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Strategic Findings of Fact and Conclusions of Law

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BACKGROUND, EDUCATION AND PRACTICE

Russell McMains was admitted to the Texas Bar in 1971. University of Houston (B.S., cum laude and Honors Program, 1968; J.D., cum laude, 1971) Phi Delta Phi.

Memberships include Adjunct Associate Professor of Law, University of Houston, 1973-79. Served from 1982 to 1997 on the Texas Supreme Court Advisory Committee; American Bar Association (Member, Section of Tort and Insurance Practice, Litigation and Appellate Section); State Bar of Texas (Member, Appellate, Litigation and Insurance Law Sections); Chairman, 1990, Appellate Practice Section; 2005-06 Chairman-Elect of Insurance Law Section of the State Bar of Texas; Texas Pattern Jury Charge –General Negligence & Motor Vehicles Committee, and Texas PJC Oversight Committee; Order of Barristers; Texas Trial Lawyers Association; Association of Trial Lawyers of America; Corpus Christi Bar Association; Bar Association of the Fifth Federal Circuit; Life Fellow, Texas Bar Foundation; recently served as member of the Library Committee of the Museum of Modern Art (MOMA).

Rusty's Board Affiliations include Director, University of Houston Law School Foundation Board; Member, University of Houston Blakely Advocacy Institute's Advisory Board; Member, Board of Governors of the South Texas Institute for the Arts .

He was certified by the Texas Board of Legal Specialization in Civil Appellate Law in 1987. His practice focuses primarily on civil appellate law and insurance litigation.

Publications include, *Contribution and Indemnity Problems in Texas Multi-Party Litigation*, 17 St. Mary's L.J., No. 3, (1986). *Bad Faith Claims Handling--New Frontiers: A Multi-State Cause of Action in Search of a Home*, J. Air L. & Com., Vol. 3, Issue 4, (1988). He has authored hundreds of articles on dozens of topics under auspices of Texas State Bar, University of Texas, SMU, and University of Houston CLE programs.

Rusty was recognized in the 2003 Texas Super Lawyer. Profiled in the 2003 issue of *TEXAS MONTHLY* and in a special publication, *Texas Super Lawyers Edition*, a joint project of the Publishers of *TEXAS MONTHLY* and *Law & Politics* magazine. For the last 10 years, listed in Best Lawyers in United States. Notable arguments include *Texaco v. Pennzoil* and *Sanchez v. Schindler*.

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B. Texas State Statutes and Rules

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II. Selected Federal Statutes and Rules

- A. 28 U.S.C.A. § 636 (West Supp. 2005)
- B. Fed.R.Civ.P. 52-53, 72-73; 28 U.S.C.A.

FINDINGS OF FACT AND CONCLUSIONS OF LAW— UTILITY AND NECESSITY

I. Introduction and Overview

A renewed interest in non-jury practice in Texas stems from the Supreme Court's enforcement of pre-suit contractual jury waivers in *In Re Prudential Insurance Co.*, 148 S.W.3d 124 (Tex. 2004). The author has seen examples of such jury waivers in a number of commercial settings and, particularly, in purchase order contracts that contain various indemnity provisions.

The Court analogized the propriety of mandamus relief in this setting to that available to enforce arbitration. But whether the pre-suit jury waiver is worded in such a manner as to operate only one way (against the consumer or non-drafter of the contract) or as to both potentially increase the number of cases tried without a jury in the consumer and/or commercial context.

There is nothing particularly difficult about the Texas practice of requesting findings of fact and conclusions of law except for the necessary follow-up procedures that are all predicated on prior steps taken by the particular party. A typical appellate timetable runs from the date the judgment is signed and while that date is also applicable to calculate the starting point for the initial request for findings, all subsequent steps run from the time of the preceding step unless the initial request is filed on the very day of the rendition of judgment. While the findings of fact and conclusions of law are subject to the same general appellate attacks as those employed in attacking a jury verdict, it is unusual to many non-Texas practitioners to find that the findings of fact and conclusions of law filed by the trial court are generally done after the judgment has been rendered, if at all.

