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Federal trial procedure

A GUIDE TO MASTERING FEDERAL TRIAL PROCEDURES, ESPECIALLY "LOCAL, LOCAL RULES"

It is well established that Article III federal judges run a tight ship in their courtrooms. When it is time for trial, it is even more important to comply with a federal judge's rules and comply with decorum in federal court. This article will provide a comprehensive overview of federal trial procedures.

Pretrial procedures and trial documents – Local rules and "local, local rules"

The United States of America has 94 district courts. (See 28 U.S.C. § 133.) California is only one of three states which have four district courts within the state; most states only have one district court. In California alone, there are 60 federal judgeship positions. Given the sheer number of districts and federal judges in California, it is of consequence to understand the rules that apply to each district and each judge.

Each district court in California (i.e., Northern, Southern, Eastern, and Central) has its own local rules. Rule 83 of the Federal Rules of Civil Procedure grants district courts the power to "make and amend rules governing its practice," and the Supreme Court of the United States has recognized the inherent power of such courts to take appropriate action to secure the just and prompt disposition of cases. (See *Link v. Wabash Railroad Co.* (1962) 370 U.S. 626, 630-631.)

The local rules guide pretrial procedures and trial documents. Foremost, the first step in preparing for trial in federal court in certain districts is to arrange a Rule 16 conference of counsel. In the Central District of California, a conference of counsel must occur *at least* 40 days before the date set for the final pretrial conference. (See Central District Cal. Local Rule 16-2.) In the Southern District of California, a conference of counsel must occur *at least* 21 days before the date set for the pretrial hearing. (See Southern District Cal. Local Rule 16.1(f)(4).)

At the conference of counsel, exhibits and witnesses must be exchanged. In the Northern and Eastern Districts, there is no such requirement. In the Eastern District, counsel must merely prepare separate or joint pretrial statements as the predicate step to prepare for trial. (See Eastern District Cal. Local Rule 281.) In the Northern District, the "local, local rules" (a judge's standing orders) control pretrial procedures, and the local rules are silent. For example, Hon. Judge William H. Orrick and Hon. Judge Edward J. Davila require lead trial counsel to confer no later than 21 days before the final pretrial conference to discuss pretrial matters.

It is important to understand that each district court requires the filing of distinct trial documents that are not required to be filed in state court. For example, all federal district courts require the filing of a proposed final pretrial conference order. (See Federal Rule of Civil Procedure 16(e).) The final pretrial conference order is important because pursuant to Federal Rule of Civil Procedure 16(e), the final pretrial order supersedes all prior pleadings and "controls the subsequent course of action in the litigation unless it is modified by a subsequent order." (*Eagle v. American Tel. & Tel. Co.* (9th Cir. 1985) 769 F.2d 541, 548.) "[A] theory will be barred if not at least implicitly included in the order." (*Id.* (citing *United States v. First Nat'l Bank of Circle*, 652 F.2d 882, 886 (9th Cir. 1981).)

In a case I tried in the Central District in October of 2024, defense counsel attempted to include an affirmative defense in the verdict form. However, defendants failed to include that defense in the jointly prepared final pretrial order, which superseded all prior pleadings, including the answer. Consequently, the judge barred defendants from raising the affirmative defense. It is important to prudently draft the final pretrial order and include all pertinent theories and claims. Generally, the local rules or a judge's standing order provide the format of a final pretrial order. Appendix A to Central District Cal. Local Rules, provides a form format for the final pretrial order.

Some additional distinct documents required by district courts include a memorandum of contentions of law and fact, which is a pretrial document that must be filed in the Central and Southern Districts but not in the Eastern or Northern Districts. This document operates as a trial brief and includes all claims, elements of such claims, key evidence that supports the claims, identification of evidentiary issues, and identification of issues of law. Central District Cal. Local Rule 16-4.1 and Southern District Cal. Local Rule 16.1(f)(2)-(3) provide what the memorandum of contentions of law and fact must contain.

With respect to exhibit lists and witness lists, while it is obvious that standard trial documents such as exhibit lists and witness lists must be filed, the specific format of such documents is spelled out in the local rules or the local, local rules. For example, Central District Cal. Local Rule 16-6 provides the format for exhibit lists. Central District Cal. Local Rule 16-6 also provides that the numbering of exhibits must be consistent with the numbering of exhibits at depositions.

