

In the first two weeks of a four-week bench trial in federal court, the plaintiff had called six witnesses to testify. Before the defense had an opportunity to call its own witnesses, the judge presiding over the case suddenly died from a heart attack.

How is the case likely to proceed?

- A. A new judge will take over, and the plaintiff's witnesses must testify again in the new judge's presence.
- B. A new judge will take over upon certifying familiarity with the record and determining that the case may be completed without prejudice.
- C. A new trial will be ordered.
- D. The case will be dismissed without prejudice.

**Explanation:**

When a **judge** presiding over a hearing or trial is **unable to proceed** (as seen here), another judge may take over so long as this **successor judge**:

- certifies that he/she is **familiar with the record** *and*
- determines that the case may be **completed without prejudice** to the parties.

When the successor judge takes over a hearing or bench trial, witnesses who previously testified need only testify again in the successor judge's presence when (1) their testimony is material and disputed, (2) they can do so without undue burden, and (3) a party so requested. Therefore, the plaintiff's witnesses will only need to testify again if these requirements are satisfied—which cannot be determined under these facts **(Choice A)**.

**(Choice C)** In the event a judge is incapacitated and cannot proceed, a new trial will be ordered only if the successor judge cannot certify familiarity with the record OR proceeding with the case will prejudice the parties (both of which are extremely rare).

**(Choice D)** When a case is dismissed without prejudice, the plaintiff may sue the defendant on the same claim in the future—ie, the dismissal is *not* an adjudication on the merits. However, a case will not be dismissed due to the incapacitation of the judge.

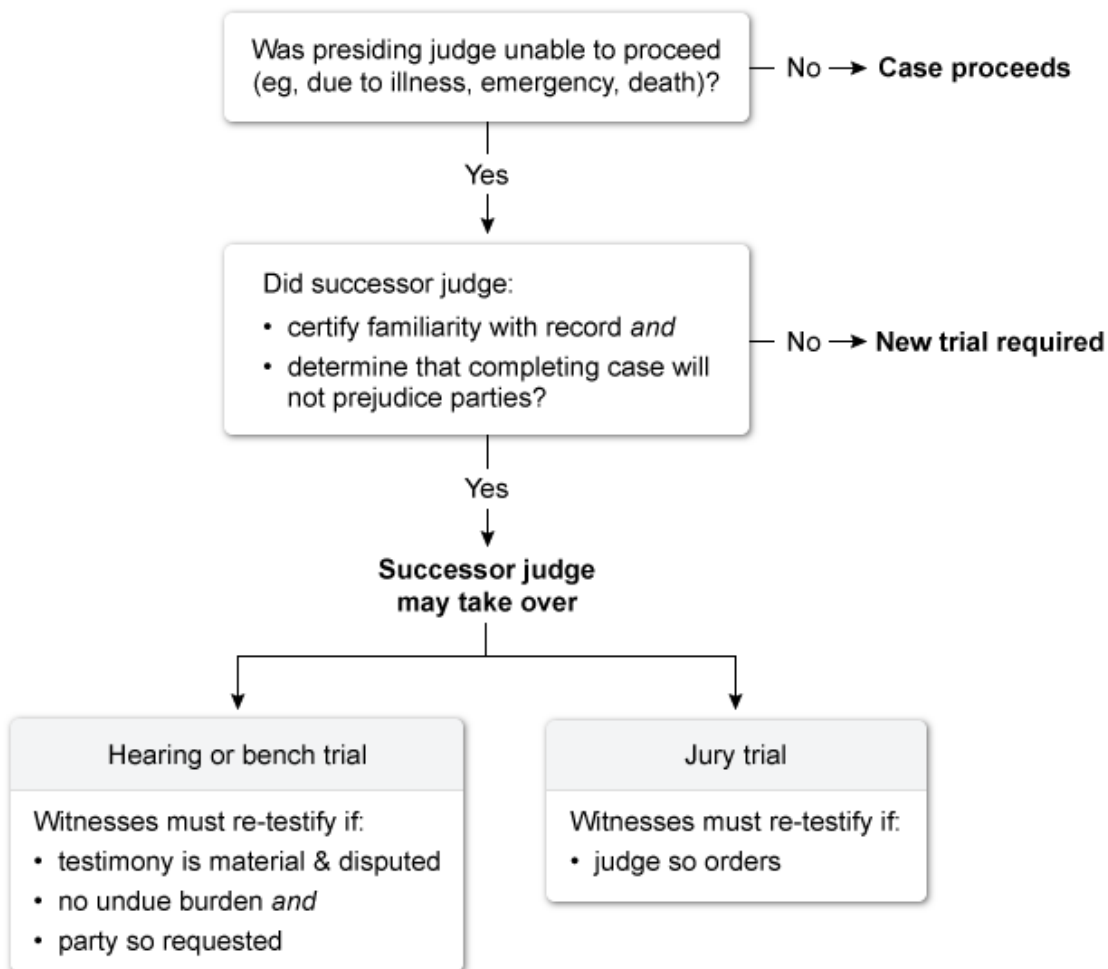
**Educational objective:**

A successor judge may take over upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties. Otherwise, a new trial will be ordered.

**References**

- Fed. R. Civ. P. 63 (judge's inability to proceed).

## Effect of judge's inability to proceed (FRCP 63)



**FRCP** = Federal Rule of Civil Procedure

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