TRICKS AND TRAPS USED BY ATTORNEYS, JUDGES AND OTHER SPECIES OF RATS CONCERNING EVIDENCE

by

VALIANT LIBERTY

The rats have laid a minefield of tricks and traps for the unwary, uninitiated, and ignorant *pro se* litigant who dares trespass into the monopolized realm of Texas Courts. By skillful and manipulative use of the rules of court and judicial interpretations of the rules, the lawyers, with the complicity of the judges, are able to get their hearsay evidence entered into the record as facts and deprive the ignorant *pro se* of his evidence. When the other side can get whatever they want, including hearsay, admitted into the record as evidence and the *pro se* cannot get anything into evidence, the outcome is going to be obvious. You can't win without evidence to prove your case. This does not seem to be fair or in the interest of justice, but fairness and justice have nothing to do with the operation of Texas courts. The *pro se* litigant is expected and required to follow the rules. The *pro se* gets no slack in Texas courts. "A party acting pro se must comply with substantive law and procedural rules." In re Caldwell, 1995, 918 SW2d 9, 10. If one is ignorant of the rules and of how the rats manipulate the rules, the rats will invariably strip you of your property, steal your children, throw you in prison, or all of the above. And the rats will have done nothing wrong in the eyes of the courts. "You should have hired an attorney," they will say, however the final outcome might well be the same if you had. Even if a litigant wins with the aid of an attorney, often the only difference in the final out come is that the attorney, not the adverse party, ends up with all your money and property. In either instance, you will have been impoverished and reduced to a pauper by the Texas form of justice. You can win, but still be the loser.

The following information and authority is found scattered through and is taken from O'Conners Texas Rules, Civil Trials, 2001, published by Jones McClure Publishing, Inc., excepting the comments in brackets []. This is the best rule book concerning Texas Rules of Court that the author has seen. It is filled with annotations and explanation of the rules and procedures for Texas courts that can be found in no other one place. If you want to play in Texas courts, you should have a copy. It may be ordered by calling 1-800-626-6667. They also publish a book containing forms for pleadings. It is imperative that the pleadings be properly drafted, or else you will surely lose. This essay is in no way intended as legal advice. If you want legal advice, hire an attorney - if you know of a competent one that you can trust and afford. Otherwise, do your homework.

I.

HOW ATTORNEY'S UNSWORN STATEMENTS BECOME FACTS OF EVIDENCE

AND HOW TO PREVENT IT

The trial court has the discretion to admit or exclude evidence; the appellate court will reverse only on objection, it will not admit the evidence. The party who offered the evidence still has other options that it must exercise, or it waives the error. If the trial court overrules the objection, it will admit the evidence. The party whose objection was overruled still has other options that it must exercise, or it waives the error.

An attorney's unsworn statements are not evidence. U.S. Gov. v Marks, 1997, 946 SW2d 326. However, on appeal, a lawyer's unsworn statement can be considered evidence unless the other side objected at the trial. Banda v. Garcia, 1997, 955 SW2d 270, 272. Normally, an attorney's unsworn statements must be under oath to be considered as evidence. Banda, *supra*. If a lawyer is presenting facts to the court, the other party should object and ask the lawyer to be sworn and subjected to cross-examination. Banda,

supra. When in doubt, a lawyer should always object to the fact statements of another lawyer. If the other party is aware that the lawyer is testifying and does not object, the administration of the oath is waived. Fullenwider v American Guar & Liab. Ins Co. , 1991, 821 SW2d 658, 662.

[Note that: Tex. Disciplinary Rule of Professional Conduct 3.03 forbids a lawyer from making false statements of material fact to a tribunal. So, it is presumed that when an attorney is stating facts without being under oath and not subject to cross-examination, the statements are the facts, unless objection is made. Any time an attorney starts stating facts, it is most likely hearsay, unless the attorney has first hand knowledge of the facts, and even then, the attorney must be under oath and subject to cross-examination, unless the other party fails to object. Almost every time an attorney opens his mouth, the opposing party should be objecting.]