Now, turning to the "local, local rules." The term "local, local rules" refers to a judge's standing order, chamber's rules, or civil trial order, which address procedures not expressly addressed by the district's local rules, Federal Rules of Civil Procedure, or other relevant legal source. Indeed, "[i]n the absence of procedural rules specifically covering a situation, the court may, pursuant to its inherent power

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and Rule 83 decision-making power, fashion a rule not inconsistent with the Federal Rules." (*Franquez v. United States* (9th Cir. 1979) 604 F.2d 1239, 1244-45 (citing *Van Bronkhorst v. Safeco Corp.* (9th Cir. 1976) 529 F.2d 943.)

Again, like all orders in federal court, it is important to read the judge's standing order, chamber's rules, or civil trial order (titles in standing orders may vary by judge) to understand deadlines for pretrial documents, trial documents, and trial procedures. A specific judge may require additional trial documents not common in state court or not listed in the local rules. For example, Honorable Hernán D. Vera, Hon. Judge Maame Ewusi-Mensah Frimpong, Hon. Judge Sherilyn Peace Garnett, and several other judges in the Central District require the filing of a "competing verdict forms" document. The "competing verdict forms" document must include: (1) the parties' respective proposed verdict forms; (2) a redline of any disputed language; and (3) the factual or legal basis for each party's respective position.

Finally, in preparing for trial, make sure to comply with the pretrial disclosures requirement pursuant to Fed. R. Civ. Proc. Rule 26(a)(3), which requires pretrial disclosures be made at least 30 days before trial.

Final pretrial conference

Now, after successfully filing all required trial documents in a timely manner, it is time to appear at the final pretrial conference. As is evident in the name, the final pretrial conference is the equivalent of a final status conference or a trial readiness conference in state court. All trial-related matters will be discussed at the final pretrial conference, including trial procedures such as jury selection and procedures specific to the judge. It is critical to be adequately prepared for the final pretrial conference because judges typically only hold one final pretrial conference, unlike in some state courts where multiple final status conferences are held.

Further, at the final pretrial conference, jury selection needs to be addressed. Jury selection should be addressed because it will vary by judge. For example, some judges utilize the standard peremptory method, whereas other judges utilize the "double blind method." (More on the "double blind method," below in the jury selection section).

Finally, at the final pretrial conference, you need to confirm the time limits that the judge will impose on each side to present their case. Most judges will impose a strict time limit depending on your case. The time limit will be in the form of hours, which includes the opening statement, direct examinations, cross-examination, and closing arguments. At the final pretrial conference, you should, at the very least, attempt to request more time than you anticipate necessary because judges will strictly enforce the time limit during the trial. For example, in a case I tried in the Central District in May of 2024, the judge originally gave me five hours to present my case. After respectfully requesting more time at the final pretrial conference, the judge imposed a six-hour time limit per side. As evident in the illustrated time limit, time management is paramount when trying a case in federal court. *(For an in-depth discussion of time management at trial, see the Collier and Teti article in this issue of Advocate. – editor)*

Jury selection – Voir dire

Foremost, "[u]nless the parties stipulate otherwise, the verdict [in a civil matter] must be *unanimous* and must be returned by a jury of at least 6 members." (Fed. R. Civ. P. 48 (emphasis added).) Fed. R. Civ. Proc. Rule 48 also provides that "[a] jury must begin with at least 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(c)." Typically, judges seat eight jurors who all constitute the jury; there are no alternates in federal civil trials.

In federal court, there is no right to mini-opening statements by statute, unlike in state court. It is rare for a federal judge to allow mini-opening statements. There is only one judge in California that I am aware of who permits a mini opening, and that is Hon. Jennifer L. Thurston in the Eastern District.

In terms of actual voir dire, "[t]he court may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper." (Fed. R. Civ. P. 47.) In practice, in terms of attorney voir dire, depending on the judge, it can range from none at all to 20 minutes at most. (See *Darbin v. Nourse* (9th Cir. 1981) 664 F.2d 1109, 1113 ["The content and conduct of the questioning are generally committed to the sound discretion of the district court in both civil and criminal cases"].)

