STATE BAR LITIGATION SECTION REPORT
THE ADVOCATE

TABLE OF CONTENTS

WINTER 2004

PREPARING FOR APPEAL

EVIDENCE & PROCEDURE UPDATES

STANDARDS & SCOPES OF REVIEW

BY HON. DEBORAH HANKINSON & RICK THOMPSON

ALTHOUGH OFTEN OVERLOOKED by trial and appellate practitioners alike, the standard of review and the scope of review are crucial aspects of each legal issue presented to an appellate court. The terms "standard of review" and "scope of review" are often used interchangeably; however, the terms have very different meanings. The standard of review is the level of deference that a reviewing court shows for the decision of a lower court or tribunal.[1] Standards of review "define the parameters of a reviewing court's authority in determining whether a trial court erred and whether the error warrants reversal."[2] Thus, the standard of review may be considered the appellate court's "measuring stick."[3] The scope of review, as the name suggests, delineates the portion of the appellate record that an appellate court may consider in deciding whether the trial court erred and whether that error warrants reversal.[4]

> **" Unfortunately, the hundreds or thousands of rulings made by a trial court before, during, and after trial are governed by different standards and scopes of review. "**

Texas courts recognize four primary standards of review: (1) *de novo* review; (2) the abuse-of-discretion standard; (3) the legal-sufficiency standard of review; and (4) the factual-sufficiency standard of review. Each of these standards sets a different level of deference to be shown to the decisions of lower courts.

De novo review is the easiest standard to define and understand. Under a *de novo* standard of review, the reviewing court "exercises its own judgment and re-determines each issue of fact and law," affording the lower court's decision "absolutely no deference."[5] The reviewing court simply substitutes its judgment for the judgment of the trial court. *De novo* review primarily applies to pure questions of law.[6]

The second and most commonly employed standard of review is abuse of discretion. A trial court abuses its discretion "if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles."[7] The abuse-of-discretion standard is very deferential to a lower court's ruling, and a reviewing court "may not substitute its own judgment for the trial court's judgment."[8] Thus, unlike the *de novo* standard, the abuse-of-discretion standard does not permit an appellate court to secondguess the trial court. This standard typically applies "to procedural or other trial management determinations."[9]

The legal-sufficiency standard of review is also known as "no evidence" and "matter of law" review. An appellate court employs "no-evidence" review when a party challenges the fact finder's ruling on an issue on which the party did not have the burden of proof at trial. Under a no-evidence standard, an appellate court reviews whether the evidence supporting the fact finder's decision is legally sufficient--*i.e.*, whether "more than a scintilla of evidence exists" to affirm the trial court's ruling.[10] More than a scintilla of evidence exists if "the evidence furnishes some reasonable basis for differing conclusions by reasonable minds about a vital fact's existence."[11] In conducting a no-evidence review, the appellate court "must view the evidence in a light that tends to support the disputed finding and disregard evidence and inferences to the contrary."[12] However, the reviewing court is not required to "disregard undisputed evidence that allows of only one logical inference."[13]

An appellate court employs "matter of law" review when a party challenges a trial court's ruling on an issue on which the party did have the burden of proof at trial. Under the matter-of-law standard, an appellate court reviews whether the evidence establishes, as a matter of law, all of the facts in support of an issue.[14] In conducting this review, the appellate court "must first examine the record for evidence that supports the [trial court's adverse] finding, while ignoring all evidence to the contrary."[15] If there is no evidence to support the trial court's finding, the reviewing court then must "examine the entire record to determine if the contrary position is established as a matter of law."[16]

The fourth standard of review is factual sufficiency. The factual sufficiency of a trial court's ruling may be reviewed by the courts of appeals, but the Texas Supreme Court has no jurisdiction to review factual sufficiency issues.[17] Under

factual-sufficiency review, the party challenging the trial court's adverse ruling on an issue on which the party did have the burden of proof "must demonstrate on appeal that the adverse finding is against the great weight and preponderance of the evidence."[18] The appellate court must consider all of the evidence presented below and then decide if "the evidence is so weak or if the finding is so against the great weight and preponderance of the evidence that is it clearly wrong and unjust."[19] If the reviewing court decides the trial court's finding is clearly wrong and unjust and should be reversed, the reviewing court's decision must "detail the evidence relevant to the issue" and "state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict."[20]

Effective appellate advocacy requires more than simply identifying the applicable standard and scope of review, but rather requires using the applicable standard and scope of review as a framework for presenting legal arguments to appellate courts. For example, it is powerful and persuasive to be able to inform an appellate court that it should decide an issue anew—*i.e.*, under the *de novo* standard of review, without any regard for the trial court's ruling. So too, effective trial court practitioners use the standard of review and scope of review to persuade the trial court to rule in their favor. Nothing may be more persuasive or comforting to a trial judge who is "on the fence" but "leaning your way" on a hotly contested discovery motion than to be reminded that her decision will not be reversed unless the ruling would be an abuse of her discretion and that such rulings rarely, if ever, amount to an abuse of discretion.

Unfortunately, the hundreds or thousands of rulings made by a trial court before, during, and after trial are governed by different standards and scopes of review. Thus, using the standard or scope of review to your advantage in the trial court, especially given the hectic nature of trial practice, can often prove difficult. The chart in the appendix accompanying this article is designed to aid in this task. The chart lists a number of motions that are commonly filed in the trial court, the applicable standard and scope of review, and citations to cases setting forth the proper standard or scope of review.

TYPE OF RULING	STANDARD OF REVIEW	SCOPE OF REVIEW	CASES AND STATUTES
Amending Admissions	Abuse of discretion.	An appellate court reviews the entire record.	*Stelly v. Papania*, 927 S.W.2d 620, 622 (Tex. 1996) (per curiam).
Attorney's Fees, Discretionary Award of	Whether to award fees is reviewed for abuse of discretion; the award itself may be reviewed for legal and factual sufficiency.	An appellate court reviews the entire record.	*Bocquet v. Herring*, 972 S.W.2d 19, 20-21 (Tex. 1998).
Challenges for Cause	Abuse of discretion; however, if the evidence shows that a prospective juror was biased, the juror will be considered disqualified as a matter of law.	An appellate court reviews the entire record, examining the evidence in the light most favorable to the trial court's ruling.	*Kiefer v. Continental Airlines, Inc.*, 10 S.W.3d 34, 39 (Tex. App.–Houston [14th Dist.] 1999, pet. denied); *see Malone v. Foster*, 977 S.W.2d 562, 564 (Tex. 1998).