When trial counsel foresees the possibility the he or she will testify on behalf of a party about a disputed fact issue (not attorney's fees), the lawyer should resolve doubts in favor of preserving the integrity of the evidence and decide against continued participation as trial counsel. See: Warrilow v. Norrell, 1989, 791 SW2d 515, 523 n.10. A testifying lawyer may still engage in out-of-court matters relating to the case, including preparing and signing pleadings, planning strategy, and negotiating settlement. Anderson Prod'g, Inc. v. Koch Oil Co., 1996, 929 SW2d 416, 422. [So, when a lawyer starts testifying to hearsay facts, the *pro se* should be objecting and demanding he take the stand under oath, submit to cross-examination and that he withdraw as trial counsel.]

A party should attempt to secure an explicit ruling admitting or excluding evidence, that is, a ruling on the record, either in open court, or in writing, that specifically state the court's ruling, i.e., that the objection is overruled or sustained. If the court does not make an explicit ruling but admits evidence over a specific objection, the court implicitly overruled the objection, and the error is preserved. Wolfe v. Wolfe, 1996, 918 SW2d 533, 542. Under TRAP 33.1(a)(2)(A), error is preserved by an implicit ruling.

If the court does not rule, or if no ruling appears in the record, the error is waived. To preserve error an objection must actually be overruled. If the trial court says that it will rule on the objection later, the statement is not a ruling and does not preserve error. TEIA v. Moore, 1955, 284 SW 2d 175, 178. If the trial court invites the party to re-urge the objection later, that is not a ruling. Bushell v. Dean, 1991, 803 SW2d 711, 712. If the trial court responds to an objection by saying, "Okay," that is not a ruling. Wal-Mart v. Gonzales, 1997, 954 SW2d 777, 782. [Comment: These types of rulings are called "equivocal rulings" and any ruling on an objection to evidence that is not "overruled" or "sustained" is an equivocal ruling and does not preserve error. There are a thousand ways a judge can equivocate and the "*pro se*" must be alert to these equivocations at all times and insist that the judge make a ruling. For instance, it might be stated, "Let the record reflect that an objection to the hearsay testimony of Lawyer Shyster has been made, that the court has neglected or refused to rule on the objection and I have objected to the court's neglect or refusal to rule.]

If the court equivocates or refuses to rule, the party must object to the court's refusal rule and must make sure its request for a ruling and the refusal to rule appear in the reporter's record or in a bill of exceptions. See: Goodchild v. Bombardier-Rotax GMBH Motorenfabrik, 1998, 979 SW2d 1, 6-7, and see: O'Donnelll v. Roger Bullivant, Inc., 1997, 940 SW2d 411, 416, and see: TRAP 33.1(a)(2(B). IN MAKING THE PRELIMINARY DECISION CONCERNING THE ADMISSIBILITY OF EVIDENCE, THE TRIAL COURT **IS NOT** BOUND BY THE TEXAS RULES OF EVIDENCE, EXCEPT THOSE THAT RELATE TO PRIVILEGES. TRE rule 104(a). To challenge successfully the denial of an improper exclusion of evidence, the appellant must bring forth the court reporter's entire record. S.H. v. National Convenience Stores, 1996, 936 SW2d 406, 407. [The trial court is allowed a wide field of discretion concerning the admissibility of evidence and it would seem that the judge can arbitrarily allow or disallow whatever evidence suits his whims. Thus, an attorney with no witness and no facts can stand in front of a judge, state hearsay facts and strip the unwary and ignorant naked. The "license to practice law," if such a thing exists, truly is a license to steal. The *pro se* cannot get away with stating hearsay or testifying without being under oath because he is not a member of the gilded monopoly and is not subject to Tex. Disciplinary Rule of Professional Conduct 3.03, *supra.* The judge, in his discretion, will politely listen the *pro se's* hearsay and ignore it, instruct the jury to disregard, and threaten contempt if he doesn't shut up.]

II.

