

Chapter 1

Variations Amongst Texas Courts and Trial Judges¹

1-1 INTRODUCTION

Experienced trial attorneys in Texas become comfortable with the fact that certain kinds of trial procedures will vary from one state court to another. Most of the procedure and evidence topics addressed in this book apply to any kind of civil trial. (To a somewhat lesser extent, with more exceptions, that is also largely true for criminal trials as well, although this book is intended primarily for the conduct of civil trials.) But in some key respects, the differences found among Texas courts and trial judges matter. This chapter addresses the most common forms of variation for which trial lawyers need to be prepared.

1-2 VARIATIONS IN JURY COMPOSITION AMONG TEXAS COURTS

The Texas trial court system has been described as “dizzying” and consisting of “patchwork” complexity.² Lawyers trying cases in Texas trial courts must recognize that both twelve-person and six-person juries are utilized. The following constitutional provisions and state statutes govern the composition of Texas state court juries in the various courts.

¹ The authors thank Taylor Fitzner for his research assistance in the updating of this chapter.

² *In re Reece*, 341 S.W.3d 360, 382 (Tex. 2011) (Willett, J., dissenting).

1-2:1 Texas State District Courts

The Texas Constitution sets the number of jurors that are required for a Texas state district court at twelve (other than non-felony criminal cases discussed in the next paragraph), but a verdict may be rendered by as few as nine jurors in a civil case.³ The Texas Government Code makes this a statutory right by setting the number of jurors at twelve in a Texas state district court, unless the parties agree to proceed with fewer than twelve.⁴

If the case is a criminal case below the grade of felony, the jury shall be composed of six persons.⁵ The Texas Code of Criminal Procedure codifies the requirement that a trial involving a misdemeanor offense consist of six qualified jurors.⁶ Therefore, a party to either a civil or criminal suit is protected by both a constitutional and statutory right to present their case to a certain number of jurors. In *Hill v. State*,⁷ The Texas Court of Criminal Appeals stated that trial can proceed with eleven jurors in a felony case when: (1) the parties consent under Section 62.201 of the Texas Government Code⁸; or (2) a juror dies or becomes disabled under article 36.29(a) of the Texas Criminal Procedure Code Procedure.⁹

1-2:2 Texas County Courts

The Texas Constitution sets the number of jurors for a Texas county court at six.¹⁰ The Texas Government Code codifies that a trial in a Texas county court will consist of six jurors.¹¹

1-2:3 Texas County Court At Law

A jury in a Texas county court at law (also referenced generically as a statutory county court) likewise generally consists of six jurors.¹² The practice and procedure of empaneling a jury in

³ Tex. Const. art. V, § 13.

⁴ Tex. Gov't Code Ann. § 62.201 (West 2012). See "Agreement of the Parties to Proceed With a Smaller Jury" in Subsection 6 below.

⁵ Tex. Const. art. V, § 13.

⁶ Tex. Code Crim. Proc. Ann. art. 33.01 (West 2012).

⁷ *Hill v. State*, 90 S.W.3d 308, 314 (Tex. Crim. App. 2002).

⁸ Tex. Gov't Code Ann. § 62.201 (West 2012).

⁹ Tex. Code. Crim. Proc. Ann. art. 36.29(a) (West 2012).

¹⁰ Tex. Const. art. V, § 17.

¹¹ Tex. Gov't Code Ann. § 62.301 (West 2012).

¹² Tex. Gov't Code Ann. § 62.301 (West 2012).

statutory county courts must conform to that prescribed by law for county courts.¹³ However, the statute containing the particular provisions of the individual county court at law may call for twelve jurors. For example, the provisions for the Austin County Courts at Law provide that the jury shall be composed of twelve members for any family law case tried before a jury.¹⁴