TYPE OF RULING	STANDARD OF REVIEW	SCOPE OF REVIEW	CASES AND STATUTES
Charge Error	Jury charge error is generally reviewed under an abuse-of-discretion standard; however, whether the charge has submitted the proper theories of recovery and defenses is a question of law to be reviewed de novo. Thus, a trial court is afforded more discretion when submitting instructions and definitions than when submitting questions.	An appellate court considers the pleadings of the parties, the evidence presented at trial, and the charge in its entirety.	*Tex. Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990); *Island Recreational Dev. Corp. v. Rep. of Tex. Sav. Ass'n*, 710 S.W.2d 551, 555 (Tex. 1986) (op. on reh'g).
Class Certification Order	Abuse of discretion.	An appellate court may review all evidence presented in the record, but the court may not indulge every presumption in favor of the trial court's ruling because actual, not presumed, conformance with Rule 42 is required.	*Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 691 (Tex. 2002); *Southwestern Ref. Co. v. Bernal*, 22 S.W.3d 425, 439 (Tex. 2000); *Intratex Gas Co. v. Beeson*, 22 S.W.3d 398, 406 (Tex. 2000).
Consolidation	Abuse of discretion.	An appellate court reviews the entire record. If, however, facts "unquestionably require" a separate trial to prevent a manifest injustice and there are no facts supporting a contrary conclusion, the trial court has no discretion to order consolidation.	*Owens-Corning Fiberglas Corp. v. Martin*, 942 S.W.2d 712, 715-16 (Tex. App.– Dallas 1997, no writ).
Continuance	Abuse of discretion.	An appellate court reviews the entire record.	*State v. Wood Oil Distributing, Inc.*, 751 S.W.2d 863, 865 (Tex. 1988); *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986).
Court Costs, Award of	Abuse of discretion.	An appellate court reviews the entire record.	*Rogers v. WalMart Stores, Inc.*, 686 S.W.2d 599, 601 (Tex. 1985).
Default Judgment - Motion for New Trial	Abuse of discretion.	An appellate court reviews the entire record.	*Cliff v. Huggins*, 724 S.W.2d 778, 778-79 (Tex. 1987); *Strackbein v. Prewitt*, 671 S.W.2d 37, 38 (Tex. 1984).
Demonstrative Evidence, Admissibility of	Abuse of discretion.	An appellate court reviews the entire record.	*In re K.M.B.*, 91 S.W.3d 18, 29 (Tex. App. –Fort Worth 2002, no pet.); *Hur v. City of Mesquite*, 893 S.W.2d 227, 231 (Tex. App.– Amarillo 1995, writ denied).

TYPE OF RULING	STANDARD OF REVIEW	SCOPE OF REVIEW	CASES AND STATUTES
Directed Verdict, Denial of	Legal sufficiency review.	An appellate court considers all the evidence in a light most favorable to the party against whom the verdict was directed and disregards all evidence and inferences to the contrary.	*King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750-51 (Tex. 2003); *Szczepanik v. First S. Trust Co.*, 883 S.W.2d 648, 649 (Tex. 1994).
Discovery Sanctions	Abuse of discretion.	An appellate court reviews the entire record.	*Cire v. Cummings*, 134 S.W.3d 835, 838-39 (Tex. 2004); *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241 (Tex. 1985).
Disqualification - Attorney	Abuse of discretion.	An appellate court reviews the mandamus record.	*Henderson v. Floyd*, 891 S.W.2d 252, 253-54 (Tex. 1995).
DWOP	Abuse of discretion.	An appellate court may consider the entire record and history of the case.	*MacGregor v. Rich*, 941 S.W.2d 74, 75 (Tex. 1997) (per curiam); *State v. Rotello*, 671 S.W.2d 507, 508-09 (Tex. 1984).
Edmonson Challenges	Abuse of discretion.	An appellate court may consider the entire record, including the unsworn statements of counsel.	*Goode v. Shoukfeh*, 943 S.W.2d 441, 446-48 (Tex. 1997).
Expert Reports - TEX. CIV. PRAC. & REM. CODE § 74.351	Abuse of discretion.	An appellate court reviews the entire record.	*Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 877 (Tex. 2001); *see Walker v. Gutierrez*, 111 S.W.3d 56, 62 (Tex. 2003).
Expert Witness - Qualifications and Reliability of Testimony	Abuse of discretion.	An appellate court may review the entire record, including "applicable professional standards outside the courtroom."	*Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 499 (Tex. 2001); *Broders v. Heise*, 924 S.W.2d 148, 151 (Tex. 1996).
Forum Non Conveniens	Abuse of discretion.	An appellate court reviews the evidence in the light most favorable to, and indulges every presumption in favor of, the trial court's decision.	*Berg v. AMF Inc.*, 29 S.W.3d 212, 215 (Tex. App.–Houston [14th Dist.] 2000, no pet.); *Adams v. Baxter Healthcare Corp.*, 998 S.W.2d 349, 356 (Tex. App.–Austin 1999, no pet.); *Direct Color Servs., Inc. v. Eastman Kodak Co.*, 929 S.W.2d 558, 563 (Tex. App. –Tyler 1996, writ denied).

TYPE OF RULING	STANDARD OF REVIEW	SCOPE OF REVIEW	CASES AND STATUTES
Guardian ad litem fees.	An award of guardian ad litem fees is reviewed for abuse of discretion.	An appellate court reviews the entire record.	*Garcia v. Martinez*, 988 S.W.2d 219, 222 (Tex. 1999); *Simon v. York Crane & Rigging Co.*, 739 S.W.2d 793, 794-95 (Tex. 1987).
Improper Jury Argument	Whether the error in the argument by its very nature constituted reversible error that could not be cured by withdrawal or by a proper instruction from the court.	An appellate court must examine the improper jury argument in light of the entire record.	*Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 839 (Tex. 1979).
Inherent Sanctions	Abuse of discretion.	An appellate court reviews the entire record.	*Kutch v. Del Mar College*, 831 S.W.2d 506, 512 (Tex. App.–Corpus Christi 1992, no writ).
Interpleader	Abuse of discretion.	An appellate court reviews the entire record.	*Bryant v. United Shortline Inc. Assurance Servs., N.A.*, 984 S.W.2d 292, 296 (Tex. App.–Fort Worth 1998, no pet.); *Barnett v. Woodland*, 310 S.W.2d 644, 647 (Tex. Civ. App.–Austin 1958, writ ref'd n.r.e.).
Invoking the Rule	Abuse of discretion.	An appellate court reviews the entire record.	*Drilex Sys., Inc. v. Flores*, 1 S.W.3d 112, 117-18 (Tex. 1999).
JNOV	Legal sufficiency standard.	An appellate court reviews the evidence tending to support the jury's verdict and must disregard all evidence to the contrary.	*Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 227-28 (Tex. 1990); *Navarette v. Temple Indep. Sch. Dist.*, 706 S.W.2d 308, 309 (Tex. 1986).
Joinder	De novo.	An appellate court must "determine whether the trial court's order is proper based on an independent determination from the [entire] record."	TEX. CIV. PRAC. & REM. CODE § 15.003(c)(1); *see Surgitek v. Abel*, 997 S.W.2d 598, 603 (Tex. 1999).
Judicial Notice	Abuse of discretion.	An appellate court reviews the entire record.	*Houston Chronicle Publishing Co. v. Hardy*, 678 S.W.2d 495, 508 (Tex. App.–Corpus Christi 1984, no writ); *Skinner v. HCC Credit Co. of Arlington, Inc.*, 498 S.W.2d 708, 711 (Tex. App.–Fort Worth 1973, no writ); *see Alaniz v. Hoyt*, 105 S.W.3d 330, 351 n.6 (Tex. App.–Corpus Christi 2003, no pet.).

