APPEALING BENCH TRIALS

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CHAPTER 10

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SELECTED RECENT PRESENTATIONS and PAPERS

- "Everything you wanted to know but were afraid to ask: an open Q&A with Judge Hurley, Justice Wainwright & Chief Justice Jones" Panel Moderator Austin Bar Association Bench bar (April 2009)
- "Oil Tank Farm and Gas Storage Cases on Appeal" Texas Oil & Gas Association 2009 Property Tax Representatives Annual Conference (February 2009) (co-presenter)
- "Case Law Update" Austin Bar Association Nuts & Bolts of Administrative Law Seminar (February 2009)
- "Practice Before the Courts of Appeals" State Bar Appellate Boot Camp (September 2008)
- "Jury Charge Issues" State Bar 31st Annual Advanced Civil Trial Course (August/September/November 2008)
- "Midland Tank Farm Appeal Update" Texas Oil & Gas Association 2008 Property Tax Representatives Annual Conference (February 2008) (co-presenter)
- "Not Just for Toxic Tort Cases: Strategic Use of Multidistrict Litigation Consolidation" 71 Tex. Bar J. 98 (2008) (co-author with Lynne Liberato)
- "Preserving Issues in Post-Trial Motions" Austin Bar Association Civil Litigation Section Ultimate Trial Notebook Seminar (June 2007)
- "Shaking Out the New Multidistrict Litigation Rules and MDL Panel Decisions" Permian Basin Oil & Gas Law Weather Report (March 2007)
- "Appellate Practice Tips Every Lawyer Needs to Know" Austin Bar Association First Friday CLE (December 2006)
- "Multidistrict Litigation" 20th Annual Advanced Civil Appellate Practice Course (September 2006)
- "Case Law Update" 7 Tex. Tech. Admin. L.J. 1 (Spring 2006) (co-author)
- "Appeals Involving the Government" 19th Annual Advanced Civil Appellate Practice Course (September 2005)
- "Case Law Update" Austin Bar Association Annual Advanced Administrative Law Seminar (2002, 2004, 2005)
- "Supreme Court Update" College of the State Bar Summer School (co-presenter) (July 2005)
- Ethics Seminar Class, "Lifestyle Issues" South Texas College of Law (co-presenter) (October 2004)
- "Third Court of Appeals Update" Travis County Bar Association Bench-Bar Conference (April 2004)
- *Austin Lawyer*: "Third Court of Appeals Update" - monthly article (2001-present)
- *The Appellate Advocate*: "Texas Supreme Court Update" - annual article (co-author) (2002-present)

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APPEALING BENCH TRIALS

I. INTRODUCTION

There are many similarities with appeals of jury trials and bench trials. Appeals of bench trials, however, involve a key difference from an appeal of a jury trial – unlike having a jury verdict to illuminate the facts underlying the result, the underlying reasons for a judgment in a bench trial are not apparent. The rules of procedure allow a litigant to obtain factual findings that replace a jury's verdict and to obtain the trial court's legal rulings. The findings of fact and conclusions of law form the basis for the appeal.

Findings of fact and conclusions of law serve many purposes. They identify the resolution of disputed facts and the legal reasons underlying the trial court's decision. This in turn narrows the issues for appeal. Findings of fact are also necessary to preserve certain errors.

While findings of fact and conclusions of law provide a roadmap or guide to the trial court's decision – both the factual basis and the legal reasons – they are an important tool for attorneys who take the time to prepare them early in a case. Having proposed findings of fact and conclusions of law prepared well in advance assists in developing case themes, in maintaining focus on the arguments and evidence to be developed, and in guiding the presentation of evidence.

Understanding the procedure, preservation and strategy issues can be critical in securing findings of fact and conclusions of law. This article discusses the procedure for obtaining findings of fact and conclusions of law, strategies for requesting additional findings of fact, how to avoid waiver, issues to raise on appeal with findings of fact and appellate review of findings of fact and conclusions of law.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Purpose of findings of fact and conclusions of law

In a jury trial, the jury's verdict provides the framework for the trial court's judgment. In cases tried without a jury, findings of fact delineate the facts that support the judgment. As they are often described, findings of fact in a bench trial have the "same force and dignity" as a jury's answers to jury questions. *Anderson v. City of Seven Points,* 806 S.W.2d 791, 794 (Tex. 1991); *Keisling v. Landrum,* 218 S.W.3d 737, 740 (Tex. App.—Fort Worth 2007, pet. denied).

Conclusions of law state the legal basis that the trial court made based on the factual findings. Given the standard of review of findings of fact and conclusions of law, findings of fact are the more important of the two. Findings of fact are reviewed for sufficiency of the evidence; conclusions of law are reviewed de novo. That is, the court of appeals treats findings of fact as it would jury findings but does not give any particular weight to the trial court's legal conclusions. When reviewing conclusions of law, the court of appeals will make its own legal determination.

Findings of fact and conclusions of law have three purposes. First, the primary purpose of findings of fact and conclusions of law is to narrow and focus the issues for appeal. *Vickery v. Commission for Lawyer Discipline*, 5 S.W.3d 241, 252, 255 (Tex. App.—Houston [14th Dist.], pet. denied). In a bench trial, there is a presumption of validity of the judgment and that all evidence necessary to support it was admitted at trial. To limit the scope of the presumption, an appellant should by requesting findings of fact narrow the issues on appeal and reduce the number of contentions an appellant must raise on appeal. *Vickery*, at 252*; Larry F. Smith, Inc. v. Weber Co., Inc.*, 110 S.W.3d 611, 614 (Tex. App.—Dallas 2003, pet. denied). A related purpose with defining the issues, findings of fact define the parameters of issues tried for purposes of res judicata. *Igal v. Brightstar Information Technology Group, Inc.*, 250 S.W.3d 78, 89-90 (Tex. 2008).

Second, a request for findings of fact extends the appellate deadlines. TEX. R. APP. P. 26.1(a)(4). The extended deadline only applies, however, in Rule 296 findings or in cases where findings of fact may be considered on appeal. *Id.*

Finally, findings of fact allow a party to "tell the story" on appeal. Although findings of fact are supposed to limited to ultimate issues and not evidentiary matters, they are often used to detail the evidence.

B. When are findings of fact appropriate and when are they not?

Findings of fact and conclusions of law are critical for appeals in bench trials. However, not every bench trial or hearing is a candidate for findings of fact and conclusions of law.

1. When findings of fact are required.

Under Rule 296, "in any case tried in the district or county court without a jury, any party may request the court to state in writing its findings of fact and conclusions of law." TEX. R. CIV. P. 296.