Once voir dire ends, it is time to raise potential cause challenges outside the presence of the venire. Cause challenges are the method by which partial or biased jurors should be eliminated. (*United States v. Gonzalez* (9th Cir. 2000) 214 F.3d 1109, 1111-12.) To disqualify a juror for cause, a showing of either actual or implied bias is required – "that is ... bias in fact or bias conclusively presumed as a matter of law." (*Id*. (quoting 47 Am.Jur.2d Jury § 266 (1995).)

Although "[b]ias can be revealed by a juror's express admission of that fact, ... more frequently, jurors are reluctant to admit actual bias, and the reality of their biased attitudes must be revealed by circumstantial evidence." (*United States v. Allsup* (9th Cir.1977) 566 F.2d 68, 71.) A juror is considered to be impartial "only if he [or she] can lay aside his [or her] opinion and render a verdict based on the evidence presented in court. . . ." (*Gonzalez*, 214 F.3d at 1114 (citing *Patton v. Yount* (1984) 467 U.S. 1025, 1037 n. 12.)

Once cause challenges are made, it is time to raise peremptory challenges. Although the right of peremptory challenge does not derive from the U.S. Constitution, it nonetheless is a "venerable" tradition dating back

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centuries. (*Holland v. Illinois* (1990) 493 U.S. 474, 480.) "In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party to make challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly." (28 U.S.C.A. § 1870.)

In terms of the methodology for exercising peremptory challenges, judges utilize the common method of alternating amongst sides until peremptory challenges are exhausted, or judges utilize the "double-blind method," also known as the "Arizona blind strike." The double-blind method is if often used amongst district courts, particularly for judges in the Southern District. Under that system, the plaintiff and the defense simultaneously list their peremptory challenges on paper without knowing which venire members the other side is challenging. The judge then eliminates the subjects of the peremptory challenges and selects the eight lowest-numbered remaining venire members as the jury. Some judges provide that if both sides strike the same juror, then both sides have used a peremptory challenge, and neither side will receive an opportunity to use another peremptory challenge.

While the opposing side exercises its peremptory challenges, you have to be cognizant of a potential *Batson v. Kentucky*, 476 U.S. 79 (1986) challenge. (See *Edmonson v. Leesville Concrete Co., Inc.* (1991) 500 U.S. 614 [extending the *Batson* principle to private litigants in civil actions].) In *Batson*, the Supreme Court announced an important limitation: peremptory challenges may not be used in a racially discriminatory manner. A *Batson* challenge also extends the anti-discrimination principle to peremptory strikes based on gender. (See *E.B. v. Alabama* (1994) 511 U.S. 127.)

If you believe that a peremptory challenge is being used in a racially discriminatory manner, you should immediately object when the opposing side exercises the peremptory challenge. The judge will then rule on the objection, most likely after hearing from counsel at side bar.

After each side has exercised its peremptory challenges, the first eight prospective jurors not challenged peremptorily or successfully challenged for cause will constitute the jury.

In terms of procedure during voir dire, the procedure is dependent on the judge. For example, in a case I tried in the Central District in April of 2023, the judge did not allow any attorney to voir dire. The judge also required that both cause and peremptory challenges be raised outside of the presence of the jury. The entire jury selection process in federal court is swift. Unlike in state court, where jury selection could take days, jury selection in federal court can be done as quickly as 30 minutes, which I experienced in a recent jury trial.

Opening statement, witness examination, and closing argument

As soon as the jury is seated, counsel is expected to provide an opening statement. The opening statement should be given from the lectern. In addition to general time limits, some judges also impose strict time limits for opening statements, which are enforced in front of the jury. It is important to comply with the time limits to avoid the judge calling you out for exceeding your time. The use of PowerPoint presentations or demonstratives are generally allowed so long as the opposing side does not object.

Concerning witness examination, it is important to ask concise and clear questions. Often, if the question is poorly phrased, the judge will sua sponte object to the question and instruct you to ask a better question even if there is no objection from the opposing side. It is important to also understand the judge's preferences. While, from your perspective, the question may be well-phrased, the judge can still sua sponte object. Moreover, during witness examination, you should seek permission from the judge to approach the witness, whether it be to refresh the witness's recollection or to establish the foundation for an exhibit.