TYPE OF RULING	STANDARD OF REVIEW	SCOPE OF REVIEW	CASES AND STATUTES
Jury Misconduct - Motion for New Trial	Abuse of discretion.	A motion based on jury misconduct must be supported by competent evidence of the misconduct from any source. If no findings of fact, an appellate court assumes that the trial court made all findings in support of its judgment. If conflicting evidence of jury misconduct exists, the trial court's finding will be upheld.	*Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 369, 372 (Tex. 2000); *Pharo v. Chambers County, Texas*, 922 S.W.2d 945, 948 (Tex. 1996).
Jury Demand, Denial of	Abuse of discretion.	An appellate court reviews the entire record.	*Mercedes-Benz Credit Corp. v. Rhyne*, 925 S.W.2d 664, 666 (Tex. 1996).
Jury Shuffle	De novo.	An appellate court reviews the record to determine whether the error destroyed the necessary degree of randomness in the listing of jurors that ensures the fundamental right to a jury trial.	*Rivas v. Liberty Mut. Ins. Co.*, 480 S.W.2d 610, 611-12 (Tex. 1972).
Late Designation of Expert Witness	Abuse of discretion.	An appellate court reviews the entire record.	*Mentis v. Barnard*, 870 S.W.2d 14, 16 (Tex. 1994).
Mistrial	Abuse of discretion.	An appellate court reviews the entire record.	*Van Allen v. Blackledge*, 35 S.W.3d 61, 63 (Tex. App.–Houston [14th Dist.] 2000, pet. denied); *Till v. Thomas*, 10 S.W.3d 730, 734 (Tex. App.–Houston [1st Dist.] 1999, no pet.); *Fort Worth Hotel Ltd. P'ship v. Enserch Corp.*, 977 S.W.2d 746, 757 (Tex. App.–Fort Worth 1998, no writ).
Motion for New Trial	Abuse of discretion.	An appellate court reviews the entire record.	*Director, State Employees Workers' Compensation Division v. Evans*, 889 S.W.2d 266, 268 (Tex. 1994).
Motion in Limine	None. The denial or grant of a motion in limine presents nothing for review.		*State v. Wood Oil Distributing, Inc.*, 751 S.W.2d 863, 866 (Tex. 1988).
Motion to Disregard Jury Findings	Legal sufficiency review.	An appellate court reviews the entire record in the light most favorable to the jury's verdict and disregards all evidence to the contrary.	*Alm v. Aluminum Co. of Am.*, 717 S.W.2d 588, 594 (Tex. 1986).

TYPE OF RULING	STANDARD OF REVIEW	SCOPE OF REVIEW	CASES AND STATUTES
Motion for Leave to File Late Response to Summary Judgment	Abuse of discretion.	In reviewing for "good cause," the appellate court reviews the entire record.	*Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 686-87 (Tex. 2002).
Newly Discovered Evidence - Motion for New Trial	Abuse of discretion.	An appellate court reviews the entire record, indulging every reasonable presumption in favor of the trial court's refusal to grant a new trial. The appellate court considers the weight and the importance of the new evidence and its bearing on the evidence received at trial.	*Jackson v. Van Winkle*, 660 S.W.2d 807, 809-10 (Tex. 1983), *overruled on other grounds by Moritz v. Preiss*, 121 S.W.3d 715 (Tex. 2003).
No-Evidence Summary Judgment	A no-evidence summary judgment is basically a pre-trial directed verdict; therefore, the court reviews the no-evidence summary judgment for legal sufficiency.	An appellate court considers the evidence in the light most favorable to the nonmovant, disregarding all contrary evidence and inferences.	*King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750-51 (Tex. 2003).
Nunc Pro Tunc	Whether an error in a judgment is judicial or clerical is a question of law only after the trial court makes factual findings regarding whether it previously rendered judgment or not; the factual findings are reviewed for legal and factual sufficiency.		*Escobar v. Escobar*, 711 S.W.2d 230, 231 (Tex. 1986).
Opening Statement	Abuse of discretion.	An appellate court reviews the entire record.	*Ranger Ins. Co. v. Rogers*, 530 S.W.2d 162, 170 (Tex. Civ. App.-Austin 1975, writ ref'd n.r.e.).
Peremptory Challenges, Award of	An appellate court reviews an award of peremptory challenges for an abuse of discretion that results in a "materially unfair" trial. However, whether antagonism exists is a question of law to be reviewed de novo.	The appellate court must review the entire record from the perspective of the trial judge as of the time he made the award of strikes; thus, the court may review the pleadings, the information disclosed by pretrial discovery, information and representations made during voir dire of the jury panel, and any information brought to the attention of the court before the parties exercise their strikes.	*Lopez v. Foremost Paving, Inc.*, 709 S.W.2d 643, 644 (Tex. 1986); *Garcia v. Central Power & Light Co.*, 704 S.W.2d 734, 736 (Tex. 1986); *Patterson Dental Co. v. Dunn*, 592 S.W.2d 914, 919-21 (Tex. 1979).

TYPE OF RULING	STANDARD OF REVIEW	SCOPE OF REVIEW	CASES AND STATUTES
Permanent Injunction	Abuse of discretion.	"[I]t is an abuse of discretion when the record demonstrates that the findings of the trial court necessary to sustain its order are not supported by some evidence." If no findings of fact and conclusions of law are filed, the trial court's judgment implies all findings of fact necessary to support it. Where a reporter's record is filed, the implied findings are not conclusive and may be challenged by sufficiency of the evidence points.	*All Am. Builders, Inc. v. All Am. Siding of Dallas, Inc.*, 991 S.W.2d 484, 487-88 (Tex. App.–Fort Worth 1999, no pet.); *2300, Inc. v. City of Arlington*, 888 S.W.2d 123, (Tex. App.–Fort Worth 1994, no writ); *Priest v. Tex. Animal Health Comm'n*, 780 S.W.2d 874, 875 (Tex. App.–Dallas 1989, no writ).
Plea in Abatement	Abuse of discretion.	On appeal, a court reviews the evidence from the hearing on the plea. If no evidence is presented, the allegations in the petition are taken as true, and the court indulges every reasonable inference in support of the trial court's decision, unless facts are disproved.	*Dolenz v. Continental Nat'l Bank of Fort Worth*, 620 S.W.2d 572, 575 (Tex. 1981); *Seth v. Meyer,* 730 S.W.2d 884, 885 (Tex. App.–Fort Worth 1987, no writ).
Plea to the Jurisdiction	De novo.	An appellate court reviews the pleadings and construes the allegations in favor of the pleader. The court must consider relevant evidence if necessary to resolve jurisdiction.	*Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002); *see Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000).
Protective Orders under Rule 166b	Abuse of discretion.	An appellate court reviews the entire record.	*Masinga v. Whittington*, 792 S.W.2d 940, 941 (Tex. 1990).
Punitive Damages - Unconstitutionally Excessive.	De novo.	An appellate court reviews the entire record.	*State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).
Rebuttal Witness Testimony	Abuse of discretion.	An appellate court reviews the entire record.	*Munoz v. Mo. Pac. R.R. Co.*, 823 S.W.2d 766, 768 (Tex. App.–Corpus Christi 1992, no writ).
Recusal	If the motion is denied, it may be reviewed for abuse of discretion. If the motion is granted, the order is not reviewable.	An appellate court reviews the entire record.	TEX. R. CIV. P. 18a(f); *see McElwee v. McElwee*, 911 S.W.2d 182, 185 (Tex. App.–Houston [1st Dist.] 1995, writ denied).