The purpose of Rule 296 is to give a party a right to findings of fact and conclusions of law following a final adjudication after a conventional trial on the merits before the court. *IKB Indus. v. Pro-Line Corp.*, 938 S.W.2d 440, 442 (Tex. 1997); *Haddix v. American Zurich Ins. Co.*, 253 S.W.3d 339, 345(Tex. App.—Eastland 2008, no pet.).

A case is "tried" when a court holds an evidentiary hearing. *Haddix*, 253 S.W.3d at 345. In such cases, findings of fact and conclusions of law are mandatory under Rule 296 and 297. A party cannot, however, compel their preparation. *IKB Indus*, 938 S.W.2d at 442-43; *Haddix*, 253 S.W.3d at 345.

Many statutes require a trial court to enter findings of fact. For example, in a guardianship proceeding, Probate Code § 693 requires the probate court to make specific findings of fact. TEX. PROB. CODE § 693(a); In a divorce proceeding, under Family Code 6.711, if requested by a party, the trial court shall file findings of fact that set out the characterization of each party's assets and liabilities and the community's assets and liabilities. TEX. FAM. CODE §6.711(a), (b). There are two excellent articles containing lists of statutes requiring trial courts to enter findings of fact. See Rosemary Kanusky, *Nonjury Appeals*, ADVANCED CIVIL APPELLATE PRACTICE COURSE, ch. 3, pp. 4-7 (State Bar of Texas, Sept. 12-13, 2002) & Honorable Eva M. Guzman & Nina Reilly, *"Think Before You Write"—Preparing Findings of Fact and Conclusions of Law*, ADVANCED FAMILY LAW COURSE, ch. 51, pp. 6-10 (State Bar of Texas, Aug. 14-17, 2006).

In addition, findings of fact may be required after a jury trial. If some issues are tried to the court while the remaining ones to the jury, findings of fact are necessary. *Toles v. Toles*, 45 S.W.3d 252, 264, n.5. (Tex. App.—Dallas 2001, pet. denied).

2. When findings of fact are helpful and may be considered on appeal.

There are instances where findings of fact are not required under Rule 296, but may be helpful and considered on appeal. *IKB*, 938 S.W.2d at 442. Given the advantages of having findings of fact and conclusions of law, the best practice is to make the request in these kinds of cases.

The supreme court identified the following as proceedings where findings of fact could be considered on appeal: a default judgment on a claim for unliquidated damages, judgment rendered as sanctions and any judgment based in any part on an evidentiary hearing. *IKB*, 938 S.W.2d at 443.

In addition, when appealing an interlocutory order, a party may request the trial court to enter findings of fact and conclusions of law. The filing of findings of fact in an accelerated appeal, however, is not mandatory. TEX. R. APP. P. 28.1(c) ("trial court need not file findings of fact and conclusions of law but may do so within 30 days after the order is signed."); *Niehaus v. Cedar Bridge, Inc.*, 208 S.W.3d 575, 579, n.5 (Tex. App.—Austin 2006, no pet.); *Tom James of Dallas, Inc. v. Cobb*, 109 S.W.3d 877, 884 (Tex. App.—Dallas 2003, no pet.). As discussed infra II E.1 & E.2.e, findings of fact in an accelerated appeal do not extend appellate deadlines and are reviewed differently on appeal.

Accelerated appeals where findings of fact may be requested include appeals from interlocutory orders when by statute an appeal is allowed, quo warranto proceedings, appeals required by statute to be accelerated or expedited, and appeals required by law to be filed or perfected less than 30 days after the order or judgment. TEX. R. APP. P. 28.1(a). Accordingly, the orders listed in Tex. Civ. Prac. & Remedies Code §51.014(a) are matters where findings of fact could be filed. TEX. CIV. PRAC. & REM. CODE §51.014(a).

Pleas to the jurisdiction are a frequently appealed and raise issue on obtaining findings of fact. While findings of fact can be requested if there are facts in dispute. See *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-27 (Tex. 2004). Findings of fact and conclusions of law can be entered after a plea to the jurisdiction when there has been an evidentiary hearing. *Goldberg v. Commission for Lawyer Discipline*, 265 S.W.3d 568, 578 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). However, if the facts are undisputed, findings of fact would be immaterial. *Id*. at 579, n.14. Similarly, in *Haddix v. American Zurich Insurance Company*, the trial court granted pleas to the jurisdiction and dismissed. On appeal, Haddix complained of the trial court's failure to file findings of fact. The Eastland Court observed that while the parties reach different conclusions regarding the evidence, the evidence was undisputed. 253 S.W.3d at 346. Thus, the trial court was not required to file findings of fact. *Id*.

Another interlocutory appeal that raises findings of fact issues is temporary injunctions. Rule 683 provides that a temporary injunction set out the reasons for its issuance and be specific. TEX. R. CIV. P. 683. As the supreme court has explained, the order should explain the elements necessary for obtaining a temporary injunction. *Transport Co. of Tex. v. Robertson Transps., Inc.*, 152 Tex. 552, 261 S.W.2d 549, 556 (1953). A party can seek Rule 296 findings of fact and conclusions of law if it chooses. *Id*. Findings of fact, however, are not required to challenge the validity of a temporary injunction. *Courtlandt Place Historical Found. v. Doerner*, 768 S.W.2d 924, 926 (Tex. App.—Houston [1st Dist.] 1989, no writ.).

3. When findings of fact are not appropriate.

Not all proceedings result in a party obtaining findings of fact and conclusions of law. Findings of fact are not appropriate in the following kinds of cases: summary judgments, directed verdicts, j.n.o.v.'s, default judgment awarding liquidated damages,

dismissal for want of prosecution without an evidentiary hearing, dismissal based on the pleadings or special exceptions, and any judgment rendered without an evidentiary hearing. *IKB*, 938 S.W.2d at 442. In these cases, judgment must be rendered as a matter of law. *IKB*, 938 S.W.2d at 442. Thus, findings of fact and conclusions of law have no purpose and should not be requested. *Id.; Haddix*, 253 S.W.3d at 345, n.3.

In addition, there are other kinds of cases where findings of fact and conclusions of law are not appropriate. For example, findings of fact are not appropriate in administrative appeals. *Young Chevrolet, Inc. v. Texas Motor Vehicle Bd.*, 974 S.W.2d 906, 912, n.9 (Tex. App.—Austin 1998, pet. denied) (no findings of fact in an administrative appeal unless an issue of procedural irregularities at agency and evidence is offered on that issue). Findings of fact also are not appropriate in an agreed case under Rule 263. No facts are "tried" in an agreed case within Rule 296. *Markel Ins. Co. v. Muzyka*, __ S.W.3d __, 2009 WL 2414327, at *2 (Tex. App.—Fort Worth Aug. 6, 2009, no pet. h.). If findings of fact are filed in agreed case, they will be disregarded. *Id*.