This distinguishes the federal practice in which the rules have been attached in the appendices where the trial judge without request is required in a non-jury matter or, even in a case where an advisory jury sits, to file findings of fact and conclusions of law. Under Fed.R.Civ.P. 52 it is not necessary to make such a request in order to be able to attack the sufficiency of the evidence relating to any of these findings as required by the trial judge. The principal difference, in addition to timing, between the Federal and State practice is that the Federal trial court in a non-jury context is entitled to the standard of review known as the clearly erroneous rule. In Texas state court the standard of reviewing judge fact findings and a jury verdict are identical.

The following materials, including the attached appendices, are not intended to be comprehensive, but to supply the basics with regards to the request practice in Texas state court and to make a few observations to contrast the Federal Court practice.

II. Texas State Practice (Tex.R.Civ.P. 296-299(a)).

A. Procedural Requirements of Requests

1. The Initial Request for Findings

Tex.R.Civ.P. 296 requires that a “Request for Findings of Fact And Conclusions of Law” be so labeled and be filed within 20 days after the judgment is signed with the clerk of the court. Under the rule, any party may file such a request, but as a practical matter only the losing party or parties, that do so. That is because a judgment rendered without findings of fact and conclusions of law provides the broadest possible basis to support a judgment on appeal. See *Royalty v. Nicholson*, 411 S.W.2d 565, 570 (Tex.Civ.App.—Houston 1967, writ ref’d n.r.e.).

2. New Date for Filing

The Court is required under Tex.R.Civ.P. 297 to file its findings of fact and conclusions within 20 days after a timely request is filed and to cause a copy of its findings and conclusions to be mailed to each party in the suit.

3. Notice of Past Due Findings

Tex.R.Civ.P. 297 continues by requiring that in the event findings of fact and conclusions of law are not forthcoming within the allowed 20 day period that a notice served on all parties under the Texas service rules and labeled “Notice of Past Due Findings of Fact and Conclusions of Law.” That notice is required by Rule to contain the date of the original request, the date the findings and conclusions were due, and must be filed within 30 days after making the original request. The effect of such filing is expressly provided for in the rule as extending the judge’s time for filing findings of fact and conclusions of law until 40 days from the date the original request was filed.

It has consistently been held that the failure to follow this specified procedure by the requesting party results in a waiver of any right to findings. *Averyt v. Grande, Inc.*, 717 S.W.2d 891 (Tex.1986).

4. Additional or Amended Findings

Tex.R.Civ.P. 298 deals with the issue of requesting additional or amended findings of fact and conclusions of law obviously expecting that the court has, in fact, filed and served something. The request for such additional (or amended) findings must be made within 10 days after the filing of the original findings and conclusions by the court. Then the trial court has an additional 10 days after such request is filed to make any additional or amended findings and serve them on the parties. Tex.R.Civ.P. 298 expressly provides that no findings or conclusions shall be deemed or presumed by any failure of the court to make any additional findings. It is virtually never error for the trial court to refuse a requested finding that is covered and directly contrary to the original finding. *Asai v. Vanko Insulation Abatement, Inc.*, 932 S.W.2d 118 (Tex.App.—El Paso 1996, no writ). A principal reason that a request for additional findings

should be made, from a strategic standpoint, in state court practice is when there has been a total omission in the original findings and conclusions of any element of a claim for recovery or a defense. This is the one example where a party that prevails might consider requesting an additional or amended finding to avoid a holding of waiver of a pleaded theory upon which there was evidence adduced. *See Polter v. Polter*, 565 S.W.2d 107 (Tex.Civ.App.—Tyler 1978, no writ).

5. Findings Should Be Separate and Not Recited in Judgment

In order to discourage a practice that had crept into the Texas practice of reciting facts in a judgment, the Rules were amended to include Tex.R.Civ.P. 299(a) which provides that findings of fact shall not be recited in a judgment, but further provides that in the event they are and there is a conflict between the findings recited in the judgment and those made pursuant to Rules 297 and 298 that the latter findings will control for purposes of appeal. This rule was changed, but consistent with the practice that had grown up in the courts of appeals to consider the formal findings to be superior to the ones contained in the judgment. The same has been held with regards to conflicts between statements made by the trial judge on the record and formal findings. *Ikard v. Ikard*, 819 S.W.2d 644 (Tex.App.—El Paso 1991, no writ).