1-2:4 Texas Statutory Probate Courts

The practice and procedure of Texas statutory probate courts must conform to that prescribed by law for county courts, except that the practice and procedure, including the number of jurors, of statutory probate courts involving those matters of concurrent jurisdiction with district courts are governed by the laws and rules pertaining to district courts.¹⁵ This means that the number of jurors in a statutory probate court will be either six or twelve depending on whether it is exercising exclusive or concurrent jurisdiction. If a statutory probate court is exercising its exclusive jurisdiction, then it has a jury of six. However, when a statutory probate court has concurrent jurisdiction with a district court, then the jury must have 12 members. When the probate court is presiding over matters within both its exclusive and its concurrent jurisdiction, a party is entitled to a jury of twelve.¹⁶

1-2:5 Texas Justice Courts

The jury in Texas justice courts is composed of six members.¹⁷

1-2:6 Agreement of the Parties to Proceed With a Smaller Jury

In district courts, Section 62.201 of the Texas Government Code permits parties to agree to proceed with fewer than twelve jurors.¹⁸ The parties to a civil case may agree to continue to try a case with

¹³ Tex. Gov't Code Ann. § 25.0007 (West 2012).

¹⁴ Tex. Gov't Code Ann. § 25.0102 (West 2012). But see S.B. 891 and S.B. 2342, enacted by the Texas Legislature as this book was going to press, relating to changes in jury compositions in various county courts at law.

¹⁵ Tex. Gov't Code Ann. § 25.0027 (West 2012).

¹⁶ *Rabson v. Rabson*, 906 S.W.2d 561, 563 (Tex. App.—Houston [14th Dist.] 1995, writ denied).

¹⁷ Tex. Gov't Code Ann. § 62.301 (West 2012).

¹⁸ Tex. Gov't Code Ann. § 62.201 (West 2012).

less than twelve jurors (or the court without consent of the parties may order the case to proceed to verdict after loss of a juror to death or disability).¹⁹ Section 62.201 applies to both civil and criminal trials.²⁰

To establish an agreement under Section 62.201 of the Texas Government Code, the record must affirmatively establish the agreement of the parties to try the case with fewer than twelve jurors.²¹ A pretrial agreement and a failure to object to size of the jury until after verdict waives right to a twelve-person jury.²²

Section 62.201 of the Texas Government Code does not apply to county and justice courts. Instead, Texas Government Code Section 62.301 applies, and that statute does not expressly say that the parties can agree to have fewer jurors than the six required in county and justice courts.

However, the Texas Court of Criminal Appeals has said that the failure of Section 62.301 to specifically authorize the parties in county court to consent to a jury of fewer than six members does not mean that such an alternative is forbidden.²³ In *Garza*, the Court held that parties in county court had the implicit power to consent to a jury of less than six members.

While there are no civil cases on this topic, it appears that similar reasoning would allow parties to consent to less than six jurors in civil cases (in county and justice courts) as long as the court agreed. Some county court at law provisions specifically allow fewer than six jurors. For example, the statute applicable to the Gregg County Court at Law says, “In a civil case tried in a county court at law, the parties may, by mutual agreement and with the consent of the judge, agree to try the case with any number of jurors and have a verdict rendered and returned by the vote of any number of those jurors that is less than the total number of jurors.”²⁴

¹⁹ *Dickson v. J. Weingarten, Inc.*, 498 S.W.2d 388, 39091 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ) (based upon a predecessor statute to Section 62.201).

²⁰ *Hatch v. State*, 958 S.W.2d 813, 815 (Tex. Crim. App. 1997).

²¹ *Willis v. State*, 320 S.W.3d 853, 855 (Tex. App.—Eastland 2010, no pet.); *Godfrey v. State*, No. 14-04-00670-CR, 2005 WL 1242354, at *2 (Tex. App.—Houston [14th Dist.] May 26, 2005 pet. ref’d) (citing *Roberts v. State*, 987 S.W.2d 160, 163 (Tex. App.—Houston [14th Dist.] 1999, pet. ref’d)).

²² *Audia v. Hammold*, 328 S.W.3d 661, 663 (Tex. App.—Dallas 2010, no pet.).

²³ *Ex parte Garza*, 337 S.W.3d 903, 913 (Tex. Crim. App. 2011).

²⁴ Tex. Gov’t Code Ann. § 25.0942 (West 2012).