If findings of fact are not appropriate in a particular case but are filed, it is not reversible error. Such findings are disregarded on appeal. *Linwood v. NCNB Texas*, 885 S.W.2d 102, 103 (Tex. 1994); *Cotton v. Ratholes, Inc.*, 699 S.W.2d 203, 204 (Tex. 1985).

C. Procedure for requesting findings of fact and conclusions of law

Requesting findings of fact and conclusions of law is a three-step process. All three steps are critical in preserving error and in presenting a case on appeal.

1. Filing a Request for Findings of Fact and Conclusions of Law

a. Rule requirements

The process starts by filing a "Request for Findings of Fact and Conclusions of Law." As Rule 296 provides, any party may file a request for the trial court to state in writing its findings of fact and conclusions of law. TEX. R. CIV. P. 296. The request must be filed with the clerk within twenty days after the judgment is signed and must be served on all parties according to Rule 21a. TEX. R. CIV. P. 296. A prematurely filed request for findings of fact is effective and deemed filed on the date of but after the signing of the judgment. TEX. R. CIV. P. 306c. The clerk must immediately notify the trial court of the request. TEX. R. CIV. P. 296.

The trial court has a mandatory duty to file properly requested findings of fact. TEX. R. CIV. P. 297. A court "shall file findings of fact and conclusions of law within twenty days after a timely request is filed." *Id*. The court must also send a copy of the findings and conclusions to each party in the suit. TEX. R. CIV. P. 297.

b. Considerations when drafting

The losing party should always request findings of fact and conclusions of law. The winning side should prepare and submit findings of fact and conclusions of law to the court.

When preparing findings of fact and conclusions of law, look at the pleadings for the causes of action and defenses. The proposed findings should track the court's judgment and the parties' grounds for recovery and defenses, including all elements. Make sure all elements of each are included if supported by judgment. Also, the findings of fact must be in a document separate from the judgment.

When drafting findings, consider the trial court's obligations. A trial court is only required to enter findings (and additional findings) on ultimate or controlling issues. *Flanary v. Mills*, 150 S.W.3d 785, 792 (Tex. App.—Austin 2004, pet. denied); *Lifshutz v. Lifshutz*, 61 S.W.3d 511, 515 (Tex. App.—San Antonio 2001, pet. denied). An ultimate issue is one that is essential to the cause of action and that would have a direct effect on the judgment or one that supports a judgment for one party or another. *Flanary*, 150 S.W.3d at 792; *Clear Lake City Water Auth. v. Winograd*, 695 S.W.2d 632, 639 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

While findings of fact typically contain numerous evidentiary findings, the trial court is not required to enter findings of fact on evidentiary issues. An evidentiary issue is one that a trial court considers in making its decision on a controlling issue, but that itself, is not a controlling issue. *Flanary*, 150 S.W.3d at 792-93. Finally, a trial court is not required to make findings of fact on undisputed matters. *Limbaugh v. Limbaugh*, 71 S.W.3d 1, (Tex. App.—Waco 2002, no pet.).

When drafting conclusions of law, consider their purpose. Conclusions of law state the reasons for the court's judgment based on the findings. In a straightforward case with a single ground of recovery, a trial court need not set out its reasoning in any detail. *Limbaugh* 71 S.W.3d at 6-7. On the other hand, if the case is factually complex and involving multiple grounds for recovery or multiple defenses, the trial court should detail its reasoning in conclusions of law. *Id*. at 7. A trial court places an undue burden on an appellant and forces an appellate to guess at the reasons a trial court ruled against it if conclusions of law are not sufficiently detailed. *Id*.

c. Practical points

First, be aware of the very short deadline: twenty days after the judgment is signed. This is a commonly missed deadline. The typical post-judgment deadlines run on day thirty. The failure to timely request findings of fact waives the right to complain of the trial court's failure to file findings of fact and conclusions of law. *Morrison v. Morrison*, 713 S.W.2d 377, 381 (Tex. App.—Dallas 1986, writ dism'd w.o.j.). The rule has no procedure for a late-filed request for findings of fact. TEX. R. CIV. P. 296.

Second, the losing party should always request findings of fact. As the losing party, submit proposed findings, too. Typically, the loser submits findings as though they won. The trial court will sign the prevailing party's findings or write its own.

Third, if a request for findings is filed, the winning party should not only prepare and file findings of fact and conclusions of law, but also make sure the trial court files signs and files them. Also, it is important to find out the trial court's preferences when submitting findings of fact and conclusions of law. Some prefer an electronic version for the court to use to revise.

Fourth, from a practical standpoint, when requesting the clerk's record, request any proposed findings of fact and conclusions of law that were filed. It may be necessary to argue on appeal that your opponent requested findings of fact that are contrary to an argument being raised on appeal. Also, note that clerk's offices vary on whether they maintain proposed findings of fact with the court's file. Clerk's offices may not keep proposed, unsigned findings of fact.

Finally, if a party is requesting findings of fact and conclusions of law that are contrary to its position, make it clear that you do not agree with the proposed findings to avoid waiver. For example, a party may have prevailed on the merits, but lost on attorney's fees. As the prevailing party, the trial court will look to that party for preparing proposed findings of fact and conclusions of law. The party will want to provide findings the court will sign so necessarily will be submitting findings contrary to their interest on attorney's fees.

The best procedure is to file a motion to submit findings of fact and use the qualifying language in *First Nat'l Bank v. Fojtik*, 775 S.W.2d 632, 633 (Tex. 1989) (motion indicated disagreement with the findings, alleged the ruling was erroneous and stated disagreement with the content and result). Without qualifying findings in this manner a party waives taking a position on appeal contrary to the findings it requested. *General Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 920 (Tex. 1993) (party cannot challenge on appeal the very issue it requested); *Bluestar Energy, Inc. v. Murphy*, 205 S.W.3d 96, 101 (Tex. App.—Eastland 2006, pet. denied) (party cannot agree to omission of a cause of action and then object to the omission).