The general principles regarding reconciling conflicting findings (whether conflicting with each other or with prior statements) are as applicable to judge findings to jury answers. Findings will attempt to be reconciled and only if irreconcilable will there be a basis for reversal of the judgment. *Bates Ford, Inc. v. Benavides*, 684 S.W.2d 736 (Tex.App.—Corpus Christi 1984, writ ref'd n.r.e.).

6. General Applicability of Tex.R.Civ.P. 296-299(a)

The actual language of the rule for invoking Rule 296 request procedures provide that such requests relate to a case tried without a jury. Since the provided times start from the entry of a final judgment, it is obvious that the term “trial” actually refers to a trial on the merits. While there are numerous interlocutory orders that derive from evidentiary hearings, some of which are appealable, Rule 296 procedures are generally inapplicable, although the trial judge has the option to make findings within 30 days after an interlocutory order is signed pursuant to Tex.R.App.P. 28.1; *see Mueller v. Beamalloy, Inc.*, 994 S.W.2d 855 (Tex.App.—Houston [1st Dist.] 1999, no pet.).

Indeed the cases have generally held that even when a trial is partially conducted to a jury whose verdict is advisory only, such as in family law cases, that findings were not required under the applicable rules. *Aubey v. Aubey*, 264 S.W.2d 484 (Tex.Civ.App.—Beaumont 1954, no writ).

B. Appellate Effects of Findings or Absence

1. Proper Request Extends Appellate Timetable

Under Tex.R.App.P. 26.1 a request for findings of fact and conclusions of law that is appropriate operates as an extension of the appellate timetable just as a motion for new trial

would do insofar as extending the times for perfection, filing the record, and the like. However, it should be noted that if findings are requested in a context in which a party has no arguable basis for doing so, such as the absence of an evidentiary hearing, then this extension is likely not appropriate. Likewise, of course, the failure of the trial judge to make findings in response to a timely request in situations where a party is not entitled to findings could not possibly constitute any basis for appellate relief. Under Tex.R.Civ.P. 329(b), the Request does not, by itself, extend the plenary power of the court.

2. Adverse Appellate Effects of Failing to Request in a Timely Manner

If findings have not been made or requested, the appellate court must affirm the judgment on any legal theory that finds support in the evidence and the trial court is presumed to have found the necessary facts if there is any probative evidence to support such findings. See *Roberson v. Robinson*, 768 S.W.2d 280, 281 (Tex. 1989).

The fact findings are presumed to support the judgment even if an incorrect legal theory is articulated so long as there is a correct legal theory that finds sufficient support in the evidence. *Point Lookout West, Inc. v. Whorton*, 742 S.W.2d 277 (Tex. 1987).

Thus, the significance of making the timely request is to preserve the right to complain about the failure to make the findings requested and avoid, if possible, the presumed and implied findings that would otherwise have to be attacked on appeal after guessing what they were.

3. Reversal or Abatement?

When the court has failed to make findings of fact and conclusions of law after proper request, such failure, if it prevents the proper presentation of the case to the court of appeals, ordinarily results not in a reversal, but an abatement of the appeal and remand for the trial judge to correct his error. *Chevne Indus., Inc. v. Magallanes*, 763 S.W.2d 768 (Tex. 1989)(See appendix). While one court of appeals, after examining the problem, has concluded that reversal rather than abatement was appropriate, that case is distinctly in the minority. See *Joseph v. Joseph*, 731 S.W.2d 597 (Tex.App.—Houston [14th Dist.] 1987, no writ). However, abatement may be improper or impractical when the judge is no longer available. See *Federal Deposit Ins. Corp., v. Morris*, 782 S.W.2d 521 (Tex.App.—Dallas 1989, no writ). However, Tex.Civ.Prac. & Rem. Code sec. 30.02(appendix), provides that a trial judge who has left office may still file findings and that a successor judge, in the event of the unavailability of the prior judge, may also file findings of fact and conclusions of law.