1-3 VARIANCES IN LOCAL RULES

Check for local rules of the court in which your case is set for trial. It is extremely common for local rules—applicable only to specific courts or to all courts in a given county—to provide specified procedures for litigation in addition to those provided by the Texas Rules of Civil Procedure and various state statutes.

1-3:1 Methods of Publication by Various Counties and Courts

In general, each administrative judicial region and the state courts residing therein are vested with the authority to create, adopt or otherwise modify their local rules so long as such rules remain consistent with the Texas Rules of Civil Procedure and publication is provided in a manner “reasonably calculated to bring it to the attention of attorneys practicing before the courts.”²⁵ Although Texas state courts are mandated to “publish” local rules, the visiting attorney is ultimately responsible for both maintaining awareness of and abiding by the court’s standard protocol.²⁶ As a result, a state court’s method for making its local rules available for review is of paramount importance to a visiting attorney’s preparation for trial.

A state court’s method for making local rules available can vary from simply charging a visiting attorney with constructive knowledge to actually providing members of the state bar with a written copy upon request.²⁷ For example, Brazos County provides that once the local rules have received approval and ratification by the Supreme Court then copies shall be “published and made available to members of the Bar and the public.”²⁸ Bowie County provides that its local rules shall be “printed and published in loose-leaf form” and “shall at all times be available through the District Clerk’s office.”²⁹

²⁵ Tex. R. Civ. P. 3a.

²⁶ See generally *Mayad v. Rizk*, 554 S.W.2d 835 (Tex. Civ. App.—Houston [14th Dist.] 1977); McDonald & Carlson Texas Civil Procedure, § 1:10.

²⁷ See generally *State v. Rotello*, 671 S.W.2d 507 (Tex. 1984); Tex. R. Civ. P. 3a(5).

²⁸ Tex. Brazos Cty. R. 13.12.

²⁹ Tex. Bowie Cty. Dist. & Cty. Ct. R. 13.12.

1-3:2 Statewide Source Available With Compilation of All Local Rules

In late 2010, the Texas Supreme Court website completed an updated analysis of state court local rules and concluded that, as of that date, a total of 206 out of Texas' 254 counties have adopted specific governing local rules. Prior to 2010, many of the local rules submitted to the Supreme Court by counties were "buried in files only available at the Texas Supreme Court."³⁰

The Texas Supreme Court has now established a statewide compilation of all Texas courts categorized according to county via its online webpage. This online resource contains links to the local rules for every Texas county.³¹ In addition to the Texas Supreme Court website, other online resources such as Westlaw and LexisNexis provide a limited archival database from which specific searches may reveal a particular county's local rules.³²

In addition, many counties now publish their local rules online in websites specific to the county. Usually a Google, Bing or other internet web search for the county name and court and "local rules" will identify the site. Finally, as one last suggestion when in doubt, call the court coordinator/administrator, or the applicable district or county clerk's office, and ask for help finding and accessing the local rules.

1-3:3 Limitation On Effect of Local Rules

Case law may prevent violation of a local rule from being directly fatal to a case. Local rules are not to conflict with the Texas Rules of Civil Procedure, nor alter the time periods provided by the Texas Rules of Civil Procedure, and no such conflicting local rule is allowed to be applied in a merits-preclusive manner.³³

³⁰ Osler McCarthy, Texas Supreme Court Advisory, http://www.txcourts.gov/All_Archived_Documents/SupremeCourt/CourtNewsAndAdvisories/advisories/rules_archival_project_120910.htm (last visited June 3, 2019).

³¹ Texas Judicial Branch, <http://www.txcourts.gov/rules-forms/rules-standards> (last visited June 3, 2019).

³² LexisNexis also publishes *Local Rules of the District Courts in Texas*, which is updated annually and seeks to compile all of the local rules of Texas district courts.

³³ Tex. R. Civ. P. 3a (1), (2) & (6); *Esty v. Beal Bank S.S.B.*, 298 S.W.3d 280, 297 (Tex. App.—Dallas 2009, no pet.) (local rule requiring an earlier service of documents than mandated by Texas Rules of Civil Procedure could not be used to invalidate a summary

1-4 VARIANCES IN COURTROOM PROTOCOL

Trial judges are vested with significant discretion in their courtrooms to require or vary procedures as they deem appropriate for maintaining order and providing a fair trial.³⁴ Many of these variations in trial procedure are not spelled out in written local rules. When set for trial for the first time with a particular judge, a lawyer should seek guidance from other lawyers who are familiar with the judge's courtroom preferences or, if possible, directly from the judge during a pretrial court conference.