TYPE OF RULING	STANDARD OF REVIEW	SCOPE OF REVIEW	CASES AND STATUTES
Remittitur	An appellate court reviews a damage award for excessiveness under a factual sufficiency review.	An appellate court considers and weighs all the evidence in the record, not just the evidence which supports the verdict, and makes its own "detailed appraisal of the evidence bearing on damages."	*Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406-07 (Tex. 1998); *Larson v. Cactus Util. Co.*, 730 S.W.2d 640, 641 (Tex. 1987).
Rule 13/Frivolous Pleadings Sanctions	Abuse of discretion.	An appellate court reviews the entire record.	*Sterling v. Alexander*, 99 S.W.3d 793, 797 (Tex. App.–Houston [14th Dist.] 2003, pet. denied) (sanctions imposed under Chapter 10 of the Civil Practice & Remedies Code); *Randolph v. Jackson Walker L.L.P.*, 29 S.W.3d 271, 276 (Tex. App.–Houston [14th Dist.] 2000, pet. denied) (Rule 13 sanctions); *see Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 877 (Tex. 2001).
Ruling Excluding Evidence Generally	Abuse of discretion.	An appellate court reviews the entire record.	*City of Brownsville v. Alvarado*, 987 S.W.2d 750, 753 (Tex. 1995).
Sealing Court Records under Rule 76a	Abuse of discretion.	An appellate court reviews the entire record.	*Gen. Tire, Inc. v. Kepple*, 970 S.W.2d 520, 526 (Tex. 1998).
Severance	Abuse of discretion.	An appellate court reviews the evidence in the light most favorable to, and indulges every presumption in favor of, the trial court's decision.	*Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 658 (Tex. 1990); *Cherokee Water Co. v. Forderhause*, 641 S.W.2d 522, 525-26 (Tex. 1982); *Adams v. Baxter Healthcare Corp.*, 998 S.W.2d 349, 356 (Tex. App.–Austin 1999,).
Special Appearance - No findings of fact or conclusions of law	De novo.	"All facts necessary to support the judgment and supported by the evidence are implied. If the appellate record includes reporter's and clerk's record, the implied findings are not conclusive and may be challenged for legal and factual sufficiency.	*BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002).

TYPE OF RULING	STANDARD OF REVIEW	SCOPE OF REVIEW	CASES AND STATUTES
Special Appearance - Findings of Fact	Findings of fact are reviewed for legal and factual sufficiency.	In reviewing factual sufficiency of findings of fact, an appellate court may consider all of the evidence before the trial court. In reviewing legal sufficiency, a court may consider only the evidence supporting the finding and must disregard all contrary evidence or inferences.	*BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002).
Special Appearance - Conclusions of Law	Conclusions of law are reviewed de novo.	"[H]owever, the reviewing court may review the trial court's legal conclusions drawn from the facts to determine their correctness."	*BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002).
Special Exceptions - Granting Special Exceptions and Dismissing Case.	Abuse of discretion.	An appellate court must accept as true all material factual allegations in the pleadings and all factual statements reasonably inferred from the allegations in the pleadings.	*Sorokolit v. Rhodes*, 889 S.W.2d 239, 240 (Tex. 1994); *Wayne Duddlesten, Inc. v. Highland Ins. Co.*, 110 S.W.3d 85, 96 (Tex. App.–Houston [1st Dist.] 2003, pet. denied); *Muecke v. Hallstead*, 25 S.W.3d 221, 224 (Tex. App.–San Antonio 2000, no pet.); *Holt v. Reproductive Servs., Inc.*, 946 S.W.2d 602, 604 (Tex. App.–Corpus Christi 1997, writ denied).
Special Exceptions - Granting Special Exceptions and Dismissing Case for Failure to State a Cause of Action.	De novo.	The propriety of the dismissal will be judged on the pleadings, not on the evidence. An appellate court accepts as true all material factual allegations in the pleadings and all facts reasonably inferred therefrom.	*Pack v. Crossroads, Inc.*, 53 S.W.3d 492, 507 (Tex. App.–Fort Worth 2001, pet. denied); *Butler Weldments Corp. v. Liberty Mut. Ins. Co.*, 3 S.W.3d 654, 658 (Tex. App.–Austin 1999, no pet.).
Standing	De novo.	An appellate court must construe the petition in favor of the pleader and look to the pleader's intent, and if necessary, review the entire record to determine if there is any evidence supporting standing.	*Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993).
Subject-Matter Jurisdiction	Whether a court has subject-matter jurisdiction is a question of law subject to de novo review.	An appellate court reviews the pleadings and construes the allegations in favor of the pleader. The court must consider relevant evidence if necessary to resolve jurisdiction.	*Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002); *see Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000).

TYPE OF RULING	STANDARD OF REVIEW	SCOPE OF REVIEW	CASES AND STATUTES
Supersedeas Bond	An appellate court reviews the trial court's rulings concerning the amount and type of security required under an abuse of discretion standard.	An appellate court reviews the entire record.	*Miller v. Kennedy & Minshew, P.C.*, 80 S.W.3d 161, 164-65 (Tex. App.–Fort Worth 2002, no pet.); *Transamerican Natural Gas Corp. v. Finkelstein*, 905 S.W.2d 412, 414 (Tex. App.–San Antonio 1995, writ dism'd).
Supplementation of Discovery Responses	Abuse of discretion.	An appellate court reviews the entire record.	*Morrow v. HEB, Inc.*, 714 S.W.2d 297, 298 (Tex. 1986).
Temporary Injunction	Abuse of discretion.	An appellate court "draws all legitimate inferences from the evidence in a manner most favorable to the trial court's judgment."	*Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002); *Synergy Ctr., Ltd. v. Lone Star Franchising, Inc.*, 63 S.W.3d 561, 564 (Tex. App.–Austin 2001, no pet.); *Miller v. K&M P'ship*, 770 S.W.2d 84, 87 (Tex. App.–Houston [1st Dist.] 1989, no writ).
Traditional Summary Judgment	De novo.	An appellate court takes as true all summary judgment evidence favorable to the nonmovant, and indulges every reasonable inference and resolves any doubts in the nonmovant's favor.	*Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003); *Southwestern Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002).
Trial Amendment	Abuse of discretion.	An appellate court reviews the entire record.	*State Bar of Tex. v. Kilpatrick*, 874 S.W.2d 656, 658 (Tex. 1994) (per curiam).
Turnover Order	Abuse of discretion.	An appellate court reviews the entire record.	*Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226-27 (Tex. 1991).
Venue	An appellate court must defer to the trial court's determination that venue was proper if there is any probative evidence supporting the venue determination, even if preponderance of the evidence is to the contrary.	Although the trial court may consider only pleadings and affidavits, an appellate court shall conduct an independent review of the entire record, including trial on the merits.	TEX. CIV. PRAC. & REM. CODE § 15.064(a), (b); *Wilson v. Tex. Parks & Wildlife Dep't*, 886 S.W.2d 259, 261-62 (Tex. 1994); *Ruiz v. Conoco, Inc.*, 868 S.W.2d 752, 757-58 (Tex. 1993).

TYPE OF RULING	STANDARD OF REVIEW	SCOPE OF REVIEW	CASES AND STATUTES
Voir Dire	Abuse of discretion.	An appellate court reviews the entire record.	*Munoz v. Berne Group, Inc.*, 919 S.W.2d 470, 473 (Tex. App.–San Antonio 1996, no writ); *Haryanto v. Saeed*, 860 S.W.2d 913, 918 (Tex. App.–Houston [14th Dist.] 1993, writ denied) (op. on mot. for reh'g en banc).
Withdrawing Deemed Admissions	Abuse of discretion.	An appellate court reviews the entire record.	*Wal-Mart Stores, Inc. v. Deggs*, 968 S.W.2d 354, 356 (Tex. 1998); *Stelly v. Papania*, 927 S.W.2d 620, 622 (Tex. 1996) (per curiam).