HOW THE COURT PREVENTS YOU FROM ADMITTING YOUR EVIDENCE

AND WHAT TO DO ABOUT IT

[If the adverse attorney objects to a witness, document, or other evidence and the court sustains the objection, the *pro se* will have no evidence and the *pro se* will lose if he doesn't know how to preserve the evidence for appeal. Remember, as stated above the judge has broad discretion to admit or disallow evidence and the judge and adverse lawyer are members of the same exclusive monopoly and they don't want non-members participating in it. If they can, the rats will vigorously punish any non-member for trespassing into their exclusive domain.]

A party should preserve excluded evidence in an offer of proof. Before a party is entitled to make an offer of proof, it must offer the evidence at trial. When an objection is lodged, the party offering the evidence should specify the purpose for which the evidence is offered an the reason it is admissible. Before a party is entitled to make an offer of proof, the court must make a ruling that the evidence is inadmissible. Once the court rules that the evidence is inadmissable, the party must make an offer of proof. The offer must show the substance of the evidence that was offered and excluded. [Citations omitted.]

To preserve oral testimony by a witness, the party offering it must make an offer of proof in the presence of the judge, the court reporter, and the opposing counsel, but outside the presence of the jury. The offer of proof is conducted out of the hearing of the jury to prevent the jury from hearing inadmissible evidence. When making an offer of proof, the lawyer [or *pro se*] may make a concise statement of what testimony would be elicited from the witness. The trial court may add a comment to the offer to show the character of the evidence, the form in which it was offered, the objection, and the ruling. [Citations omitted.]

To preserve documentary evidence, the party should, at the time the document is rejected, say, **"I make an offer of proof of this document an ask that it be filed with the record."** An offer of proof to preserve an excluded document may be make in the presence of the jury because the jury is not prejudiced by evidence in the excluded document that it cannot see. The court reporter should mark the document as an offer of proof and identify it with an exhibit number. The document will be filed with the court clerk so that it will be included with the exhibits in the reporter's record. [Citations omitted.]

Even when a document is already on file with the court - for example, depositions or interrogatories - if the court refuses to permit it to be introduced into evidence, the party should submit it as an offer of proof and get the court to rule on the offer. [Citation omitted.] [This surely includes those affidavits that many "patriot" *pro se's* staple onto motions and other pleadings in the mistaken belief that by just by virtue of being filed into the record such affidavits are evidence. It should be remembered that affidavits, like all other evidence, must be testified to under oath by a competent witness in order to become admissible evidence - unless of course, the adverse attorney runs his mouth about one of his affidavits and there is no objection.]

To preserve tape-recorded evidence ruled inadmissible by the trial court, the party should, at the time the tape is rejected, say, **"I make and offer of proof of this tape and ask that it be filed with the record."** As part of the offer, the party must describe the excluded evidence on the tape and specify the purpose of the evidence. If a transcript of the tape is available, the party should file it as part of the offer; if not, the party should ask permission to file a transcript as part of the offer of proof as soon as it is made. [Citations omitted.]

Error is preserved by the court's explicit ruling that the evidence in the offer of proof is not admissible during trial. However, under TRAP 33, error can also be preserved if the trial court implicitly overrules the offer, or refuses to rule on the offer and the complaining party objects to the refusal. [Citations omitted]

[Another way to preserve excluded evidence is with a Bill of Exceptions. This is an antiquated procedure preserved in Texas law that is so strict and difficult as to be impractible, but possible. In some cases, where the evidence was not timely preserved, a Bill of Exceptions may be the only remedy. It will not be discussed here, but the reader should be aware of the existence of this remedy. The Federal Rules have no equivalent procedure.]

[When excluded evidence if properly preserved, the judge can and may reverse himself. If the evidence is relevant and substantive, the probability of a reversal by the court is relatively high because the judge knows he will be reversed on appeal and judges don't like their decision reversed on appeal. In fact, judges don't like their decisions appealed, even if they are upheld. Whoever has the preponderance of the evidence in a civil case will win. How can you win if you have been prevented from getting your evidence into the record? How can you win if Joe Shyster gets his hearsay testimony into the record without the risk of a cross-examination? Evidence is everything. If the record does not contain your evidence, you have nothing and you will lose. On the other hand, if the *pro se* can keep the adverse attorney's bullshit hearsay out of the record, he just might deprive the adversary of evidence and win!]