Special Considerations in Bench Trials

By David E. Ross

With all of the attention that jury trials receive, it is easy to overlook the importance of bench trials. According to a recent study, there are more bench trials each year (both civil and criminal) than jury trials. *See*, *e.g.*, Brian J. Ostrom, Shauna M. Strickland, and Paula L. Hannaford-Agor, "Examining Trial Trends in State Courts: 1976–2002," Journal of Empirical Legal Studies 1, no. 3 (November 2004): 755–782 at Figure 2 (for criminal trials); *id.* at figure 10 (for civil trials).

Indeed, in each of the 27 years studied, there were between two and three-and-a-half times as many civil bench trials as civil jury trials. The importance of bench trials becomes even clearer when you consider that the study did not include arbitrations or administrative proceedings, which share many of the same characteristics as bench trials.

Lawyers trying bench trials utilize the same fundamental tools for the same purposes as lawyers trying jury trials. For this reason, many of the skills and lessons learned trying cases before a jury transfer easily to bench trials. At the same time, the unique aspects of bench trials present additional considerations and traps for trial lawyers. This article discusses some of the considerations and opportunities that may exist and how to take advantage of them in your next bench trial.

Look for Opportunities to Pre-Try Your Case

One primary difference between bench trials and jury trials is that, in a bench trial, opportunities exist to begin shaping the fact finder's view of the case long before the trial begins.

Except in rare cases, juries never learn about the parties' pretrial actions and contentions. Jurors meet the lawyers and parties at voir dire. They will never know about any "creative" arguments a lawyer made in trying to dismiss a well-pled claim or how reasonable the parties were in discovery. But in jurisdictions where cases remain with one judge from filing through trial, pretrial proceedings present a valuable opportunity to shape his or her views well before the first witness is called.

While judges know that these considerations are supposed to be irrelevant to the merits, as human beings it is difficult to ignore them altogether. Strained arguments on a motion to dismiss or summary judgment may undermine a party's later attempt to claim that it acted reasonably during the events at issue. Similarly, a party's refusing to produce clearly relevant documents could lead a judge to wonder what it is hiding—to say nothing of its credibility.

Lawyers also must therefore be mindful of how their pretrial positions will be received by the court and how they relate to their overall case themes. That's not to say you should shy away from aggressive positions. But the collateral risks associated with any position must be fully understood and weighed accordingly.

In that same vein, lawyers should seize upon opportunities that exist when litigating against an unreasonable party. Rather than grow frustrated, consider unreasonable positions as an opportunity to force the opposing party to spend some of its credibility with the court. In doing so, remember that almost every pretrial filing presents an opportunity to further educate the judge about the merits of the case. When briefing a motion to compel, for example, take time to explain what the case is about, your arguments on the merits, and how the requested evidence will bolster those arguments. Not only will this make your motion more effective, but it will also familiarize the judge with your theory of the case.

Identify Special Rules Governing Bench Trials

Another important early consideration in non-jury cases is whether the court rules or judge's procedures impose any unique requirements for bench trials.

Lawyers who have tried only jury trials may be surprised to learn that there are special rules governing bench trials—a surprise that would be particularly problematic if it came on the eve of trial. Most notably, Federal Rule of Civil Procedure 52(a)(1) requires that "[i]n an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately."

Even when not required by court rules, proposed findings of fact and conclusions of law serve two important purposes. First, if prepared properly, they serve as a road map for the court. The findings of fact tell a story, building to high points that coincide with the legal elements necessary for the court to rule in your favor. Second, much like jury instructions, proposed findings of fact and conclusions of law can be an invaluable aid for both discovery and trial. Preparing these documents forces you to think carefully about what you must prove and how to do so. As you enter discovery, having a clear picture of what you want (and need) to prove will help ensure that you obtain the necessary evidence. And as you move toward trial, an internal annotated version will assist greatly in determining the most effective means for presenting that evidence.

It is therefore a mistake to wait until the eve of trial to draft proposed findings of fact and conclusions of law. It is similarly a mistake to relegate this responsibility to a young, inexperienced lawyer. While it will, of course, be necessary to revise them as you approach trial, the proposed findings of fact and conclusions of law require early and frequent attention from more senior members of the trial team.

Consider the Unique Roles of Pretrial Pleadings

Because they speak directly to the trier of fact, pretrial briefs are generally more important in bench trials than in jury tri-

als. A well-written pretrial brief offers an opportunity to educate and persuade the fact finder that does not exist in jury trials. And pretrial briefs are especially important when, as is sometimes the case in a bench trial, the judge does not permit an opening statement. Pretrial briefs permit you to pre-try your case with detailed discussions of the documentary evidence and expected testimony, the governing law, and the interaction of the two. In the Delaware Court of Chancery, which, as a court of equity, tries almost exclusively non-jury cases, it is not unusual for pretrial briefs in large cases to be 50 pages or more.

Motions in limine, in contrast, are far less important. In fact, these motions rarely make practical sense, because they require the fact finder to review the very evidence you are seeking to exclude. Even when a case is assigned to a different judge for pretrial proceedings, because our system presumes that the risk of evidence improperly influencing a judge is minimal, a busy court may question why it is being burdened by an unnecessary motion.

One potential exception involves challenges to expert witness testimony. While even these motions are rare in bench trials, they offer an opportunity to begin educating the court regarding an opposing expert witness's lack of relevant expertise or faulty analysis. They can therefore be viewed as analogous to taking an expert witness on voir dire after the sponsoring lawyer has attempted to establish his or her qualifications. As with expert witness voir dire, however, to be most effective, such motions should be used sparingly.