Deborah Hankinson honed her trial and appellate skills at Thompson & Knight, LLP., between 1983 and 1995. She was then appointed and later elected to the Texas judiciary, where she first served as a justice on the Fifth District Court of Appeals at Dallas and then as a justice on the Supreme Court of Texas. While serving on the Supreme Court of Texas, Justice Hankinson led the effort to establish the Texas Access to Justice Commission, which serves as an umbrella organization to develop and implement policy initiatives to expand access to and enhance the quality of justice in civil legal matters for low-income Texas residents. Hankinson is now in private practice.

Rick Thompson has over 10 years of experience as a trial and appellate attorney. He has handled appellate matters in a variety of areas, ranging from class actions to state and federal constitutional and jurisdictional issues, to sovereign immunity. Following law school, Mr. Thompson held a judicial clerkship with Judge Lamberth of the United States District Court for the District of Columbia. He now works for the Law Offices of Deborah Hankinson PC in Dallas.★

[1]. *Quick v. City of Austin*, 7 S.W.3d 109, 116 (Tex. 1998) ("[A] standard of review is more than just words; rather, it embodies principles regarding the amount of deference a reviewing tribunal accords the original tribunal's decision.").

[2]. *See* W. Wendell Hall, *Standards of Review in Texas*, 34 ST. MARY'S L.J. 1, 8 (2002). For a more comprehensive discussion of standards of review, I highly recommend this law review article authored by Wendell Hall. Many thanks to Wendell for permitting me to use his article as a template for the standard-of-review chart accompanying this article.

[3]. *See id.* (quoting John C. Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 SW. L.J. 801, 810 (1976)).

[4]. *See* Hall, *Standards of Review in Texas*, 34 ST. MARY'S L.J. at 11.

[5]. *Quick*, 7 S.W.3d at 116.

[6]. *See, e.g., El Paso Natural Gas Co. v. Minco Oil & Gas, Inc.*, 8 S.W.3d 309, 312 (Tex. 1999) ("Because the issue... is a question of law, our review is *de novo*.").

[7]. *Walker v. Gutierrez*, 111 S.W.3d 56, 62 (Tex. 2003); *see Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985).

[8]. *Walker*, 111 S.W.3d at 62.

[9]. *In re Doe*, 19 S.W.3d 249, 253 (Tex. 2000).

[10]. *Minyard Food Stores, Inc. v. Goodman*, 80 S.W.3d 573, 577 (Tex. 2002).

[11]. *Id.*

[12]. *Wal-Mart Stores, Inc. v. Canchola*, 121 S.W.3d 735, 739 (Tex. 2003) (per curiam); *see Sixth RMA Partners, L.P. v. Sibley*, 111 S.W.3d 46, 52 (Tex. 2003); *Minyard*, 80 S.W.3d at 577; *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 782-83 (Tex. 2001); *Bradford v. Vento*, 48 S.W.3d 749, 754 (Tex. 2001).

[13]. *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 519-20 (Tex. 2002).

[14]. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001).

[15]. *Id.*

[16]. *Id.*

[17]. TEX. CONST. art. V, ‘ 6; *see Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003).

[18]. *Francis*, 46 S.W.3d at 242.

[19]. *Id.*; *see Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986).

[20]. *Francis*, 46 S.W.3d at 242 (quoting *Pool*, 715 S.W.2d at 635). In *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002), the Texas Supreme Court articulated a modified version of factual-sufficiency review in a parental-rights termination case. In such cases, given the importance of the rights involved, the fact finder must find "by clear and convincing evidence" that parental-rights should be terminated. Thus, given the elevated burden of proof at trial, the Court recognized the need for an elevated level of factual-sufficiency review on appeal. The appellate standard of review "is whether the evidence is such that a fact finder could reasonably form a firm belief or conviction about the truth of the State's allegations." *Id.* Similarly, in another parental-rights termination case, *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002), the Supreme Court clarified that under a legal-sufficiency review when the burden of proof is clear and convincing evidence, a court should look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. It remains to be seen whether these modified standards of factual- and legal-sufficiency review will be applied in all cases in which fact findings must be proven by clear and convincing evide

PRESERVING ERROR BEFORE TRIAL

BY DEBBIE MCCOMAS & BEN MESCHES

"TO PRESERVE A COMPLAINT for appellate review, a party must present to the trial court a timely request, motion, or objection, state the specific grounds therefore, and obtain a ruling."[1] In simplest terms, this rule translates to "object often and get a ruling." But what does it mean to object? How specific must you be? Must the ruling be in writing? And what do you do if the court refuses to rule?

Texas Rule of Appellate Procedure 33.1 and the authorities interpreting it answer some, but not all, of these questions. For instance, Rule 33.1(a) states that to preserve a complaint for appellate review, the objection must be sufficiently specific "to make the trial court aware of the complaint."[2] An objection is sufficiently specific if it identifies the issue, allows the trial court to make an informed ruling and permits the other party to remedy the defect if he can.[3] Rule 33.1(a)(2), unlike former Rule of Appellate Procedure 52, which required an express ruling by the trial court, permits the trial court's ruling to be express or implied. Moreover, Rule 33.1(c) states that a "signed separate order" is not necessary to preserve error. Courts have interpreted these rule changes to mean that no written order is necessary to preserve error if the record indicates that the trial court has either explicitly or implicitly ruled on the issue.[4] Despite the loosening of the error preservation rules with respect to the trial court's ruling, the safest course is to obtain an express, signed order ruling on the motion, objection, or request. However, even if the court refuses to rule, the party can still preserve that complaint for review if he or she objects to the refusal to rule.[5]

Rule 33.1 sets out only the framework for general error preservation. The rule does not establish what is necessary to preserve error in a particular procedural or substantive context. Accordingly, compliance with Rule 33.1 should be considered a baseline for preserving error. Trial and appellate lawyers also need to have familiarity with the necessary steps to preserve error in particular circumstances. This article addresses both the technical and substantive aspects of preserving error before trial in a variety of contexts, including pleadings, jurisdictional and venue issues, summary judgment, pretrial motions, and sanctions.

I. Pleadings

Error preservation begins with the filing of the very first pleading. Indeed, although the pleading requirements in Texas are quite liberal, the plaintiff's original petition must give fair notice of the claims and plead each independent ground for recovery.[6] Likewise, it is important for the defendant to plead each applicable defense in the answer to avoid waiving arguments on appeal.[7] If a party's pleadings do not fairly state its claims or defenses, there are several mechanisms available to force that party to better articulate its position.