2. Notice of Past Due Findings of Fact and Conclusions of Law

Unlike most preservation rules, the rules on findings of fact require a reminder notice if the trial court misses its deadline to file findings of fact and conclusions of law. The notice extends the trial court's deadline for filing findings of fact and conclusions of law and is mandatory for an appellant to avoid waiver of the trial court's failure to file findings of fact.

a. Rule requirements

Rule 297 provides the procedure for filing a notice of past due findings of fact. If the court fails to timely file findings of fact and conclusions of law within 20 days after the request is filed, the party who requested findings of fact must file a "Notice of Past Due Findings of Fact and Conclusions of Law." The notice of past due must be filed within thirty days after the original request was filed. TEX. R. CIV. P. 297. The notice of past due findings must state the date the original request was filed and the date the findings and conclusions were due. TEX. R. CIV. P. 297. The clerk is required to immediately inform the court of the late notice. *Id.*

The filing of the late notice extends the time for the trial court to file findings of fact and conclusions of law. TEX. R. CIV. P. 297. With the last notice filing, the trial court's deadline to file findings and conclusions is extended to forty days from the date the original request was filed. *Id.*

b. Practical points

The failure to file a notice of past due findings waives the right to complain about the failure to file findings. *Gnerer v. Johnson*, 227 S.W.3d 385, 389 (Tex. App.—Texarkana 2007, no pet.).

Some courts of appeals have concluded that a notice of past due findings request filed early is not timely and an appellant waived complaint regarding the trial court's failure to file findings of fact. *Estate of Gorski v. Welch*, 993 S.W.2d 298, 301 (Tex. App.—San Antonio 1999, pet. denied); *Echols v. Echols*, 900 S.W.2d 160, 161-62 (Tex. App.—Beaumont 1995, writ denied). The courts reasoned that Rule 306c lists only the request for findings of fact, not the notice of past due findings of fact, as a document that can be filed early and effective. TEX. R. CIV. P. 306c.

Even if the trial court misses the extended deadline, the trial court can still file findings and conclusions. The rules do not prohibit a trial court

from entering findings of fact after the deadline. *Davey v. Shaw*, 225 S.W.3d 843, 852 (Tex. App.—Dallas 2007, no pet.). If the trial court enters findings of fact after the deadline, if a party can show harm by the late filed findings of fact, the party should request the court of appeals to abate the appeal to allow the party to request additional or amended findings. *Id.* The late-filed findings and conclusions are considered on appeal. Id.

3. Request for Additional Findings of Fact and Conclusions of Law

Once findings of fact and conclusions of law are filed, both parties must consider whether additional or amended findings of fact and conclusions of law are necessary for their respective appeals. Findings of fact and conclusions of law may omit elements of a ground of recovery or a defense. Findings of fact and conclusions of law may omit an entire ground of recovery or a defense. A request for additional findings points out these omissions and preserves arguments for appeal.

a. Rule requirements

Rule 298 sets out the procedure for filing additional or amended findings of fact once the trial court files its original findings and conclusions. After findings are filed, any party may request additional or amended findings or conclusions. TEX. R. CIV. P. 298. A request for additional findings of fact and conclusions of law must be made within ten days after the original findings and conclusions are filed by the court. TEX. R. CIV. P. 298. The court then has ten days to file additional findings and conclusions. *Id.* ("court shall file any additional or amended findings and conclusions that are appropriate within ten days after the request is filed.") The rule also provides that no findings or conclusions "shall be deemed or presumed by any failure of the court to make additional findings or conclusions." *Id.*

A related matter to additional findings of fact is omitted findings. As Rule 299 points out, findings of fact form the basis of the judgment upon "all grounds of recovery and of defense embraced therein." TEX. R. CIV. P. 299. The judgment cannot be supported on appeal by a presumed finding of a ground of recovery or defense if no element has been included in the findings. *Id.* However, if one of more elements of a ground or defense is included in the findings, "omitted unrequested elements, when supported by evidence, will be supplied by presumption in support of the judgment." *Id.* Finally, the court's refusal to file a requested finding is reviewable on appeal. *Id.*

b. Purpose of additional or amended findings of fact

The request for additional or amended findings of fact and conclusions of law serves three purposes:

1) point out omitted elements of grounds of recovery or defenses that are partially included to avoid deemed findings under Rule 299

2) point out entirely omitted grounds of recovery or defenses

3) limit an appellee from expanding issues on appeal to avoid presumptions in support of judgment

c. Consideration when drafting

A request for additional findings is similar to an objection. *Vickery*, 5 S.W.3d at 255-56. Thus, the request for additional findings, like an objection, needs to be specific. *Id.* A request for additional findings of fact has significance unrelated to the trial court actually filing additional findings of fact.

Like original findings of fact, a request for additional findings must be for ultimate issues, not evidentiary matters. *Vickery* 5 S.W.3d at 255; Flanary, 150 S.W.3d at 792 (trial court must only file additional findings if original findings do not succinctly relate the ultimate findings of facts and law necessary to apprise the appellant of adequate information to prepare an appeal). To be effective, a request for additional findings must specifically point out the defects and hide them among numerous unnecessary requests. *Vickery* 5 S.W.3d at 254; *Stuckey Diamonds, Inc. v. Harris County Appraisal Dist*., 93 S.W.3d 212, 213 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (request for additional findings containing 103 findings obfuscated any valid findings).

A trial court does not have sign additional findings that are inconsistent with or contrary to the original findings. *Johnston v. McKinney American, Inc*., 9 S.W.3d 271, 277 (Tex. App.—Houston [14th Dist.] 1999, pet. denied.) (citing *Tamez v. Tamez*, 822 S.W.2d 688, 692-93 (Tex. App.—Corpus Christi 1991, writ denied)). If the requested additional findings would not result in a different judgment, the trial court need not make them. *Johnston*, 9 S.W.3d at 277; *Tamez*, 822 S.W.2d at 693.

Requesting additional findings of fact depends on the omission, whether an omitted element or an entirely omitted cause of action. Although summarized here, it is worth reading *Vickery* v. *Commission for Lawyer Discipline*, 5 S.W.3d 241 (Tex. App.—Houston [14th Dist.] 1999, pet. denied)

before preparing additional or amended findings of fact.

If an element is omitted. If there is an omission, it must first be determined whether the trial court deliberately or inadvertently omitted the element. *Vickery*, 5 S.W.3d at 252.

If findings of fact are entered but inadvertently omit an essential element of a ground of recovery or defense, the omitted element is supplied by implication. *Id*. The reason for implying omitted elements is that when a ground of recovery or defense is partially included in the findings of fact, this is some evidence that the trial court relied on it in making its decision. *Id*. at 253. As Rule 299 states, "when one or more elements thereof have been found by the trial court, omitted, unrequested elements, when supported by evidence, will be supplied by presumption in support of the judgment." TEX. R. CIV. P. 299.