Generally, the harmless error rule may well be applicable when a party has not been prejudiced by the failure of the trial court to make the findings. *Las Vegas Pecan & Cattle Co. v. Zavala Cty.*, 682 S.W.2d 254 (Tex. 1984).

C. Miscellaneous

1. Prematurely Filed Request

Clearly Tex.R.Civ.P. 306c applies to request for findings of fact and conclusions of law so if such request were made prior to the judgment being rendered, then it would have the same date of filing as the judgment itself. In fact, in the event that one anticipates a loss of either all or part of a case, that premature filing, might be advisable so as to allow your appellate timetable to run from the same date, to wit, the date of the rendition of the judgment.

2. No Notice of Judgment

The beneficial effects of Tex.R.Civ.P. 306a should also be applicable with regards to the failure to give notice of the rendition of the judgment. The Rule, of course, provides that the judgment runs from the date of actual notice of the judgment assuming that one has complied with the Rule requirements. But if, a party has not received notice of the judgment, the absence of a request for findings is less troublesome than the other missing post trial motions or the Notice of Appeal itself.

3. Sanctions Order

The Supreme Court, in the appended case of *American Flood Research, Inc. v. Harry Jones*, 49 Tex.Sup.Ct.J. 606 (May 8, 2006), specifically held that the discovery sanctions order findings by the trial court were of no legitimate effect on the appellate court's right and obligation to review the order *de novo*.

It is noteworthy that numerous rules, including the frivolous suit rule in Tex.R.Civ.P. 13, and the guardian ad litem rule in Tex.R.Civ.P. 173, require that certain findings be made in the order itself, all ostensibly contrary to the notion in Tex.R.Civ.P. 299a that a judgment should not contain findings of fact. I suppose this is understandable as a result of the fact that these are orders and not per se judgments.

It should further be noted that there are numerous provisions of the Family Code that require various findings to be made and that requests be made based on different times than that provided in these general rules. No attempt is being made in these materials to deal with the peculiar vagaries of the domestic relations practices. But practitioners should note that there are different provisions in numerous provisions of the family code, such as Tex.Fam.Code Ann. sec. 154.130, which requires any request to be made 10 days after the hearing is held, for example. These matters are well beyond the scope of this material.

III. Federal Practice in Brief

It is not the function of this material to deal with the variety of different types of claims that may be associated with a Federal practice. It is, however, noteworthy that Fed.R.Civ.P. 52 makes applicable the clearly erroneous rule to cases tried in which there is an advisory jury (contrary to state practice). That is a specific distinguishing characteristic between the Federal

practice and the State practice insofar as the general applicability of the non-jury rules are concerned.

Also included in the appendices is material from the applicable statute relating to magistrates as well as the applicable rules relating to determinations by masters, which are frequently used in Federal courts. There is frequently a double level of deference involved in reviewing factual determinations that were actually heard by someone other than the trial judge. But the procedure for challenging findings of a master are included in the appended materials and practitioners should be aware of their frequent applicability.

Perhaps the greatest difference between Texas and Federal Practice is the ability of the Federal Judge to render a judgment during a non-jury trial because of the parties' failure to meet the applicable burden of proof as to a particular element of a claim or defense. The Court thus makes findings on a prematurely ended trial.

IV. Conclusion

Ultimately, there can be no doubt that the numerous hurdles and steps required in the non-jury practice regarding findings of fact and conclusions of law, requests, reminders, and the like, are at least partly designed to insulate such cases from procedural error. Nonetheless, a diligent practitioner can utilize the request practice in aid of appellate relief when armed with the proper information. Reliance on the appellate rules for extensions of appellate deadlines, based on request for findings of fact and conclusions of law when made under questionable circumstances requires that the careful practitioner go ahead and file a post-trial motion that will, in fact, extend the plenary power of the trial court if available. While it is unlikely that reversal of a non-jury case can be obtained based on the admission or exclusion of evidence as readily as it might in a jury case, it is difficult to reverse cases based on such a procedural error anyway, that that issue in and of itself should not preclude the use of the judge as fact finder.