The following are some common differences between Texas judges relating to trial procedures.³⁵

1-4:1 Presenting Pretrial Motions and Proposed Jury Charges Prior to Trial

The willingness of trial judges to hear extensive pretrial motions (such as lengthy motions in limine) on the morning of jury selection varies. Rule 248 of the Texas Rules of Civil Procedure requires unresolved pending matters, as far as practicable, to be heard and determined by the court before the trial commences, but it does not specify how far in advance of trial the matters should be heard and determined, nor does the rule define what constitutes "practicable."³⁶ Recognize that trial judges are often reluctant to delay jury selection and keep a jury panel waiting in order to dispose of lengthy pretrial issues on the morning of jury selection.³⁷ Rule 166 of the Texas Rules of Civil Procedure clearly authorizes trial judges to set pretrial matters for hearing in advance of trial.³⁸ Find out the preference and usual practice of

judgment response); *Vince Poscente International, Inc. v. Compass Bank*, 460 S.W.3d 211, 216–17 (Tex. App.—Dallas 2015, no pet.) (declining to invalidate a summary judgment by applying a local rule in a manner to conflict with well-established rules of civil procedure and evidence).

³⁴ See Tex. R. Evid. 611, stating that a court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence; *but see* Tex. R. Civ. P. 265, providing the order in which parties will make opening statements and present evidence.

³⁵ The import of answers to these questions is discussed further in Chapter 7.

³⁶ Tex. R. Civ. P. 248.

³⁷ "If a motion is not brought to the court's attention until the day of trial, it follows that it becomes impracticable for the court to conduct a pretrial hearing. We iterate that a motion or objection must be timely brought to the attention of the trial court as a general rule." *Darpino v. T.D.C.J.-I.D.*, No. 12-03-00021-CV, 2003 WL 22839250, at *3 (Tex. App.—Tyler Nov. 26, 2003, no pet.) (mem. op.).

³⁸ Tex. R. Civ. P. 166.

the trial judge for addressing pretrial motions and the trial judge's expectations regarding the timing of submission of proposed jury questions, instructions and definitions by each party.

1-4:2 Conduct of Voir Dire and Assertion of Challenges for Cause

During the voir dire process, a trial court is given great latitude to control the proceedings. The Texas Supreme Court has stated that the voir dire process is inherently subjective and does not lend itself to formulaic management.³⁹

Chapter 6, Jury Selection, discusses of the trial court's discretionary latitude and the governing rules applicable during voir dire. In order to better anticipate and plan for the trial court's approach to voir dire, it is extremely helpful to learn the answers to these questions in advance of trial.

1-4:2.1 Access to Jury List

When do the attorneys first have access to the list of persons who have been summoned or assigned to the panel for jury selection?

Usually the list is not available until the morning of jury selection, but in some rural counties (typically a county served by only one district court and one county court) a list of persons summoned for jury service may be available several days before jury selection.

1-4:2.2 Supplemental Juror Questionnaires

What is the court's attitude toward the use of supplemental juror questionnaires?

Attitudes of Texas trial judges vary greatly on this topic.

1-4:2.3 Time Allotted for Questioning Jury

How much time is likely to be granted by the court to each party for questioning the jury panel during voir dire?

The answer to this question often depends on the nature of the case being tried, but some judges tend to allow more time than others, within the time parameters from the case law discussed in Chapter 7. It is important for planning and preparation to know what to expect regarding time allowances.

³⁹ *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 753–54 (Tex. 2006).

1-4:2.4 Discussion of Case Facts During Voir Dire

How strict or lenient is the court regarding discussion of case facts, i.e., how does the court interpret commitment questions during voir dire?