To avoid deemed findings when an element has been omitted, a party should request an additional finding on the omitted element. *Vickery*, 5 S.W.3d at 253-54; TEX. R. CIV. P. 298, 299. The appellant, however, must specifically make the trial court aware of the omitted element and indicate the party does not agree. *Vickery*, 5 S.W.3d at 254.

If the record, however, demonstrates that the trial court deliberately omitted the element, there is no presumption to supply the missing element. *Id*. at 252. If the prevailing party submits proposed findings that includes all elements and the trial court omits a ground or defense, it is apparent that the omission was deliberate and that the element was requested and refused. *Id*. at 253. In this situation, there is no supplied element by implication. *Id*. Unlike the requirement in Rule 299 to deem omitted elements, the omitted element in this scenario is not "unrequested."

The party relying on the omitted element should file a request for additional findings including the omission to argue the issue on appeal.

Vickery demonstrates the need to clearly identify the omitted element. Vickery complained about an omitted element from the findings of fact, however never alerted the trial court to the omitted elements. Instead, Vickery submitted negative findings and hid the two omitted elements among 44 other additional findings, making it impossible for the trial court to realize the omission. *Vickery*, 5 S.W.3d at 254-55. The court of appeals presumed that the trial court impliedly found the omitted elements. *Id*. at 258.

The court of appeals described the use of negative findings. A party that requests findings that are contrary to the judgment is said to have requested "negative" findings. While a trial court is not required to enter findings that are contrary to the judgment, there are occasions when negative findings must be filed to avoid waiver. If findings support plaintiff but are silent on defendant's affirmative defense, defendant must file additional findings on its affirmative defense, which would be contrary to the judgment, but critical for defendant's appeal. *Vickery*, 5 S.W.3d at 255.

In *Vickery*, appellant's negative findings did not avoid the omitted findings from being deemed. If an appellant chooses to request negative additional findings contrary to the judgment, an appellant does not avoid deemed findings on omitted elements unless appellant had specifically identified the true issue – omitted necessary elements. *Id*. at 256.

If an omission of an entire ground or defense. If a trial court's findings of fact omit an entire ground of recovery or defense, the party relying on the ground or defense must request additional findings to preserve error. *Limestone Group, Inc. v. Sai Thong, L.L.C.*, 107 S.W.3d 793, 799 (Tex. App.—Amarillo 2003, no pet.). Failing to do so waives the complaint about the unmentioned ground or defense.

When a ground of recovery or defense is entirely omitted, the presumption is that the trial court did not rely on that ground or defense and the omission is deliberate. *Vickery*, 5 S.W.3d at 252. Under Rule 299, a judgment cannot be supported by a ground or defense that has been entirely excluded from the findings of fact. TEX. R. CIV. P. 299; *Vickery*, 5 S.W.3d at 252.

To properly raise an omission of an entire ground of recovery or defense, the party relying on the omitted ground must file a request for additional findings including the omitted ground or defense.

A party waives for appellate purposes a theory of recovery or defense unless the proponent of the theory secures a finding on the theory or an element of it. *Hill v. Hill*, 971 S.W.2d 153, 156 (Tex. App.—Amarillo 1998, no pet.). This waiver applies to both appellants and appellees. If an appellant contends the trial court erred in rejecting her defense, she must make sure that she requests the court to make a finding upon that defense. *Id*. at 156-57. If she does not, the defense is waived. *Id*. An appellee suffers the same waiver if she fails to request findings upon all of her theories of recovery. If an appellee fails to request findings on all her theories of recovery, she is precluded from arguing that the trial court erred in failing to grant relief on the theories omitted from the findings. *Id.* at 157; see also *Midland Cent. Appraisal Dist. v. BP America Prod. Co.*, 282 S.W.3d 215, 224, n.3 (Tex. App.—Eastland 2009, pet. filed) (error waived when appellant attempted to raise on appeal a statutory ground on which it failed to request a finding).

d. Practical points

The rule ties the deadline for requesting additional or amended findings to the date the trial court files it

findings of fact, not the day they are signed. TEX. R. CIV. P. 298. Failing to timely request additional findings of fact and conclusions of law waives the right to complain of the trial court's failure to enter the additional findings. *Heritage Res., Inc. v. Hill*, 104 S.W.3d 612, 620 (Tex. App.—El Paso 2003, no pet.) (appellant waived complaint regarding trial court's failure to segregate attorney's fees when appellant failed to request an additional finding on the issue).

Also, as with the submission of original findings of fact, if requesting additional or amended findings that are contrary to your position, state that you disagree with the submission. See supra II. C. 1. c.

D. Proper form of the trial court's findings of fact and conclusions of law

Rule 296 and 299a prescribe the form for the trial court's findings of fact and conclusions of law. The rules require that findings of fact and conclusions of law be in written and a separate document from the judgment. TEX. R. CIV. P. 296, 299a. The trial court's finding of fact "shall not be recited in a judgment." TEX. R. CIV. P. 299a. Findings of fact shall be filed with the district clerk separate and apart from the judgment. *Id*. While the rule requirements are straightforward they raise several issues.

1. Must be in writing, cannot be oral.

Findings of fact and conclusions of law must be in writing and cannot be made orally on the record. *In re Doe 10*, 78 S.W.3d 338, 340, n.2 (Tex. 2002). While oral pronouncements may not amount findings of fact and conclusions of law, such statements are not without significance.

For example, the Austin Court recently specifically considered oral pronouncements when ruling on an appellant's complaint about lack of findings of fact. In *Burnet Cent. Appraisal Dist. v. Millmeyer*, __ S.W.3d __, 2009 WL 884802 at *5-6 (Tex. App.—Austin April 2, 2009, no pet.), appellant complained about the trial court' failure to enter findings of fact and conclusions of law. In deciding whether appellant suffered harm by the lack of findings, the Austin Court referred to the trial court's statements on the record at end of trial that explained reasons for its ruling. According to the Austin Court, the trial court's oral pronouncements negated any harm in the failure to file findings of fact. *Id*.; see also *Pope v. Pope*, No. 03-06-00550-CV, 2007 WL 2010766 (Tex. App.—Austin July 12, 2007, no pet.) (mem. op.) (court looked to trial judge's comments from the bench to determine if appellant was harmed by the trial court's failure to file findings of fact).

2. In writing, but can a letter suffice?

The rule requires findings to be written and separate from the judgment but does not otherwise prescribe the format.

The problem comes up with letter rulings. The supreme court rejected an attempt to alter formal findings of fact with a pre-judgment letter ruling. *Cherokee Water Co. v. Gregg County Appraisal Dist*., 801 S.W.2d 872, 878 (Tex. 1990). The Court's reasoning appeared to be based on the fact that the letter was prepared before the judgment and thus did not constitute post-judgment Rule 296-99a findings of fact. *Id*.

