for a written statement of decision, which is binding, important to preserve and protects the judgment. Below is a step-by-step analysis of how to navigate this process.

Step one: The tentative decision

In a bench trial, the court is required to provide a tentative decision at the close of trial to accompany its judgment. (Code Civ. Proc., § 632; Cal. Rules of Court rule 3.1590.)

Most often, the judge will announce its oral tentative decision at close of trial, in open court on the record. However, the judge has the option of waiting to announce its opinion by written statement served on all parties by the clerk. (Cal. Rules of Court rule 3.1590(a).)

If a case remains pending and undetermined for 90 days or more after its submission for decision, a judge may not receive his or her salary. (Cal. Const. Art. VI, § 19; Gov. Code, § 68210.) Thus, if the judge opts for a written statement, expect to receive the tentative within 90 days of the close of trial.

When making its tentative decision, the court will advise how the tentative should be utilized in the creation of the written statement of decision, the dispositive document. Under California Rules of Court rule 3.1590(c), the court has the following options when making its tentative decision:

(1) State that it is the court's proposed statement of decision, subject to a party's objection under subd. (g);
(2) Indicate that the court will prepare a statement of decision;
(3) Order a party to prepare a statement of decision; or
(4) Direct that the tentative decision will become the statement of decision unless, within 10 days, a party specifies that principal controverted issues are not included in the tentative decision.

In practice, the tentative decision is announced orally at the close of trial. Prior to the announcement, the court will ask if either side requests a statement of decision pursuant to California Rules of Court rule 3.1590 (d). Further, what "principal controverted issues" that party wishes the court to address in its opinion.

The parties then each submit a short written brief concerning which specific issues it requests the court to provide an opinion with supporting analysis. The court will then make its tentative decision and ask the prevailing party to prepare a proposed statement of decision and judgment based upon the tentative.

After service of the proposed statement of decision and judgment, the parties have 15 days to file a written objection. (Cal. Rules of Court rule 3.1590 (g).) The court then makes its statement of decision and judgment, usually without additional hearing. (Cal. Rules of Court rule 3.1590(k).)

Step two: The written statement of decision

The written statement of decision is an important document. It provides the court's support for its factual findings. (*Marriage of Williamson* (2014) 226 Cal.App.4th 1303, 1318.) It is often the first document an appellate court reviews, as it provides insight on the trial court's reasoning and relied-upon facts. (*Marriage of Sellers* (2003) 110 Cal.4th 1007, 1011.)

It must explain "'the factual and legal basis for its decision as to each of the principal controverted issues at trial.'" (*Altavion, Inc. v. Konica Minolta Sys. Lab., Inc.* (2014) 226 Cal.App.4th 26, 45-46 [internal citations omitted].) "'Where [a] statement of decision sets forth the factual and legal basis for the decision, any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision.'" (*Ibid*.)

When drafting the statement of decision, begin with the basic factual background of the case. Rather than read through trial transcripts, the appellate court will want to get an idea of the case by first referencing the statement of decision. Next, set out essential elements of the claims, with admitted testimony that supports a finding for each element. Conclude with figures awarded in the judgment. Do not overreach. Stick close to the language of the court's tentative ruling.

The statement of decision is important because of the doctrine of implied findings. This doctrine states that an appealed judgment or order is presumed correct. As such, if the record is silent on an issue, it is presumed that the trial court made all necessary findings to support the judgment: "All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown." (*Denham v. Sup.Ct.* (Marsh & Kidder) (1970) 2 Cal.3d 557, 564.)

So, if the statement of decision is brief, it favors the prevailing party, who can then argue on appeal that all matters not discussed in the statement of decision, and not addressed in the record, must be presumed to be supported by factual findings.

The losing party will often request a detailed statement of decision, in hopes of creating an appealable issue. Expect the defense to highlight on appeal that the court relied on an inadmissible piece of evidence, and, therefore, the judgment must be reversed.

Although it is an additional cost, appellate counsel should be retained to review a proposed statement of decision. You work so hard to get that judgment,

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make sure you go the extra mile to ensure its enforceability.

Conclusion

With COVID-19 causing a severe backlog of jury trials, arbitration or a bench trial may be the only options available to give your client her day in court.

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