Evidence In a Bench Trial

Do the Rules Really Matter?

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Illustration by Gilberto Sauceda

According to a recent U.S. Department of Justice report, plaintiffs are 14 percent more likely to prevail in a bench trial than they are in a jury trial.[1] There are many possible explanations for this disparity, one of which is that trial judges — unlike juries — hear all the evidence, even "inadmissible evidence" (assuming that there *really* is "inadmissible" evidence in a bench trial). It is easy to imagine what effect this might have in jury verdicts. For example, what if juries were permitted to hear evidence that a car-accident defendant had liability insurance or were allowed to hear that a criminal defendant had previously been acquitted of a similar offense?

There is little doubt that this evidence would unfairly prejudice defendants and make it considerably more likely that a jury would return a verdict for the plaintiff or the prosecution. As a result, the rules generally make this type of evidence inadmissible.[2] Trial judges act as gatekeepers by applying the rules of evidence to prevent the fact-finder from hearing evidence that will likely influence their verdict for the wrong reasons. However, in a bench trial, the fact-finder *is* the gatekeeper, and therefore, we must answer the pragmatic question, "Do the rules of evidence really matter in a bench trial?"

The Rules Apply to Bench Trials "In So Far As Applicable"

In a bench trial, the judge is the trier-of-fact, and in his or her discretion, determines the facts proved, the creditability of the witnesses, and the appropriate weight to be given to the witnesses' testimony.[3] Texas Rule of Civil Procedure 262 provides that "[t]he rules governing the trial of causes before a jury shall govern in trials by the court in so far as applicable."[4] Crudely summarized, Rule 262 means that any rule that does not specifically reference the jury (*e.g.*, Tex. R. Civ. P. 280–89; Tex. R. Evid. 103(c)) applies in a bench trial. Therefore, because most of the rules of evidence do not specifically reference the jury, they *theoretically* apply in bench trials.

However, one view is that the rules of evidence do not really matter in bench trials because of the requirements for preserving error on evidentiary rulings and the appellate standards for reviewing a trial court's findings of fact and evidentiary rulings. On the other hand, some argue that the rules of evidence do really matter because they affect what ammunition (*i.e.*, evidence) the attorneys will rely on in closing arguments. Both views are explored in this paper.

VIEWPOINT 1: THE RULES OF EVIDENCE DO *NOT* REALLY MATTER IN BENCH TRIALS

Preserving Error on Rulings Excluding Evidence

Texas Rule of Evidence 103(a) provides the framework for preserving error on evidentiary rulings.[5] With regard to a ruling excluding evidence, Rule 103(a)(2) provides that, to preserve error, "the substance of the evidence [must be] made known to the court by offer, or [must be] apparent from the context within which questions were asked."[6] Rule 103(a)(2) is intended to: (1) Enable the appellate court to determine whether excluding the evidence was error and, if so, whether it was harmful error; and (2) Permit the trial judge to reconsider his or her original ruling once he or she hears the actual evidence.[7] To satisfy Rule 103(a)(2), the offering party must actually offer the evidence or a summary of the evidence and secure an adverse ruling from the trial court.[8] The offer of proof must provide sufficient detail to allow the appellate court to determine whether reversible error was committed. Thus, for error to be preserved for appeal, the trial judge must be made aware of the exact nature and detail of the inadmissible evidence.

To prevent the prejudicial effects of the jury hearing an offer of proof, Texas Rule of Evidence 103(c) provides, "[i]n jury cases, proceedings shall be conducted … so as to prevent inadmissible evidence from being suggested to the jury by any means. …"[9] Therefore, offers of proof are typically presented during breaks when the jury is not in the box. However, in bench trials, there is no such safeguard to prevent the fact-finder from hearing the inadmissible evidence. Rather, for error to be preserved in a bench trial, the fact-finder/trial judge must be made aware of the exact nature and details of the inadmissible evidence.