Several courts of appeals apply *Cherokee Water* and have concluded that pre-judgment letter rulings do not constitute findings of fact. *Mondragon v. Austin*, 954 S.W.2d 191, 193 (Tex. App.—Austin 1997, pet. denied); *Castillo v. August*, 248 S.W.3d 874, 880 (Tex. App.—El Paso 2008, no pet.); *Coleman v. Coleman*, No. 09-06-00171-CV, 2007 WL 1793756, at *2, n.2 (Tex. App.—Beaumont 2007, pet. denied) (mem. op).

Other courts of appeals vary on this interpretation. The Eastland Court distinguished Cherokee Water and construed a pre-order letter ruling as findings of fact. The Eastland Court noted that unlike Cherokee Water, the trial court in Kendrick did not file formal finding of fact and expressly indicated in the letter ruling that it intended the letter to constitute findings as findings of fact. *Kendrick v. Garcia*, 171 S.W.3d 698, 701-02 (Tex. App.—Eastland 2005, pet denied). Other courts have construed letter rulings as findings of fact, noting that the rules do not require any particular form. *Rose v. Woodworth*, No. 04-08-00382-CV, 2009 WL 97256, at *1 (Tex. App.—San Antonio Jan. 14, 2009, no pet.); *Senora Res., Inc. v. Kouatli*, No. 01-00-00264-CV, 2000 WL 1833771, at *2-3 (Tex. App.—Houston [1st Dist.] Dec. 14, 2000, no pet.) (mem. op); *Villa Nova Resort, Inc. v. State*, 711 S.W.2d 120, 124 (Tex. App.—Corpus Christi 1986, no pet).

3. Separate from the judgment, but . . .

The rule makes it clear that findings should be in a separate document from the judgment, however, the rule also contemplates that findings will often end up in a judgment. Rule 299a states that "if there is a conflict between findings of fact recited in a judgment in violation of this rule and findings of fact made pursuant to Rules 297 and 298 the latter findings will control for appellate purposes." TEX. R. CIV. P. 299a; *Redman v. Bennett*, 401 S.W.2d 891, 894 (Tex. App.—Tyler 1966, no writ).

Cases split on how to consider findings of fact contained in a judgment. The Amarillo Court has concluded that findings in a judgment have probative value as long as they do not conflict with separately

filed findings of fact. *South Plains Lamesa R.R., Ltd*., 280 S.W.3d 357, 365 (Tex. App.—Amarillo 2008, no pet.); *Hill v. Hill*, 971 S.W.2d at 157. The court reasoned that findings recited in the judgment reveal the basis for the trial court's decision and should be considered. *South Plains Lamesa R.R*., 280 S.W.3d at 365; *Hill*, 971 S.W.2d at 157; see also *Martinez v. Molinar*, 953 S.W.2d 399, 401 (Tex. App.—El Paso 1997 no writ) (findings in a judgment serves the underlying purpose of Rule 296 of allowing the parties to know the court's findings); *In re U.P*., 105 S.W.3d 222, 229, n.3 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (findings in a judgment have probative value if not in conflict with separately filed findings).

Other courts of appeals have concluded that findings in a judgment cannot be considered on appeal. *Guridi v. Waller*, 98 S.W.3d 315, 317 (Tex. App.—Houston [1st Dist.] 2003, no pet.); *Salinas v. Beaudrie*, 960 S.W.2d 314, 317 (Tex. App.—Corpus Christi 1997, no pet.); *Sutherland v. Cobern*, 843 S.W.2d 127, 131, n.7 (Tex. App.—Texarkana 1992, writ denied.). If the findings of fact in the judgment are not considered, then the court of appeals reviews as though no findings were made. *Sutherland*, 843 S.W.2d at 131, n.7.

The court in Guridi demonstrates the significance of this problem. In that case, the First Court refused to consider findings of fact recited in a judgment when separate findings of fact were filed. The separately filed findings contained no mention of fraud; the judgment recited findings relating to fraud. Because the separately filed findings contained no element of fraud and the court refused to consider the findings on fraud contained in the judgment, no presumed findings on fraud could be supplied on appeal. *Id*. at 317.

E. Appellate issues relating to findings of fact and conclusions of law

1. Effect on appellate deadlines

A request for findings of fact and conclusions of law made in an appropriate case (required under Rule 296 or when can be considered on appeal) will extend the deadlines for perfecting an appeal. TEX. R. APP. P. 26.1(a)(4); see *IKB*, 938 S.W.2d at 442-43. If unsure if findings of fact will extend the appellate deadlines, do not rely on a request for findings of fact and conclusions of law. File a motion for new trial. See, e.g., *Ford v. City of Lubbock*, 76 S.W.3d 795, 798 (Tex. App.—Amarillo 2002, no pet.) (appeal of plea to jurisdiction where facts were not disputed, findings of fact served no purpose and request for findings did not extend appellate deadlines).

Accelerated appeals are different. A request for findings of fact and conclusions of law in an accelerated appeal does not extend the time to perfect an accelerated appeal. TEX. R. APP. P. 28.1(b). Accelerated appeals include appeals in quo warranto proceedings, appeals required by statute to be accelerated or expedited, and appeals required by law to be filed or perfected less than 30 days after the order or judgment. TEX. R. APP. P. 28.1(a).

While a request for findings of fact in an appropriate case extends the appellate deadlines, a request for findings of fact does not extend plenary power. See TEX. R. CIV. P. 329b. File a motion for new trial if seeking to extend the court's plenary power. *Id*. 329b(e).

2. Appellate review

Appellate complaints relating to findings of fact and conclusions of law fall into three categories: 1) the absence of findings of fact; 2) the sufficiency of the evidence supporting the findings of fact and correctness of conclusions of law, if findings are filed; and 3) the omissions or lack of completeness of the findings of fact, if filed.

a. Absence of findings of fact.

If findings of fact are not requested and none are filed. If no findings of fact and conclusions of law are filed nor requested, all questions of fact will be presumed and found in support of the judgment. *Zac Smith & Co. v. Otis Elevator Co*., 734 S.W.2d 662, 666 (Tex. 1987).

If there are no findings of fact and conclusions of law filed, the court of appeals infers that the trial court made all the necessary findings of fact necessary to support the judgment. *Sixth RMA Partners, L.P. v. Sibley*, 111 S.W.3d 46, 52 (Tex. 2003). If there is a reporter's record, the implied findings are not conclusive and may be challenged by raising both legal and factual sufficiency of the evidence issues on appeal. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002); *In re Estate of Henry*, 250 S.W.3d 518, 522 (Tex. App.—Dallas 2008, no pet.).