As discussed in Chapter 6, trial judges have discretion to allow commitment questions to be asked (although challenges for cause may not be based upon an improper commitment question). Some judges are more lenient than others regarding these kinds of questions.

1-4:2.5 Allowance for Additional Questioning

What is the court's preference or customary procedure for allowing additional questioning or rehabilitation of individual venire persons at the bench, for the purpose of exploring possible challenges for cause, subsequent to questioning of the panel?

The majority of trial judges allow counsel to ask additional questions of individual venire persons at the bench in support of or opposition to potential challenges for cause, but this is not true of all judges. It is important to know the judge's usual practice or preference before questioning the panel as a whole, because the answer will dictate how far questioning of venire persons must be pursued during panel discussions.

1-4:3 Use of Demonstrative Exhibits During Opening Statement

Most trial judges allow potential evidence and demonstrative exhibits to be shown to the jury during opening statement if they have been shown in advance to opposing counsel and no objection has been raised. Some trial judges prefer only preadmitted exhibits to be shown to the jury during opening statement. Some trial judges are very willing to rule upon and allow disputed exhibits to be shown, even in the absence of a formal preadmission procedure. But trial judges usually do not like to be surprised by counsel showing potentially inadmissible and undisclosed evidence and demonstrative exhibits to the jury.

Find out in advance how the trial judge prefers for material to be presented visually during opening statement.

1-4:4 Preference for Conduct of Examinations and Movement Within the Courtroom

Most Texas trial judges, but certainly not all, prefer for counsel to remain seated at counsel table during direct and cross examinations. Some judges expect counsel to conduct examinations from a podium, as more commonly seen in federal court. Some judges allow counsel to stand during their questioning if they prefer, provided they stay behind counsel table except when necessary to approach the witness. Some judges allow counsel to move freely about the courtroom when questioning a witness.

Many judges expect counsel to ask each time before approaching a witness; some expect that to be done only the first time.

The objective is to simultaneously demonstrate respect to the court (by working within the judge's expectations) while asserting a strong presence and credibility with jurors by moving comfortably and confidently within the courtroom. Find out the judge's preferences and expectations before trial and plan accordingly.

1-4:5 Offering, Showing and Preserving Demonstrative Exhibits During Trial

Terminology regarding demonstrative exhibits varies somewhat between trial judges, although experienced trial judges tend to be flexible enough to accommodate whatever terminology is utilized by trial counsel.

Judges generally appreciate counsel clarifying when an exhibit is being offered for demonstrative purposes only (simply to aid the jury in understanding the testimony), because purely demonstrative exhibits (as opposed to exhibits offered as evidence with independent evidentiary value of their own) are not usually sent to the jury room during deliberations.⁴⁰

The phraseology most commonly utilized in Texas to clarify this distinction is to state (when offering the exhibit) or to inquire (when responding to an opponent's offer) whether the exhibit is a "demonstrative exhibit only"/"offered for demonstrative purposes only."

⁴⁰ See, e.g., *Vanegas v. State*, No. 06-08-00143-CR, 2009 WL 960786, at *6 (Tex. App.—Texarkana Apr. 10, 2009, no pet.) (unpublished opinion).

Not all judges, however, are comfortable with this distinction. Article 36.25 of the Texas Code of Criminal Procedure requires “all exhibits admitted as evidence” to be provided to jurors on request.⁴¹ Some judges, in order to further differentiate between evidentiary exhibits and merely demonstrative aids, prefer not to formally admit demonstratives as exhibits at all. Instead, they prefer to simply acknowledge, on request, that a demonstrative is “preserved” for further use by counsel, in order to prevent the exhibit from being marked upon and altered by opposing counsel.⁴²

Regardless of what terminology is preferred by the court, it is also important to know the judge’s preferences for showing any anticipated demonstrative evidence to opposing counsel and the court before referencing it or showing it in front of the jury. Some judges are more lenient in their expectations than others, but there is no reason to have credibility impaired due to a failure to reveal demonstrative evidence in advance in accordance with the judge’s expectations.

Judges also vary in their willingness to allow individual exhibit notebooks to be prepared for and provided to jurors during trial. These can be very useful tools for jurors, but find out in advance whether juror exhibit notebooks will be allowed if there is a plan to use them.