So if the fact-finder in a bench trial is going to hear the inadmissible evidence in detail, what purpose can the rules of evidence possibly serve? One response is that notwithstanding the trial court's knowledge of the excluded evidence, the rules of evidence still matter in a bench trial for appellate purposes. Aside from violating the old adage, "A lawyer should try his case for trial, not the appeal," this response ignores the remote chance that an erroneous evidentiary ruling will result in an appellate victory, and the unlikelihood that a judgment rendered after a bench trial will be reversed.[10]

The Uphill Battle of Reversing a Judgment Rendered After a Bench Trial

Findings of Fact and Conclusions of Law

Rule 296 of the Texas Rules of Civil Procedure states that "[i]n any case tried … without a jury, any party may request the court to state in writing its findings of fact and conclusions of law."[11] Findings of fact provide the trial court's decisions regarding the ultimate and controlling factual issues of a plaintiff's claim or a defendant's defense.[12] From the findings of fact, the trial court draws its conclusions of law that support its disposition of the case.[13] Therefore, findings of fact and conclusions of law filed are the equivalent of a jury verdict returned after a jury trial.[14] "If no findings of fact or conclusions of law are filed, the reviewing court must imply all necessary fact findings in support of the trial court's judgment."[15] Therefore, the trial court's findings of fact (or lack thereof) are crucial to a litigant's chances of prevailing on appeal.[16]

The typical process for obtaining findings of fact and conclusions of law has been described by some as counterintuitive. This is how it ordinarily works. First, the parties present their cases to the trial court, and then the trial court issues an oral ruling. Importantly, Texas cases hold that "an appellate court cannot construe comments the trial judge may have made at the conclusion of the bench trial as findings of fact and conclusions of law."[17] Because oral pronouncements of the trial court's ruling may not be substituted for written findings and conclusions, a trial court's judgment must be affirmed if it can be upheld on any legal theory that finds support in the evidence, regardless of whether the trial court orally announces the correct reason for the judgment entered.[18]

Second, after the trial court announces its ruling and signs a judgment, the non-prevailing party will typically request written findings of fact and conclusions of law pursuant to Rule 296. Such request shall be filed within 20 days after the trial court's judgment is signed.[19] After receiving the request from the non-prevailing party, the trial court will ordinarily request that the prevailing party prepare proposed findings of fact and conclusions of law in accordance with the oral pronouncements, if any, of the court.[20]

The prevailing party — who is interested in preserving the trial court's judgment — will ordinarily propose findings of fact and conclusions of law that state precisely what is needed (and then some) to prevail on appeal.[21] Of course, the prevailing party's proposed findings of fact and conclusions of law will (or at least, should) be based only on the evidence admitted during the trial. Although the trial court heard (and may have even considered) the evidence that was declared inadmissible, the prevailing party's proposed findings of fact will certainly not rely on the excluded evidence.

The trial court is not bound to accept the prevailing party's proposed findings and conclusions and may make changes or completely rewrite them.[22] However, the trial judge — who is also interested in preserving his or her judgment on appeal — has an incentive to sign the prevailing party's proposed findings and conclusions with minimal revisions. When the trial court files findings of fact, the findings form the basis of the trial court's judgment "upon all grounds of recovery and defense embraced therein."[23]

Third, after the court files its original findings of fact and conclusions of law, any party (but typically, the non-prevailing party) may request additional or amended findings and conclusions.[24] This request must be made within 10 days after the filing of the trial court's original findings and conclusions, and the trial court has 10 days from receiving this request to file any

additional or amended findings and conclusions.[25] However, because the court's original findings of fact and conclusions of law (which are ordinarily crafted by the prevailing party) are likely to result in the trial court's judgment being affirmed on appeal, the trial court has little incentive to file amended findings or conclusions. Therefore, unless there are inaccuracies in the original findings and conclusions that need to be corrected, the trial judge is likely to deny the non-prevailing party's requests. So at the end of the "bench-trial day," the basis of the trial court's judgment is not necessarily what the court had in mind when it announced its ruling, but rather, the carefully crafted basis prepared by the interested, prevailing party.[26]

Appellate Review of Trial Court's Findings of Fact and Evidentiary Rulings

A trial court's findings of fact in a bench trial ordinarily have the same force and dignity as a jury's answers to jury questions.[27] Therefore, like a jury's verdict, a trial court's findings are given considerable deference by appellate courts.[28] "The reviewing court does not serve as a fact-finder and may not pass upon the witnesses' creditability or substitute its judgment for that of the fact-finder, even if the evidence would clearly support a different result."[29] Therefore, the trial court's findings of fact are reviewed for legal and factual sufficiency of the evidence, which is the same standard used to review evidence supporting jury findings.[30]

