

I recently had the pleasure of listening to Skip Watson¹ give a presentation to the San Antonio Bar Association Appellate Section on findings of fact and conclusions of law in bench trials. His thoughtful comments on the subject raised many points of discussion among those present. To me, the most compelling question was, "Why don't we submit proposed 'charges' to the court in bench trials?" The answer is probably a combination of "Because it's not in the rules" and "Because no one ever has." As these are both legitimate responses, perhaps the question should be rephrased: "Shouldn't we start submitting proposed 'charges' to the court in bench trials?" I believe the answer is an emphatic "Yes." And, while it would take a change in the rules to require such a submission, there is no impediment to submitting a proposed charge voluntarily.

Proposed "Charges" For Bench Trials

By Ellen B. Mitchell



The purpose of a jury charge is to submit for the jury's resolution the contested issues of fact. To ensure that those contested issues are resolved within the parameters of applicable law, the charge also provides the jury with necessary instructions and definitions. It is the responsibility of the parties and the court to ensure that the charge encompasses every essential element of a cause of action or defense that is supported by some evidence. If this is accomplished, then the jury's answers will provide the basis for the court's judgment. Thus, the factual issues are decided before any judgment is rendered.

Compare the procedure used in most bench trials. The court hears the evidence and, perhaps, receives and considers trial briefs on discrete aspects of the case. The court then takes the matter under advisement and resurfaces days, weeks, or months later to render judgment. At the time judgment is rendered, no one really knows its basis. Nevertheless, the prevailing party

reduces the judgment to writing and the judge signs it. At that point, the losing party requests that the court file findings of fact and conclusions of law. The court then instructs the prevailing party (or, sometimes, both parties) to submit proposed findings and conclusions. Often, the findings and conclusions proposed by the prevailing party are simply adopted by the court, on the theory that it is up to the prevailing party to protect the judgment.

There are at least two significant flaws inherent in this system. First, the party who drafts the proposed findings and conclusions (which often become the official findings and conclusions) is not privy to the court's actual reasoning in the case. Thus, the findings and conclusions do not necessarily reflect the true basis of the court's judgment; they reflect only what theoretically *would* support the judgment. This relates to the second flaw in the system — it allows judges to decide cases without a firm understanding of the necessary elements or legal requirements, and then to justify those decisions in hindsight by selecting

findings and conclusions that support them. In other words, cases tried to the bench are subject to being decided backwards — result, then foundation.

A factor that contributes to this flawed system is that trial judges are not necessarily well-versed in the law applicable to the cases before them. This is not a criticism of trial judges; it is an observation. In a system where the civil courts are not specialized, judges hear matters ranging from divorce and property division to personal injury to complex business litigation. While it may be tempting to say that a judge's job is to know the law, that is not a practical viewpoint. Even appellate court judges, who have legal research facilities and support staffs that are not available to many trial judges, require (or at least request) assistance from the parties in identifying the applicable law. If this were not so, there would be no requirement that appellate briefs contain citations to legal authorities.

It is not realistic to expect a trial judge to know every element of every cause of action, or which measures

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of damages are available in which circumstances, or which claims are subject to which defenses. But there is no formal method of identifying where the judge needs help. In a jury trial, the law and the factual inquiries necessary to resolve a given claim are thoroughly discussed in the charge conference. In a bench trial, there is no such process. If the judge recognizes that he lacks sufficient information about a particular area of law, he may request trial briefs. Or the parties, suspecting a lack of information or understanding, may voluntarily submit such briefs. But this is a hit-or-miss approach to the problem. The judge may well think that he knows all of the law necessary to decide the case when, in fact, he does not. Being confident that he has the information he needs, he will not request briefing, and the parties may never know that he is laboring under a misimpression concerning the law or its application to the particular facts.

I suggest that parties in bench trials submit to the court a proposed "charge" similar to what would be submitted in a jury trial. Such a "charge" would set out the necessary elements of each cause of action or defense, state any necessary definitions or legal explanations (what would be "instructions" to a jury), and identify the appropriate measure of damages for each claim. While agreement or a formal ruling on one final "charge" would not necessarily be required, it would certainly be helpful so that everyone involved knows on what basis the judge is deliberating. In any event, it would certainly be beneficial to engage in an informal charge conference so that each side has an opportunity

to explain to the judge the merits of its submissions and any objections to the opposing party's submissions. The judge, of course, would ultimately decide for himself (as he would in ruling on submissions and objections in a jury charge conference) which, if either, submission is most appropriate.

The judge would not be required to formally answer questions; rather, the "charge" would provide a roadmap for his decision. The benefit is that the judge, by following the "charge," would resolve the fact issues first and would *then* decide the ultimate outcome based on those findings. An added benefit is that the "charge" would later provide a basis for the court's findings of fact, which could be drafted by the actual fact-finder (the judge) and would be based on the fact-finder's actual reasoning, instead of speculation by the prevailing party.

Preparing and submitting a proposed "charge" in bench trials imposes an additional burden on the parties, but it is to the parties' ultimate benefit. First, preparing such a "charge" requires the parties to focus clearly on the elements of their claims and defenses. This will help them ensure that they present adequate evidence at trial and legal argument in support of each element. Further, using a proposed "charge" to delineate the law and its application to the particular case at bar should give the parties confidence that the case will be decided based on appropriate law. In those cases where the parties disagree on the applicable law, at least those disagreements will be clearly identified and addressed. Finally, giving the judge a roadmap for his decision

will allow him to later articulate and file more meaningful findings of fact and conclusions of law. This is a benefit not only to the parties and to the judge who makes the findings and conclusions, but also to the appellate justices who must review them.

Submitting a proposed "charge" to the court in a bench trial may seem to be a revolutionary concept, but it is not. Parties routinely seek to educate the trial judge by submitting trial briefs addressing specific matters of concern. A proposed "charge" is nothing more than an offer to educate the judge more comprehensively and in a more practical structure. As with any trial brief, the judge has wide discretion to decide what use, if any, he will make of the proposed bench "charge." Unlike a jury charge, though, a proposed bench "charge" will not define the case for appellate purposes — that function will still be fulfilled by findings of fact and conclusions of law. The purpose of the proposed bench "charge" is simply to focus the judge's attention on the necessary elements and law applicable to each claim and defense *before* he renders judgment. The court's subsequently filed findings and conclusions will then accurately reflect the basis of the court's decision, rather than a party's conjecture regarding what the basis might have been. This, in turn, will allow more meaningful appellate review because the courts of appeals will be addressing the actual foundation for the trial court's decision, not merely what the foundation might have been.

While this proposal is not revolutionary, it is new. Just as Skip Watson's comments generated spirited discussion among those attending his presentation, I hope that my comments may encourage members of the bench and bar to continue the discussion and to develop new ways to promote the fair and efficient resolution of legal disputes.

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