Finally, if you plan to use technology for the visual presentation of evidence and exhibits, find out in advance what technology is already in place in the courtroom. (Courtrooms vary greatly in how they are equipped.) If there is a need to bring in additional equipment, get it cleared with the court before trial to prevent last minute misunderstandings.

1-4:6 Presenting Legal Authority and Bench Briefs During Trial

It is helpful to learn how individual judges prefer legal authority and bench briefs to be presented during trial. Texas state trial court judges, unlike federal judges, generally operate without the benefit of briefing clerks. This means they have the burden of distilling legal research offered by attorneys without any screening

⁴¹ Tex. Code Crim. Proc. Ann. art 36.25.

⁴² For further discussion of use of demonstrative exhibits, *see* the Subsection “Use of Demonstrative Exhibits With Experts” in Chapter 11.

or additional research from their own court staff. Senior attorneys in law firms have preferences regarding how they like legal research to be presented. Judges do as well.

Although many judges still prefer to work from paper submissions, an increasing number of judges prefer to review research online from digital submissions, with citations hyperlinked to the actual authority.

In the midst of a jury trial, most judges prefer not to wade through a long, multipage bench brief while the jury is sitting in the jury box. Some judges prefer to have controlling authority copied, highlighted and presented for their consideration on a disputed issue (with a similarly marked copy for opposing counsel). Other judges prefer to have a short (two page) bench brief provided on the disputed issue, or a short bench brief with highlighted authority attached.

Although a judge will generally accept briefing in whatever form it is presented, a judge appreciates and respects the attorney who provides the needed authority in the form the judge finds most useful. It demonstrates diligence and attention to detail—factors that weigh on the assessment of credibility.

1-5 RULE DIFFERENCES FOR EXPEDITED TRIALS

Effective March 1, 2013, mandatory expedited trial rules apply to cases filed after that date seeking only money damages of \$100,000 or less, other than cases governed by the Family Code, the Property Code, the Tax Code, or Chapter 74 of the Texas Civil Practice and Remedies Code (and the expedited trial rules are in the process of being revised again).⁴³

In Chapter 22, Special Rules Governing Expedited Trials, the specialized rules for expedited trials are itemized and discussed in detail, but some of the most important departures from traditional trial rules (after the conduct of discovery, which is also affected) are the following:

- “A pleading, amended pleading, or supplemental pleading that removes a suit from the expedited

⁴³ Tex. R. Civ. P. 169. *But see* S.B. 2342, enacted by the Texas Legislature as this book is going to press, directing the Texas Supreme Court to adopt rules effective September 1, 2020, “to promote the prompt, efficient, and cost-effective resolution of civil actions filed in county courts at law in which the amount in controversy does not exceed \$250,000.”

actions process may not be filed without leave of court unless it is filed before the earlier of 30 days after the discovery period is closed or 30 days before the date set for trial. Leave to amend may be granted only if good cause for filing the pleading outweighs any prejudice to an opposing party,” in which case “the court must reopen discovery.”⁴⁴

- Trial continuances are limited to two, “not to exceed a total of 60 days.”⁴⁵
- “In no event may a party who prosecutes a suit under [Rule 169] recover a judgment in excess of \$100,000, excluding post-judgment interest.”⁴⁶
- “Each side is allowed no more than eight hours to complete jury selection, opening statements, presentation of evidence, examination and cross-examination of witnesses, and closing arguments,” which may be expanded to “no more than twelve hours per side” on “a showing of good cause.”⁴⁷
- “Time spent on objections, bench conferences, bills of exception, and challenges for cause to a juror . . . are not included in the time limit.”⁴⁸
- “Unless requested by the party sponsoring the expert, a party may only challenge the admissibility of expert testimony as an objection to summary judgment evidence . . . or during the trial on the merits” (with an exception for “a motion to strike for late designation”).⁴⁹

⁴⁴ Tex. R. Civ. P. 169(c).

⁴⁵ Tex. R. Civ. P. 169(d).

⁴⁶ Tex. R. Civ. P. 169(b).