In reviewing for legal sufficiency, appellate courts view "the evidence in the light most favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not."[31] In reviewing for factual sufficiency, appellate courts should only set aside the finding "if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust."[32] The focus of these sufficiency challenges is limited to whether the trial court's findings are supported by legally and factually sufficient evidence. Because the trial court's findings of fact in a bench trial are ordinarily drafted by the appellee (the prevailing party in the trial court), it is unlikely that a finding will be included if it is not supported by at least some evidence admitted during trial. Therefore, the chances of prevailing on a sufficiency challenge of a trial court's findings of fact are relatively low.[33]

In addition, the likelihood of obtaining a reversal based on a trial court's evidentiary ruling is similarly small. A trial court's evidentiary rulings are reviewed for abuse of discretion, which requires a determination that the trial court acted without reference to any guiding rules or principles.[34] And even if the trial court did abuse its discretion in admitting or excluding evidence, to reverse, the appellant must show that the error probably resulted in an improper judgment.[35]

The standards of review by which findings of fact and evidentiary rulings are reviewed on appeal make it a steep uphill battle to obtain a reversal from the appellate court. And even if the appellant prevails, the remedy for a successful factual-sufficiency or an evidentiary-ruling challenge is a new trial, rather than a rendering of judgment. These conclusions, when combined with the reality that the trial judge/fact-finder will be aware of the details of any "inadmissible" evidence, lead some to believe that the rules of evidence really do not matter in a bench trial. Others, on the other hand, take issue with this theory.

VIEWPOINT 2: THE RULES OF EVIDENCE *DO* REALLY MATTER IN BENCH TRIALS

Yes, a judge in a bench trial will be aware of evidence that he or she rules is inadmissible. And yes, it may be impossible for the judge to purge his or her knowledge of that inadmissible evidence when he or she makes a ruling. And yes, it may be difficult to obtain a reversal of a trial judge's judgment on appeal. However, just because a judge knows about "inadmissible" evidence that does not mean that he or she will rely on it in reaching his or her findings. Indeed, the judge is compelled not to. In addition, the difficulty of prevailing on appeal only emphasizes the importance of prevailing at the trial level.

A skilled and seasoned trial lawyer uses every resource in his or her arsenal, especially the rules of evidence, to win his or her case. The renowned attorney, judge, and professor Irving Younger taught in his famous *Ten Commandments of Cross Examination* that the "ultimate" points in a trial lawyer's case should be saved for closing argument. In other words, the time to tie all the testimony and evidence together is during closing argument. Closing argument is the last opportunity for counsel to artfully and passionately communicate his or her position to the fact-finder and to convince the fact-finder why his or her version of the "truth" is correct. According to Younger, the entire purpose of trial is to give counsel ammunition to use in closing argument. Therefore, an effective defensive strategy is to prevent opposing counsel from stockpiling ammunition by using the rules of evidence.

There is a significant difference between a judge briefly hearing inadmissible evidence in an offer of proof, and a judge hearing opposing counsel explain how that inadmissible evidence ties into his theory of the case. In addition, an appellate court will sustain a no-evidence challenge when, among other things, the court "is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact."[36] For these reasons, some believe that the rules of evidence do really matter in a bench trial.

CONCLUSION

The processes for preserving evidentiary error, capturing the trial court's findings of fact, and reviewing the trial court's findings and evidentiary rulings are imperfect. And the rules of evidence are not entirely workable when the gatekeeper is the fact-finder. However, gatekeepers or not, judges are judges, and they take an oath to follow the law; that oath obliges them to only consider and rely on admissible evidence. Whether this is enough is for you to decide.