Many judges require that at the end of each day, counsel inform the opposing side of witnesses anticipated the following day with an estimate of the length of direct examination. Judges also require counsel to provide an estimate of the length of cross-examination.

Once you have presented your case in chief, be prepared for a Fed. R. Civ. Proc. Rule 50 or judgment as a matter of law motion. A court may enter judgment as a matter of law only if "a reasonable jury would not have a legally sufficient evidentiary basis to find for the [prevailing] party" as to "an issue" on which that party "has been fully heard" during the trial. (Fed. R. Civ. P. 50(a)(1).)

The standard that the moving party must meet on a Rule 50 motion is "very high" and "recognizes that credibility, inferences, and factfinding are the province of the jury, not [] [the] court." (*Costa v. Desert Palace, Inc.* (9th Cir. 2002) 299 F.3d 838, 859.) "The standard for judgment as a matter of law ... 'mirrors' the summary judgment standard." (*Reed v. Lieurance* (9th Cir. 2017) 863 F.3d 1196, 1204 (quoting *Reeves v. Sanderson Plumbing Prods.* (2000) 530 U.S. 133.) "Judgment as a matter of law is proper when the evidence permits only one reasonable conclusion, and the conclusion is contrary to that reached by the jury." (*Ostad v. Or. Health Scis. Univ.* (9th Cir. 2003) 327 F.3d 876, 881.)

Once you have rested your case in chief, defense counsel will tell the judge that she or he wishes to make a motion. The judge understands what this means and will likely say that the motion will be heard outside the presence of the jury. Outside the presence of the jury, the judge will hear the motion. This is your time to present a strong argument as to why a reasonable jury will only reach one reasonable conclusion, a decision in your client's favor. A vast majority of the time, the judge will take the motion under submission and wait until the jury renders a decision unless there is a clear legal misstep made by the plaintiff.

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What is also important to know and consider is that Rule 50 also permits a plaintiff to move for judgment as a matter of law. Therefore, if the case calls for it, a plaintiff can move under Rule 50 once the defense has rested its case in chief but before the case is submitted to the jury. In a civil-rights jail-death case with a medical-malpractice claim I tried in the Southern District in September of 2024, I moved for judgment as a matter of law because the defense failed to present expert testimony by a medical professional as to the standard of care for the medical-malpractice claim. I made the motion orally after the defense rested its case in chief but before the case was submitted to the jury. While unorthodox, a Rule 50 motion can be made by either side.

Finally, once both sides have rested their cases, it is time for closing arguments. As in opening statements, time limits will also be imposed. The time limit will also encompass time for a rebuttal argument. Some judges pre-instruct the jury, while others do not. Once the judge instructs the jury, the case is submitted to the jury for a verdict.

General federal court decorum

In addition to the formal rules applicablein federal court, there is also distinct decorum which is strictly enforced. The following decorum should be followed:

- A vast majority of federal judges require counsel to speak from the lectern while standing except when a party objects.
- When you object, you must stand and then object. The last thing you want is for a judge to admonish you in front of the jury for not standing to object.
- Do not argue a ruling to an objection. If you wish to argue an objection, ask permission to do so.
- All remarks must be addressed to the judge, not the opposing side.
- Do not approach the courtroom deputy, the jury box, or the witness stand without the judge's authorization, and you must return to the lectern when the purpose of the approach has been accomplished.
- Do not address or refer to witnesses or parties by first names alone.
- Do not offer a stipulation unless you have conferred with opposing counsel and have verified that the stipulation will be acceptable.
- Some judges do not allow writing words, charts, or diagrams on the ELMO, a courtroom image projector, so confirm before you do so.
- Be aware of a specific judge's rules regarding sidebars. Some judges do not permit sidebars.

In sum, while federal court may seem daunting at first, federal court is actually easier to navigate than state court once you ensure that you strictly follow the rules. All the rules that must be followed are either in the local rules or the local, local rules, whereas in state court, trial procedures may be unreliable and unpredictable. By adhering to the rules, you will gain respect from the judge and gain necessary credibility from the jury in the pursuit of a just result.

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