⁴⁷ Tex. R. Civ. P. 169(d).

⁴⁸ Tex. R. Civ. P. 169(d).

⁴⁹ Tex. R. Civ. P. 169(d).

1-6 RULE DIFFERENCES FOR JUSTICE COURT TRIALS

Effective August 31, 2013, new rules govern trials in Texas justice courts. The Texas Supreme Court added Rules 500-510 to the Texas Rules of Civil Procedure and repealed Rules 523-591 and 737-755.

Texas justice courts are not courts of record (for which a court reporter is available to make a record of the evidence, objections and rulings), and judgments may be appealed to county court to be tried again (*de novo*).⁵⁰ Nevertheless, justice courts may exercise subject matter jurisdiction over cases involving up to \$10,000 in controversy (increasing to \$20,000 on September 1, 2020), providing a simplified, low-cost alternative for smaller cases.⁵¹

In Chapter 3, *New Rules Governing Justice Court Trials*, the specialized rules and rule changes for justice court trials are itemized and discussed in detail, but some of the most important changes from the trial rules applicable in other state trial courts (after the conduct of discovery) are these:

- The Texas Rules of Evidence and Texas Rules of Civil Procedure (other than those specified for justice courts) are not generally applicable in justice court trials. Repealed Rule 523 formerly stated, “All rules governing the district and county courts shall also govern the justice courts, insofar as they can be applied, except where otherwise specifically provided by law or these rules.”⁵² Now, the new Rule 503 states, “The other Rules of Civil Procedure and the Rules of Evidence do not apply except when the judge hearing the case determines that a particular rule must be followed to ensure that the proceedings are fair to all parties; or when otherwise specifically provided by law or these rules.”⁵³ This change in language reverses the

⁵⁰ *Ex parte Quong Lee*, 31 S.W. 391, 391 (Tex. Crim. App. 1895). Tex. R. Civ. P. 506.1, 506.3.

⁵¹ Tex. R. Civ. P. 500.3. See S.B. 2342 enacted by the 2019 Texas Legislature increasing the jurisdiction of justice courts to \$20,000, effective September 1, 2020.

⁵² Tex. R. Civ. P. 523 (repealed).

⁵³ Tex. R. Civ. P. 500.3(e).

former presumption that the rules in other trial courts also govern cases in justice courts.

- During jury selection, the judge (i.e., justice of the peace) is specifically allowed to question jurors as to their ability to serve impartially in the trial.⁵⁴ While judges are not prohibited from questioning jurors in district and county courts, there is no rule expressly giving them that right. As a practical matter, judges have greater need to question the jurors in justice court trials because commonly, attorneys do not represent the parties. The rest of jury selection tracks the procedure in county courts.⁵⁵
- In order to develop the facts of the case in justice court, the judge is expressly allowed by rule to question a witness or party and may summon any person or party to appear as a witness when the judge considers it necessary to ensure a correct judgment and a speedy disposition.⁵⁶ This gives the judge the ability to conduct more efficient trials.
- In contrast to other state trial courts, the judge in justice court is not allowed to charge the jury (presumably because a justice of the peace is not required to be an attorney).⁵⁷ This means that justice court juries simply find in favor of one party. When the suit is for the recovery of specific articles and the jury finds for the plaintiff, the jury must assess the value of each article separately, according to the evidence presented at trial.⁵⁸
- In justice court, the judge is provided added deference in rendering a judgment. The judge may render judgment on the verdict or, if the verdict

⁵⁴. Tex. R. Civ. P. 504.2(c).

⁵⁵. Tex. R. Civ. P. 504.2.

⁵⁶. Tex. R. Civ. P. 500.6.

⁵⁷. Tex. R. Civ. P. 504.3.

⁵⁸. Tex. R. Civ. P. 504.4.

is contrary to the law or the evidence, judgment notwithstanding the verdict. Unlike other Texas trial courts, the judge may render a judgment notwithstanding the verdict without a motion from a party.⁵⁹

- The time period for challenging the judgment in justice court is shorter (21 days) than in other state trial courts.⁶⁰

1-7 RULE DIFFERENCES FOR BENCH TRIALS

There are obviously numerous procedural differences between jury trials and bench trials. In Chapter 4, Procedural Rules Governing Bench Trials, the specialized rules for bench trials are itemized and discussed in detail. Clearly, with a bench trial, there is no jury selection, and factual evidence and arguments are addressed to the court rather than a jury.

