

FROM MY SIDE OF THE BENCH

The Bench Trial: It Really Is Different

BY HON. RANDY WILSON

WE'RE IN THE MIDDLE OF A BENCH TRIAL and I'm reminded of the many ways that a trial to the judge differs from a jury trial. Trial lawyers often approach them the same, but there are fundamental differences. Now that I've presided over scores of bench trials, I offer these observations.

First, keep in mind that the judge is deciding both the facts and the law. As a result, you should approach the trial differently from the onset. The opening statement to a jury will focus on the facts. In a bench trial, however, the opening statement should weave the facts and law together. Describe the various theories of the affirmative case or defenses and then introduce the facts that will support those theories.

Second, be even less repetitious than usual. One of the most pervasive complaints by jurors is that lawyers are repetitious. You should be even more to the point in a bench trial. Even more than a jury, the judge may perceive that your constant repetition is a veiled comment on his lack of intelligence.

Third, give the judge a trial notebook containing exhibits. I can't tell you the number of times that lawyers have questioned witnesses about a document while I'm sitting on the bench in the dark with no idea what the exhibit says.

Fourth, you have greater latitude in a bench trial. In a lengthy trial, give the judge a cast of characters or a chronology of events. While you probably couldn't give such aids to a jury absent consent of both sides, there's little to stop you from simply handing such documents to the judge.

Fifth, many of the tricks that are used to drive home a point for a jury are ill advised for the judge. For example, don't

ask a witness to read a paragraph out loud. The document is already in evidence; there's absolutely no reason to have the witness demonstrate his reading prowess. Simply turn to the judge and say, "Your Honor, I'm now going to focus my questions on paragraph 4 of Ex. 1. Would you like a minute to look at it before I begin my questions?" And, whatever you do, avoid the hackneyed trick of reading a paragraph from a document and merely asking the witness, "did I read that correctly?" That ruse might be a way to drive home a point in a document to a jury, but it has little place with the judge.

Sixth, think of closing arguments the same as a jury trial.

In a jury trial, lawyers are usually taught to argue from the charge, i.e., put the court's charge on the screen and point out the evidence that supports each question and element asked about. While there is no jury charge in a bench trial, it would be very useful to the judge to argue from

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a mock charge. For example, if you are trying a fraud case to the court, prepare a mock jury charge from the Pattern Jury Charge; give it to the judge and then point out the evidence that supports each element of fraud. You could, for example, annotate the charge with the specific exhibits that support particular questions or elements. That will focus the judge's attention on the elements to be proven and the annotations of the exhibits may assist the judge in preparing findings of fact and conclusions of law.

Seventh, although you'd think it goes without saying, a motion in limine doesn't work with a bench trial. I wish I could say I've never seen one before in a bench trial; unfortunately, I cannot.

Finally, don't forget that your judge is human. You still have to persuade. You still have to show why you are entitled to significant damages. While the bench trial demands a more

direct and to the point presentation, you still have to persuade the trier of facts of the virtue of your case.

These are suggestions based on my observations in bench trials. The same suggestions would presumably hold true for arbitrations and administrative hearings. As always, just remember your audience and tailor your presentation accordingly.

Judge Randy Wilson is judge of the 157th District Court in Harris County, Texas. Judge Wilson tried cases at Susman Godfrey for 27 years and taught young lawyers at that firm before joining the bench. He now offers his suggestions of how lawyers can improve now that he has moved to a different perspective. ★