A. Special Exceptions

A defendant may file special exceptions to object to non-jurisdictional defects apparent on the face of the opponent's pleadings and to force the pleader to clarify the statement of his claim.[8] To preserve error, the special exception must specifically state how the pleading is defective.[9] To avoid waiver, the specially excepting party must obtain a (nonevidentiary) hearing, bring the special exceptions to the attention of the trial judge before the instructions or charge to the jury or, in a non-jury case, before the judgment is signed, and obtain a ruling.[10] Failure to specially except waives pleading deficiencies that can be cured by repleading, and the issues raised by the defective pleadings will be tried by consent.[11] In the absence of special exceptions, pleadings will be liberally construed in favor of the pleader.[12]

If the trial court sustains the special exceptions, the offending party may replead or he may elect to stand on his pleadings, suffer dismissal of the case, and test the trial court's order on appeal.[13] The pleader who repleads waives any error by the trial court in sustaining the special exceptions.[14]

B. The Answer

As a general rule, Texas law allows a party to answer a petition with a general denial.[15] A party's general denial is sufficient to put in issue the allegations made in the petition.[16] However, the failure to specifically plead the affirmative defenses listed in Texas Rule Of Civil Procedure 94 and failure to verify certain defensive pleadings as required by Rule 93 waives the right to assert that defense at trial and on appeal.[17] Nonetheless, if an unpleaded defense is raised at trial without objection, it may be deemed to be tried by consent.[18]

C. Amendments

If pleadings do not include all theories going to trial and all questions going to the jury, amend. Either party must obtain leave of court to amend pleadings within seven days of the trial setting.[19] The trial court lacks authority to refuse a pleading amendment "unless (1) the opposing party presents evidence of surprise or prejudice; or (2) the amendment asserts a new cause of action or defense, and thus is prejudicial on its face."[20] To preserve the right to complain when a pleading is untimely filed, a party must move to strike.[21] To preserve the right to complain about the court's error in granting a motion for leave to amend, move for a continuance alleging surprise and seek attorneys' fees.[22]

II. Jurisdiction/Venue

A. Plea to the Jurisdiction

For obvious reasons, subject matter jurisdiction is one of those rare issues that cannot be waived. Ordinarily, subject matter jurisdiction should be challenged through a plea to the jurisdiction in the trial court.[23] However, error concerning subject matter jurisdiction can be raised for the first time on appeal.[24]

B. Special Appearance

To challenge the court's jurisdiction over the person, a party must file a special appearance *before any other plea, pleading or motion,* and any other pleading must be urged subject to the special appearance or the special appearance is waived.[25]

The special appearance must be verified and factual allegations should be supported by affidavit.[26] The trial court determines the special appearance on the basis of the pleadings, stipulations, affidavits and attachments, discovery products, if any, and any testimony.[27] Obtain a ruling on the special appearance or it is waived. Any affidavits must be based on personal knowledge and filed at least seven days before the hearing.[28]

The appellate court will consider all the evidence that was before the trial court at the hearing on the motion. Without a record, the appellate court must presume that the evidence was sufficient to support the trial court's judgment.[29] Findings of fact and conclusions of law may be requested but are not required on appeal.[30] When a trial court does not file findings of fact in a special appearance, all questions of fact are presumed to support the judgment.[31] Such implied findings are reviewed for only legal and factual sufficiency.[32]

C. Motion to Transfer Venue

As the party filing suit, the plaintiff initially chooses venue. "If the plaintiff's venue choice is not properly challenged through a motion to transfer venue, the propriety of venue is fixed in the county chosen by the plaintiff."[33] If a defendant objects to the plaintiff's venue choice and properly challenges that choice through a motion to transfer venue, the question of proper venue is raised.[34]

A motion to transfer venue must be filed concurrently with or prior to any other plea, pleading or motion except a special appearance. Otherwise, the objection is waived.[35] The motion should be accompanied by affidavits supporting the venue facts alleged but it need not be verified.[36] The motion must: (a) specifically deny the facts pleaded by the plaintiff and (b) state the legal and factual bases asserted for the transfer by either specifying the county of proper venue and stating that the county chosen by the plaintiff is not proper, or that venue is mandatory in the allegedly proper county by virtue of a specific statute, which must be clearly indicated in the motion.[37]

It is questionable whether the trial court must allow an oral hearing before ruling on a motion to transfer venue.[38] Texas Rule of Civil Procedure 87 merely requires the court to make its determination "promptly" and seems to contemplate the possibility of a hearing by written submission.[39] To obtain a hearing, the movant has a duty to request a trial setting.[40] If the trial court refuses a request to set the motion for a hearing, the movant will not waive its right to complain of venue on appeal by failing to re-urge its request or by failing to request a continuance.[41]

To preserve error on the grounds of inadequate time to conduct discovery or prepare for a hearing on venue, move for a continuance.[42]

III. Summary Judgment Practice

A. Presentation of the Grounds for Summary Judgment

A summary judgment must "state the specific grounds therefore."[43] If the moving party does not expressly present the grounds for summary judgment in the motion itself, the motion is inadequate as a matter of law.[44] Likewise, the nonmovant must expressly present the reasons summary judgment should not be granted in a written response.[45] Nevertheless, if the movant's grounds will not support summary judgment *as a matter of law,* a written response or answer is not necessary and a motion for new trial is sufficient to preserve error.[46]

With respect to no-evidence summary judgment motions under Texas Rule of Civil Procedure 166a(i), the motion must

state the elements of the opposing party's claim or defense as to which there is no evidence.[47] A no-evidence motion that states "there is no evidence of causation... adequately identified causation as the challenged element."[48] However, a no-evidence motion that simply states there is no evidence of negligence, without identifying the specific elements attacked will not suffice.[49] To preserve a complaint that the movant's summary judgment grounds are unclear, the nonmoving party should specially except to the motion in writing before the summary judgment hearing.[50]

Some courts have held that a no-evidence motion that does not identify each element as to which there is no evidence is legally insufficient and that the nonmoving party can raise this complaint for the first time on appeal.[51] Other courts have held that the nonmoving party has the burden to challenge an insufficient no-evidence motion in the trial court.[52]

B. Additional Time for Discovery

In the traditional summary judgment context, the nonmoving party may seek additional time for discovery.[53] Texas Rule of Civil Procedure166a(i) permits a party to move for a no-evidence summary judgment "after adequate time for discovery."[54] In a traditional summary judgment, the nonmovant has the burden of seeking additional time for discovery.[55]

The no-evidence rule does not expressly address whether Rule 166a(g) applies, although most Texas courts have held that the burden for obtaining additional time for discovery is on the nonmovant. This is consistent with Rule 166a(i)'s provision placing the burden of overcoming a no-evidence summary judgment on the nonmoving party.[56] Thus, in the no-evidence summary judgment motion context, the prudent practice is for the nonmoving party to raise whether there has been an adequate time for discovery.[57]

"When a party contends that it has not had an adequate opportunity for discovery before a summary judgment hearing, it must file either an affidavit explaining the need for further discovery or a verified motion for continuance."[58] In the no-evidence summary judgment context, courts have applied the same standard.[59] Courts have typically held that a trial court implicitly overrules a continuance motion or a complaint that the nonmoving party lacks adequate time for discovery when it decides the summary judgment motion.[60] Nevertheless, the most cautious approach is to obtain a signed order from the trial court.