In addition to these differences, the following are some of the important rule differences to know which are specifically applicable to bench trials:

- In a bench trial, the judge has greater discretion in admitting evidence. Unlike in a jury trial, in which the jury weighs the evidence and determines the credibility of witnesses, “[in] a trial to the bench, the trial court [is] the exclusive judge of the credibility of the witnesses and the weight to be given to their testimony.”⁶¹ Because the trial judge is presumed to be capable of weighing or disregarding marginal evidence, judges in bench trials often admit evidence that would normally be excluded in a jury trial. As the fact finder, the judge need not be concerned about commenting on the weight of the evidence by the admission

⁵⁹. Tex. R. Civ. P. 505.1.

⁶⁰. Tex. R. Civ. P. 506.1, 507.1.

⁶¹. *Hazelwood v. Lafavers*, 394 S.W.3d 620, 628 (Tex. App.—El Paso 2012, no pet.); see also *In re A.M.*, 418 S.W.3d 830, 841 (Tex. App.—Dallas 2013, no pet.) (fact-finder may choose to believe one witness over another, and an appellate court may not impose its own opinion to the contrary).

or exclusion of marginal evidence. Instead, the trial judge can provisionally admit evidence, and it is presumed on appeal that the trial judge disregarded any incompetent evidence in reaching a judgment.⁶² Furthermore, the admission of incompetent or inadmissible evidence does not warrant reversal if there appears on the record competent evidence supporting the trial court's decision.⁶³

- In a bench trial, the judge has discretion to admit additional evidence after rendering a verdict. “When it clearly appears to be necessary to the due administration of justice, the court may permit additional evidence to be offered at any time, provided that in a jury case no evidence on a controversial matter shall be received after the verdict of the jury.”⁶⁴ There are four factors a trial court may consider when determining whether to allow admission of additional evidence: (1) whether the movant showed due diligence in obtaining the evidence; (2) whether the additional evidence is decisive; (3) whether reopening the evidence will cause undue delay; and (4) whether reopening the evidence will cause injustice.⁶⁵
- In a bench trial, the judge has discretion regarding whether to allow or refuse oral argument.⁶⁶
- Since there is no jury verdict in a bench trial, findings of fact and conclusions of law state the factual and legal grounds for the trial court's judgment. “In any case tried in the district or county court without a jury, any party may request

⁶² *Texas Alco. Bev. Comm'n v. Sanchez*, 96 S.W.3d 483, 488 (Tex. App.—Austin 2002, no pet.).

⁶³ *In re R.M.T.*, 352 S.W.3d 12, 26 n.20 (Tex. App.—Texarkana 2011, no pet.).

⁶⁴ Tex. R. Civ. P. 270.

⁶⁵ *Moore v. Jet Stream Investments, Ltd.*, 315 S.W.3d 195, 201 (Tex. App.—Texarkana 2010, pet. denied).

⁶⁶ *City of Corpus Christi v. Krause*, 584 S.W.2d 325, 330 (Tex. Civ. App.—Corpus Christi 1979, no writ).

the court to state in writing its findings of fact and conclusions of law.”⁶⁷ Generally the non-prevailing party will request findings of fact and conclusions of law in order to narrow the grounds for appeal. When findings of fact are filed and unchallenged, they occupy the same position and are entitled to the same weight as the verdict of a jury.⁶⁸

Beyond these primary differences, “[t]he rules governing the trial of causes before a jury shall govern in trials by the court in so far as applicable.”⁶⁹

⁶⁷. Tex. R. Civ. P. 296.

⁶⁸. *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696 (Tex. 1986); *R.J. Suarez Enterprises Inc. v. PNYX L.P.*, 380 S.W.3d 238, 244 (Tex. App.—Dallas 2012, no pet.).

⁶⁹. Tex. R. Civ. P. 262.