Tailor the Presentation of Your Case

Often, but not always, you may present your case to a judge differently than you would to a jury. Whether any changes make sense and, if so, which ones, depends upon several factors (including the nature of the case, the evidence, and the judge). While it is impossible to identify in this article all of the opportunities that may exist, you should dedicate time during your trial preparation to considering how, if at all, your presentation will change because the case is being tried to a judge.

There are two primary factors behind most changes that lawyers make when trying a bench trial. First, the judge brings a level of sophistication and experience beyond that of the typical juror. Substantively, this sophistication may permit you to move quickly into the more complex aspects of the case. Procedurally, the judge may be willing (and indeed, may expect you) to abbreviate—or even avoid altogether—some of the detailed procedures that must be followed when trying a case to a jury. With a busy docket and heavy caseload, a judge may become frustrated with a lawyer who, by trying a bench trial in the same way that he would try a jury trial, unnecessarily slows down the presentation of the case.

Leave the pre-trial conference with a clear understanding of how the court expects the case to be presented.

One common means for streamlining the presentation of evidence involves qualifying expert witnesses. Even if they are not familiar with a particular expert witness or the relevant substantive area, experienced trial judges understand what an expert is and what makes a given witness an expert. Unless the witness has a particular subspecialty or aspect of his or her education or experience that makes him or her uniquely qualified, in most cases, you can just as easily establish a witness's expertise by providing the court with a copy of the witness's current curriculum vitae and moving directly into the substance of your examination. Unless there is a bona fide issue as to the witness's qualifications, the non-sponsoring party is well suited to forgo objecting to such a streamlined presentation.

Another potential means for streamlining your presentation is through the use of written direct examinations. While many trial lawyers may recoil at losing the opportunity to elicit a compelling narrative from a good witness, what better way to differentiate your good witnesses from the other party's witnesses than by focusing upon cross-examination? And because it will shorten the time necessary to try a case, this can be particularly useful when you are having trouble finding time on the court's calendar or when it is important to get a time-sensitive matter to trial quickly.

It is essential, of course, to consult with the court about any nontraditional ideas for presenting your case. Provided it occurs sufficiently in advance of the trial to permit you to make any necessary changes, the pretrial conference is a logical opportunity to present your proposals for simplifying the presentation of your case.

It also is important to leave the pretrial conference with a clear understanding of how the court expects the case to be presented. For example, will there be an opening statement? While you do not want to lose valuable time before trial preparing one when the court is unwilling to hear it, it is equally problematic if you fail to prepare one because you incorrectly assume that this judge will not permit it. Be sure that you address these and any other questions that you have to minimize the risk of surprises during trial.

The difference in fact finders may affect not only how you examine witnesses but also the order in which you call them. While the principles of primacy and recency are as important in bench trials as they are in jury trials, the court's familiarity with the case may afford you opportunities that would not exist when trying a case to a jury. This is particularly true when your primary witness is an adverse witness.

Continued on page 23

Special Considerations in Bench Trials

Continued from page 14

This issue arose in a case in which we sought to enjoin a client's former employee from assuming a senior position with a direct competitor in violation of his noncompetition agreement. The defense rested primarily upon two claims by the former employee. First, he claimed that he was not aware of the relevant provisions and did not agree to be bound by them. Second, although he admitted to having access to our client's sensitive trade secrets, the defendant promised to protect those trade secrets in his new position.

While we appreciated the importance of establishing all of the elements of our case, it quickly became clear that our ability to obtain the injunction hinged upon the defendant's credibility. Confident that we had ample grounds to call that into question, we decided to call the defendant as our first witness.

In a jury trial, this would have been risky, since the jury would have had no context to understand his testimony. Before a jury, the first witness likely would have been a senior employee of our client who could explain the industry, the competition between the former and new employers, the trade secrets to which the former employee had access, and the threats posed by his change of employment. But because we addressed each of these in our pretrial brief, we were comfortable that the court had a sufficient background for us to examine the former employee effectively at the outset of our presentation.

The examination went even better than expected. Blinded by his confrontational mindset, the defendant refused to admit basic background facts reflected in his own emails. He was quickly impeached with his writings and never recovered. In less than an hour, his credibility was destroyed, and the case was effectively over. Not surprisingly, the opinion granting the injunction made clear that concerns about the defendant's credibility factored significantly into the court's decision.

In addition to affecting your affirmative case, the difference in fact finders may also affect how you respond to the opposing party's presentation of its case. While you cannot shy away from objections that are necessary to preserve any substantive issues or significant evidentiary issue for appeal, the court will not have the same patience for objections than it would have in a jury trial. Rather than dealing with serial objections to form and other mundane matters, the court will prefer to admit the evidence and give it the weight that it deserves. You will therefore be well-served to be judicious in your use of objections.

As with jury trials, there are no hard-and-fast rules when trying bench trials. Every case presents unique challenges and opportunities. But it is a mistake to view a bench trial as just another trial or (even worse) not a "real" trial because there is no jury. Bench trials require careful consideration of the unique challenges and opportunities that can have a significant effect upon who ultimately prevails. ■

David E. Ross is a partner at Connolly Bove Lodge & Hutz LLP, in Wilmington, Delaware. He can be reached at dross@cblh.com.