C. Denial or Grant of Motion

Generally, there is no right to appeal the denial of summary judgment, even after trial on the merits.[61] When the trial court grants a summary judgment for one party and denies the opposing party's motion for summary judgment, the appellate court can review both the grant and the denial.[62] When the trial court grants a partial summary judgment dismissing some but not all claims, the party appealing the partial summary judgment after trial on the merits must include in the appellate record the pleadings containing the causes of action dismissed by summary judgment, or risk waiver.[63]

D. Specific Complaints

To preserve a complaint that an opposing party violated Texas Rule of Civil Procedure 63 by filing a pleading within seven days of the summary judgment hearing, a party must *both* demonstrate surprise *and* request a continuance.[64] To preserve a complaint that a party did not receive 21-days notice before the summary judgment hearing under Texas Rule of Civil Procedure 166a, a party must promptly bring the error to the trial court's attention, usually by filing a motion for continuance and a post-trial motion complaining of lack of notice.[65] To preserve a complaint that movant's pleadings do not support the requested summary judgment, raise the defect in the trial court, usually in the non-movant's summary judgment response.[66]

E. Evidentiary Objections

Objections that a summary judgment motion or a response contains inadmissible evidence must be preserved by written objection filed in the court.[67] It is incumbent upon the party asserting objections to obtain a written ruling at, before, or very near the time the trial court rules on the motion for summary judgment or risk waiver.[68] At least one Texas court has held that a ruling on objections to summary judgment evidence obtained after the trial court ruled on the summary judgment motion waived the objections.[69]

Under Texas Rule of Appellate Procedure 33.1, rulings can be implied and need not be in writing. Despite the rule change, courts have disagreed about whether a trial court's ruling on a motion for summary judgment impliedly disposes of objections to summary judgment evidence.[70] At least two courts have held that a party failed to preserve error regarding the trial court's exclusion of summary judgment evidence by not raising the issue in the trial court.[71]

One appellate court has held that a prevailing summary judgment movant "is required to object to claimed defects in the form of summary judgment affidavits" and obtain a

ruling on such an objection.[72] Because the defendants did not obtain a ruling from the trial court on their objections to the plaintiff's summary judgment evidence, the defendants waived their argument that the affidavit was not proper summary judgment evidence.[73]

IV. Pretrial Motions And Hearings

Many rules require the filing of written motions. Even if not specifically required by the rules, the best practice is always to file a written motion to preserve your requests or objections on appeal. As a general rule, to preserve arguments in opposition to any pretrial motion, file a response, oppose the motion at hearing, and get a record.[74]

A. Hearings

If there is no evidence presented, error is not waived by failure to obtain a hearing on the motion.[75] If the motion requires presentation of evidence, and no hearing is held, any error is waived. If your opponent failed to obtain a hearing in a situation where one was necessary, file an affidavit with the appellate court stating that no hearing was held.[76] You may be entitled to findings of fact and conclusions of law when the trial court grants a pretrial motion.[77] To be on the safe side, present the appellate court with a record reflecting a timely request for findings and conclusions and, if necessary, a reminder.[78]

B. Record

Make a record of all evidentiary hearings. On appeal, the appellant has the burden to present a record showing error requiring reversal.[79] Absent a record, the evidence is presumed to support the trial court's order.[80]

C. Motion for Continuance

The motion for continuance must be in writing and must strictly comply with the rules.[81] It must be verified or accompanied by affidavits. Failure to verify is fatal.[82]

To preserve error regarding a motion for continuance sought to complete discovery (including the absence of a witness), include the following in the motion: (a) allege and prove the testimony is material; (b) show your diligence in attempting to obtain it; (c) explain the cause of your failure to obtain it, if known; (d) show the evidence is not available from other sources; and (5) state that the continuance is not for delay only, but so that justice will be done.[83]

To preserve error on the denial of a motion for continuance based on the absence of counsel, show: (a) counsel's absence was not the party's fault and did not occur through his lack of diligence,[84] and (b) no other attorney could handle the case.[85]

D. Expert Issues

A party seeking to exclude expert testimony should object before trial in a motion to exclude expert testimony and at trial. The Texas Supreme Court has seemingly endorsed the idea that a party may object to expert testimony "before trial *or* when the evidence is offered."[86] The Texas Supreme Court has also held that a motion to strike expert testimony can be raised as late as "immediately after cross-examination when the *basis* for the objection *becomes apparent*."[87]

There may be risks associated with objecting only before trial. For example, the court may conclude that the objection is premature.[88] In addition, the basis for the objection may not be apparent until the expert testifies at trial.[89] Keep in mind that filing a motion in limine does not preserve error on appeal.[90] Instead, if the party is seeking to object to expert testimony a motion to exclude expert testimony is necessary.[91]

There are also circumstances in which an objection—either before or at trial—is unnecessary. If the party's complaint is that the expert testimony is conclusory or speculative and thus no evidence, an objection is not required.[92]

V. Sanctions

A party who does not obtain a pretrial ruling on a discovery dispute existing before trial has waived a claim of sanctions based on the alleged misconduct.[93]

A party seeking to challenge the trial court's sanctions ruling on appeal should be careful to bring the complaint to the trial court's attention.[94] In *Cire v. Cummings*,[95] a case in which the Texas Supreme Court set aside the court of appeals' reversal of the trial court's death penalty sanctions, the court agreed that "doing nothing in the face of a pending [discovery] motion and then complaining on appeal runs afoul of the policy underlying Appellate Rule 33.1."[96]

CONCLUSION

To preserve error for appeal, the complaining party must object timely and specifically, obtain a ruling from the trial court, and establish a record. But these are only the baseline requirements for preserving error. As this article demonstrates, despite changes in the rules aimed at liberalizing error preservation, preserving error for appeal remains complex and requires trial and appellate lawyers to carefully assess what steps are necessary to preserve error in a particular context.

Debbie McComas is a partner in the Appellate Practice Group at Haynes and Boone, LLP.

Ben Meschesis an associate in the Appellate Practice Group at Haynes and Boone, LLP. ★