When there is no reporter's record and no findings of fact have been requested or filed, the court of appeals implies all necessary findings in support of the judgment. *Waltenburg v. Waltenburg*, 270 S.W.3d 308, 312 (Tex. App.—Dallas 2008, no pet.). In that case, every reasonable presumption consistent with the record will be indulged in favor of the judgment. *Ette v. Arlington Bank of Commerce*, 764 S.W.2d 594, 595 (Tex. App.—Fort Worth 1989, no writ). Only if there were fundamental error would an appellant be entitled to a reversal. *Id*.

If findings of fact are requested, but none are filed. To raise a complaint about the lack of findings of fact and conclusions of law, an appellant must have

filed a timely request for findings of fact and conclusions of law and a timely notice of past due findings of fact and conclusions of law.

If properly requested and in an appropriate case, it is mandatory for the trial court file findings of fact and conclusions of law. *Cherne Indus., Inc. v. Magallanes*, 763 S.W.22d 768, 772 (Tex. 1989). When a trial court fails to file findings, it is presumed harmful, unless the record affirmatively shows no harm. *Id*. The question is whether a party has to guess at the court's reasons. *In re Marriage of Grossnickle*, 115 S.W.3d 238, 253 (Tex. App.—Texarkana 2003, no pet.)

The failure to make findings of fact does not compel reversal if the record affirmatively demonstrates that the complaining party suffered no harm. *Las Vegas Pecan & Cattle Co. v. Zavala County*, 682 S.W.2d 254, 256 (Tex. 1984); *Martinez v. Molinar*, 953 S.W.2d at 401. Where there is only one theory of recovery or defense, there is no injury. *Martinez*, 953 S.W.2d at 401; see also *General Elec. Capital Corp. v. ICO, Inc*., 230 S.W.3d 702, 711 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (only one argument raised thus appellant knew the basis for trial court's ruling). The test for whether the complaining party has suffered harm is whether the appellant is forced to guess at the reason or reasons the trial court ruled against it. *Martinez*, 953 S.W.2d at 401; *Burnet Cent. Appraisal Dist. v. Millmeyer*, __ S.W.3d __, 2009 WL 884802 at *5-6 (Tex. App.—Austin April 2, 2009, no pet.) (trial court's statements on the record at end of trial sufficiently explained reasons for its ruling and negated any harm in the failure to file findings of fact).

Other cases support an appellant's argument of harm when no findings of fact are filed. When there are multiple possible bases on which the trial court could have relied in making its decision, an appellant is harmed by the lack of findings of fact. *Liberty Mut. Fire Ins. v. Laca*, 243 S.W.3d 791, 795 (Tex. App.—El Paso 2007, no pet.). The El Paso Court reasoned that without findings, appellant was forced to appeal under a more onerous standard of review even though the party properly requested findings of fact. Without findings of fact, appellant was forced to expend resources to brief all issues, rather than those forming the basis of the trial court's decision. *Id*.; see also *Vargas v. Texas Dep't of Protective & Regulatory Servs*., 973 S.W.2d 423, 426-27 (Tex. App.—Austin 1998, pet. granted, judgm't vacated w.r.m.) (forcing appellant to challenge sufficiency of each ground for termination put appellant at disadvantage without findings of fact; court remanded based on changed circumstances).

Remedy. The remedy for a trial court's failure to file findings of fact when required is to abate the appeal and direct the trial court to correct the error. *Cherne Indus*., 763 S.W.2d at 773; TEX. R. APP. P. 44.4(a). If the original judge is no longer serving, the case may be remanded for a new trial. *Liberty Mut*., 243 S.W.3d at 795.

b. Challenges to the sufficiency of the evidence.

It is imperative to challenge the court's findings of fact and conclusions of law. Findings of fact are reviewable for legal and factual sufficiency of the evidence under the same standards applied with reviewing a jury's answers.[1] *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996); *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994). Similarly, implied findings can and should be challenged for insufficiency the same as if actual findings. *Vickery*, 5 S.W.3d at 258; *Sutherland*, 843 S.W.2d at 131.

A challenge to the sufficiency of the evidence in a bench trial can be raised for the first time in appellant's brief. There is no need to file a post-judgment motion raising it. TEX. R. APP. 33.1(d). It is important to note, however, that raising sufficiency of the evidence does not expand to challenging an omitted finding. *Long v. Long*, 234 S.W.3d 34, 42 (Tex. App.—El Paso 2007, pet. denied). Challenging omitted elements requires filing a request for additional findings of fact. *Id*.

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[1] When reviewing findings of fact under a legal sufficiency challenge, the appellate court determines whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review. *Midland Cent. Appraisal Dist. v. BP America Prod. Co.*, 282 S.W.3d at 219-20; *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). The appellate court reviews the evidence in a light most favorable to the challenged finding, crediting any favorable evidence if a reasonable factfinder could and disregarding any contrary evidence unless a reasonable factfinder could not. *Keller*, 168 S.W.3d at 821-22; 827. A no-evidence or legal sufficiency challenge is sustained only when: 1) the record discloses the complete absence of a vital fact; 2) the court is barred by the rules of evidence or other law from giving weight to the only evidence offered to prove a vital fact; 3) the only evidence is no more than a scintilla; or 4) the evidence conclusively establishes the opposite fact. *Keller*, 168 S.W.3d at 810; *BP America*, 282 S.W.2d at 220. When reviewing a factual sufficiency challenge, the appellate court considers all the evidence and determines whether the evidence supporting a finding is so weak as to be clearly wrong and unjust or whether the evidence is so against the great weight and preponderance of the evidence to be clearly wrong and manifestly unjust. *BP America*, 282 S.W.3d at 220; *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001).

Appellate review of findings of fact and conclusions of law depends on whether there is a reporter's record on file at the court of appeals.

Reporter's record on file. If there is a reporter's record, the trial court's findings are not conclusive if the contrary is established as a matter of law or if there is no evidence to support the finding. *Middleton v. Kawasaki Steel Corp.*, 687 S.W.2d 42, 44 (Tex. App.—Houston [14th Dist.] 1985), writ ref'd n.r.e. per curiam, 699 S.W.2d 199 (Tex. 1985); *Johnston v. McKinney American, Inc*., 9 S.W.3d at 276. With a reporter's record, findings of fact (and implied findings) are reviewable for legal and factual sufficiency. *Ortiz v. Jones*, 917 S.W.2d at 772.