NOTES

1. Langton, Lynn and Cohen, Thomas H., *Civil Bench and Jury Trials in State Courts*, 2005 (U.S. Department of Justice, Bureau of Justice Statistics 2008).
2. *See* Tex. R. Evid. 411, 404(b).
3. *Jones v. Young*, 539 S.W.2d 901 (Tex. Civ. App. — Texarkana 1976, writ ref'd n.r.e.).
4. Tex. R. Civ. P. 262.
5. Tex. R. Evid. 103(a).
6. *Id.*
7. *In re Canales*, 113 S.W.3d 56, 68 (Tex. Rev. Trib 2003, pet denied).
8. *Perez v. Lopez*, 74 S.W.3d 60, 66 (Tex. App. — El Paso 2002, no pet.).
9. Tex. R. Evid. 103(c) (emphasis added).
10. Cohen and Rutter, "Why Courts Reverse," Advanced Civil Appellate Practice Course (2003), Chapter 17, at 2 (stating that in 2003, in appeals following bench trials, the reversal rate was only 22 percent; 86 percent of the reversals in bench trials were because the evidence was legally or factually insufficient to support the judgment).
11. Tex. R. Civ. P. 296.
12. Keltner and Perkins, "Findings of Fact; Conclusions of Law (Civil)," Statewide Judicial Conference (2009), at 1.
13. *Id.*
14. *Id.*
15. *Black v. Dallas Cty. Child Welfare Unit*, 835 S.W.2d 626, 630 n.10 (Tex. 1992).
16. Keltner and Perkins, "Findings of Fact; Conclusions of Law (Civil)," at 1 ("[I]f findings are not filed, it is often virtually impossible to attack the trial court's judgment on appeal."; "In all but the rarest of circumstances, the complete failure to request or obtain findings of fact and conclusions of law will have a catastrophic effect on an appeal.").
17. *Rutledge v. Staner*, 9 S.W.3d 469, 470 (Tex. App. — Tyler 1999, pet. denied); *Gannon v. Baker*, 830 S.W.2d 706 (Tex. App. — Houston [1st Dist.] 1991, writ denied) (stating that court of appeals is not entitled to look to any comments that trial judge may have made at conclusion of bench trial as substitute for findings of fact and conclusions of law); *Giangrosso v. Crosley*, 840 S.W.2d 765 (Tex. App. — Houston [1st Dist.] 1992, no writ) (same).
18. *Schoeffler v. Denton*, 813 S.W.3d 742 (Tex. App. — Houston [14th Dist.] 1991, no writ); *Southwestern Newspaper Corp. v. Curtis*, 584 S.W.2d 362 (Tex. Civ. App. — Amarillo 1979, no writ).
19. Tex. R. Civ. P. 296.
20. 141 Dorsaneo, Texas Litigation Guide §141.01[1] (2009); *see also, e.g., Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 253 (Tex. App. — Houston [14th Dist.] 1999, pet. denied); *Grossnickle v. Grossnickle*, 935 S.W.2d 830, 837 n.1 (Tex. App. —Texarkana 1996, writ denied).
21. Keltner and Perkins, "Findings of Fact; Conclusions of Law (Civil)," at 12 (recommending that litigants make a list of the elements of each ground of recovery or defense or other controlling issue and use these "as checklists to be sure you request all the findings you need and do not omit anything").
22. *Vickery*, 5 S.W.3d 253; *Grossnickle*, 935 S.W.2d at 837 n.1.
23. Tex. R. Civ. P. 299.
24. Tex. R. Civ. P. 298.
25. *Id.*
26. *See Schoeffler*, 813 S.W.3d at 745; *Southwestern Newspaper Corp.*, 584 S.W.2d at 366.
27. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991).
28. *See e.g., McDonald v. Dankworth*, 212 S.W.3d 336, 339 (Tex. App. — Austin 2006, no pet. h.) ("We may not merely substitute our judgment for that of the jury); *West Beach Marina, Ltd. v. Erdeljac*, 94 S.W.3d 248, 262 (Tex. App. — Austin 2002, no pet.) ("We may not substitute our judgment when a jury verdict is grounded in sufficient evidence, and will not do so merely because we might reach a different result.").
29. *Ludwig v. Encore Med., L.P.*, 191 S.W.3d 285, 294 (Tex. App. — Austin 2006, pet. denied).
30. *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996); *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994).
31. *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005).
32. *See e.g., Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (citing cases).
33. *See* footnote 9, *supra.*
34. *See In re J.P.B.*, 180 S.W.3d 570, 575 (Tex. 2005); *Paciwest, Inc. v. Warner Alan Props.*, LLC, 226 S.W.3d 559, 567 (Tex. App. — Fort Worth 2008, pet. denied).
35. Tex. R. App. 44.1(a).
36. *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998).

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