Be aware of the "unchallenged" findings of fact. With voluminous findings, it is important to confirm that all relevant findings are challenged. Unchallenged findings of fact with a reporter's record are binding on an appellate court unless the contrary is established as a matter of law or if there is no evidence to support the finding. *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696-97 (Tex. 1986); *Odessa Tex. Sheriff's Posse, Inc. v. Ector County*, 215 S.W.3d 458, 467 (Tex. App.—Eastland 2006, pet. denied). The appellate court must overrule challenges to findings of fact that support a legal conclusion when other unchallenged findings of fact also support the legal conclusion. *Britton v. Texas Dep't of Criminal Justice*, 95 S.W.3d 676, 682 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

No reporter's record on file. If there is no reporter's record, the court of appeals is bound by the findings of fact and must presume that the evidence was sufficient and that every fact necessary to support the findings and judgment were proved at trial. *Redman v. Bennett*, 401 S.W.2d at 894.

With unchallenged findings of fact, and when there is no reporter's record, findings of fact are conclusive on appeal. *Rapp Collins Worldwide, Inc. v. Mohr*, 982 S.W.2d 478, 481 (Tex. App.—Dallas 1998, no pet.).

c. Challenges to conclusions of law

A challenge to a conclusion of law can be raised on appeal for the first time. As with findings of fact, there may be instances where a additional or amended conclusions of law must be requested to preserve error. Conclusions of law have less impact on appeal than findings of fact. On appeal, courts of appeals re-determine the legal questions. Conclusions of law are review de novo to determine their correctness as applied to the facts. *Perry Homes v. Cull*, 258 S.W.3d 580, 598 (Tex. 2008); *Keisling*, 218 S.W.3d at 741. Erroneous conclusions of law are not binding on an appellate court. *Chavez v. Chavez*, 148 S.W.3d 449, 456 (Tex. App.—El Paso 2004, no pet.).

Conclusions of law will be upheld on appeal if the judgment can be sustained on any legal theory supported by the evidence. *Johnston*, 9 S.W.3d at 277. That is, an incorrect conclusion of law will not require reversal if the controlling findings of fact support a correct legal theory. *Johnston*, 9 S.W.3d at 277.

Frequently findings of fact will include statements that are conclusions of law. Even when conclusions of law are mislabeled as findings of fact, the court of appeals reviews them de novo. *BP America*, 282 S.W.3d at 220; see *BMC Software*, 83 S.W.3d at 794.

d. Review of incomplete findings of fact

If complaining of the incompleteness or omissions, i.e., an element of or an entire cause of action or defense has been omitted, a party must file a request for additional findings of fact to raise the defect and avoid deemed findings. See supra II. C. 3.

Similar to arguments regarding the absence of findings of fact, with the trial court's failure to file additional findings, to obtain a reversal based on the failure to enter additional findings of fact, the appellant must demonstrate that it was prevented from adequately presenting its case on appeal. *Johnston*, 9 S.W.3d at 277. Complaints about the trial court's failure to file additional findings as preventing an appellant from adequately presenting its appeal must detail how a party was prevented from being able to appeal. *Stuckey Diamonds*, 93 S.W.3d at 213.

e. Review of non-Rule 296 findings of fact

Findings of fact filed in interlocutory appeals and other non-Rule 296 cases are reviewed differently than Rule 296 findings. For findings made in cases where the trial court standard is abuse of discretion, the findings are helpful and aid in the court's review on appeal, but not "binding" in the same manner as findings under Rule 296. *IKB*, 938 S.W.2d at 442; *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 852-53 (Tex. 1992). Unlike review of Rule 296 findings where findings are tested for legal and factual sufficiency, in an abuse of discretion review, an appellate court can reverse even if findings and evidence support a trial court's order. *IKB*, 938 S.W.2d at 442; *Chrysler Corp*., 841 S.W.2d at 852-53; see also *Tom James*, 109 S.W.3d at 884 (in an interloctory appeal, findings are "helpful," but "they do not carry the same weight on appeal as findings made under rule 296, and are not binding when we are reviewing a trial court's exercise of discretion.")

F. Proposed Amendments to Rules 296-299a

The Supreme Court Advisory Committee is considering revisions to Rules 296-299a. The proposed amendments address three areas: 1)

encouraging broad form findings and avoiding voluminous and evidentiary findings; 2) modifying the deadline for the original request deadline to conform to other post-judgment preservation rules, and 3) eliminating the requirement for the notice of past due findings of fact and 4) clarifying the scenario when findings are stated in a judgment. Supreme Court Advisory Committee *Hearing Transcript* (Feb. 13, 2009).

The proposed amendments would simplify the request and require the drafting party to narrowly focus the findings and avoid submitting numerous evidentiary findings.

III. OTHER POST-JUDGMENT MOTIONS TO CONSIDER

While findings of fact and conclusions of law make bench trials unique, other post-judgment motions need to be considered as well. As in jury trials, bench trials also have reasons for filing motions for new trial and motions to correct or reform the judgment.

Motion for new trial. A motion for new trial must be filed within thirty days after the judgment is signed. TEX. R. CIV. P. 329b(a). Motions for new trial are not a prerequisite for appeal in a bench trial unless raising newly discovered evidence or the failure to set aside a default judgment. TEX. R. CIV. P. 324(a),(b)(1). As stated earlier, challenges to the sufficiency of the evidence can be raised for the first time on appeal when appealing from a bench trial. TEX. R. APP. P. 33.1(d).

A motion for new trial in a bench trial may be used simply to extend the appellate deadlines. TEX. R. APP. P. 26.1(a)(1). If there is any question about whether a request for findings of fact will extend the appellate deadlines, a motion for new trial should be filed. Finally, a motion for new trial also extends the trial court's plenary power. TEX. R. CIV. P. 329b(e). A motion for new trial does not extend the appellate deadlines in accelerated appeals. TEX. R. APP. P. 28.1(b)

Motion to modify, correct or reform a judgment. A motion to modify, correct or reform a judgment can also be filed following a bench trial. A motion to modify is used to correct errors in the rendition of judgment but when a party does not seek to vacate the findings and when a party does not want a new trial.

A motion to modify, correct or reform a judgment if making a substantive change extends the appellate deadlines and plenary power. TEX. R. CIV. P. 329b(g), (h).

IV. CONCLUSION

Obtaining findings of fact and conclusions of law is critical for a successful appeal of a bench trial. The deadlines and requirements for securing findings of act are unlike other preservation rules – shorter, with a reminder notice and with a requirement to follow up if there are omissions. Requests for additional findings are important for both appellant and appellee for preservation purposes to avoid waiver if elements or entire grounds are omitted.