[1] *Wal-Mart Stores, Inc. v. McKenzie*, 997 S.W.2d 278, 280 (Tex. 1999); *see also* TEX. R. APP. P. 33.1(a)(1), (2).
[2] TEX. R. APP. P. 33.1(a)(1), (2).
[3] *Osterberg v. Peca*, 12 S.W.3d 39 (Tex. 1999) *cert denied*, 530 U.S. 1244 (2000); *McKinney v. National United Firestone Co.*, 772 S.W.2d 72, 74 (Tex. 1989).
[4] *See, e.g., Krishnan v. Ramirez*, 42 S.W.3d 205, 220-21 (Tex. App.—Corpus Christi 2001, pet. denied); *but see Durbin v. Culberson County*, 132 S.W.3d 650, 656-57 (Tex. App.—El Paso 2004, no pet. h.) ("[A] trial court's ruling on an objection to summary judgment evidence is not implicit in its ruling on the motion for summary judgment.").
[5] TEX. R. APP. P. 33.1(a)(2)(B).
[6] *Stoner v. Thompson*, 578 S.W.2d 679 (Tex. 1979); *Roarke v. Allen*, 633 S.W.2d 804 (Tex. 1982); *State Fidelity Mortgage Co. v. Varner*, 740 S.W.2d 477 (Tex. App.—Houston [1st Dist.] 1987, writ denied); *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896-97 (Tex. 2000); TEX. R. CIV. P. 47, 301; *see also Castleberry v. Branscum*, 721 S.W.2d 270, 272, 275 n.5 (Tex. 1986).
[7] TEX. R. CIV. P. 93, 94; *Nootsie, Ltd. v. Williamson County Appraisal Dist.*, 925 S.W.2d 659, 662 (Tex. 1996).
[8] *Agnew v. Coleman County Elec. Coop. Inc.*, 153 Tex. 587, 272 S.W.2d 877, 879 (1954).
[9] *Huff v. Fidelity Union Life Ins. Co.*, 312 S.W.2d 493 (Tex. 1958).
[10] TEX. R. CIV. P. 90.
[11] *Roarke v. Allen*, 633 S.W.2d 804, 809 (Tex. 1982).
[12] *Roarke*, 633 S.W.2d at 809.
[13] *Fernandez v. City of El Paso*, 876 S.W.2d 370 (Tex. App.—El Paso 1993, writ denied) (regarding dismissal after special exceptions were granted); *D.A. Buckner Constr., Inc. v. Hobson*, 793 S.W.2d 74 (Tex. App.—Houston [14th Dist.] 1990, orig. proceeding).
[14] *Long v. Tascosa Natl. Bank*, 678 S.W.2d 699, 703 (Tex. App.—Amarillo 1984, no writ).
[15] TEX. R. CIV. P. 92.
[16] *Id.*
[17] TEX. R. CIV. P. 93, 94; *Nootsie, Ltd. v. Williamson County Appraisal Dist.*, 925 S.W.2d 659, 662 (Tex. 1996).
[18] *See Roarke*, 633 S.W.2d at 809.
[19] *Carr v. Houston Business Forms, Inc.*, 794 S.W.2d 849 (Tex. App.—Houston [14th Dist.] 1990, no writ).
[20] *Chap & Chapin, Inc. v. Tex. Sand & Gravel Co.*, 844 S.W.2d 664, 665 (Tex. 1992).
[21] *See Forscan Corp. v. Dresser Ind.*, 789 S.W.2d 389 (Tex. App.—Houston [14th Dist.] 1990, writ denied).
[22] *State Bar of Texas v. Kilpatrick*, 874 S.W.2d 656 (Tex. 1994); TEX. R. CIV. P. 70.
[23] *Texas Highway Dept. v. Jarrell*, 418 S.W.2d 486, 488 (Tex. 1967).
[24] *Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 441 (Tex. 1993).
[25] TEX. R. CIV. P. 120a; *see, e.g., Liberty Enters. v. Moore*, 690 S.W.2d 570, 571-72 (Tex. 1985) (stating that a defendant has waived special appearance by filing a motion to set aside a default judgment and agreeing to an order granting the motion); *Exito Elecs. Co. v. Trejo*, 2004 WL 1434798 at *2 (Tex. June 25, 2004) (holding that a Rule 11 agreement to extend a defendant's time to file an initial responsive pleading does not waive a special appearance and that a defective verification and affidavit does not waive a special appearance); *HMS Aviation v. Layale Enters., S.A.*, 2004 WL 1920007, at *3-4 (Tex. App.—Fort Worth Aug. 25, 2004, no pet. h.) (holding that defendant's motion to increase sequestration bond was made subject to special appearance and was not heard before the special appearance was determined and therefore the special appearance was not waived).
[26] TEX. R. CIV. P. 120a(1)(3); *see Casino Magic Corp. v. King*, 43 S.W.3d 14 (Tex. App.—Dallas 2001, pet. denied).
[27] TEX. R. CIV. P. 120a(3).
[28] *Slater v. Metro Nissan of Montclair*, 801 S.W.2d 253 (Tex. App.—Fort Worth 1990, writ denied).
[29] *Matthews v. Proler*, 788 S.W.2d 172 (Tex. App.—Houston [14th Dist.] 1990, no writ).
[30] *See Matthews v. Proler*, 788 S.W.2d 172 (Tex. App.—Houston [14th Dist.] 1990, no writ).
[31] *BMC Software, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002).
[32] *Id.*
[33] *Wilson v. Texas Parks & Wildlife Dep't*, 886 S.W.2d 259, 260 (Tex. 1994).
[34] *In re Masonite*, 997 S.W.2d 197 (Tex. 1999) (orig. proceeding).
[35] TEX. CIV. PRAC. & REM. CODE § 15.063; TEX. R. CIV. P. 86(1).
[36] *GeoChem Tech Corp. v. Verseskes*, 962 S.W.2d 541 (Tex. 1998); TEX. R. CIV. P. 86(3).
[37] TEX. R. CIV. P. 87(3)(a).
[38] *Orion Enters., Inc. v. Pope*, 927 S.W.2d 654, 657-58 (Tex. App.—San Antonio 1996, no pet.).
[39] *Id.*; TEX. R. CIV. P. 87 (trial court shall consider the pleadings, stipulations, the motion to transfer and response, and all affidavits and discovery products, if any, on file); *but see Flores v. Arietta*, 790 S.W.2d 75 (Tex. App.—San Antonio 1990, writ denied) (record was required for appellate review).
[40] TEX. R. CIV. P. 87(1); *see also Grozier v. L-B Sprinkler & Plumbing Repair*, 744 S.W.2d 306, 309-10 (Tex. App.—Fort Worth 1988, writ denied).
[41] *Marshall v. Mahaffey*, 974 S.W.2d 942, 946 (Tex. App.—Beaumont 1998, pet. denied).
[42] *Beard v. Gonzalez*, 924 S.W.2d 763, 765 (Tex. App.—El Paso 1996, no writ).
[43] TEX. R. CIV. P. 166a(c).

[44] *McConnell v. Southside Ind. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993).
[45] *Id.* at 343.
[46] *Castellow v. Swiftex Mfg. Corp.*, 33 S.W.3d 890, 895 (Tex. App.–Austin 2000, no pet.), *abrogated on other grounds Lawrence v. CDB Servs., Inc.*, 44 S.W.3d 544 (Tex. 2001).
[47] TEX. R. CIV. P. 166a(i).
[48] *In re Mohawk Rubber Co.*, 982 S.W.2d 494, 498 (Tex. App.—Texarkana 1998, orig. proceeding) (no-evidence motion challenging causation is sufficient).
[49] *Oasis Oil Corp. v. Koch Refining Co.*, 60 S.W.3d 248, 255 (Tex. App.—Corpus Christi 2001, pet. denied) (motion challenging "other elements" of a claim is insufficient).
[50] *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 342 (Tex. 1993); *Lavy v. Pitts*, 29 S.W.3d 353, 356 (Tex. App.—Eastland 2000, pet. denied).
[51] *See, e.g., Cuyler v. Minns*, 60 S.W.3d 209, 213 (Tex. App.—Houston [14th Dist. 2001, pet. denied).
[52] *See, e.g., Walton v. Phillips Petroleum Co.*, 65 S.W.3d 262, 268 n.1 (Tex. App.—El Paso 2001, no pet.).
[53] *See* TEX. R. CIV. P. 166a(g).
[54] TEX. R. CIV. P. 166a(i).
[55] *See Tenneco Inc. v. Enter. Prod. Co.*, 925 S.W.2d 640, 647 (Tex. 1996).
[56] *See* TEX. R. CIV. P. 166a(i).
[57] *See, e.g., Quesada v. Am. Garment Finishers, Corp.*, 2003 WL 1889602, at *2 (Tex. App.—El Paso April 17, 2003, no pet.) (memorandum opinion) (nonmoving party must raise the "adequate time for discovery" issue in the trial court); *Dolcefino v. Randolph*, 19 S.W.3d 906, 917 n.6 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).
[58] *Tenneco*, 925 S.W.2d at 647.
[59] *Quesada*, 2003 WL 1889602, at *2, *quoting Tenneco Inc. v. Enterprise Prods. Co.*, 925 S.W.2d 640, 647 (Tex. 1996); *see also Blanche v. First Nationwide Mortgage Corp.*, 74 S.W.3d 444, 451 (Tex. App.—Dallas 2002, no pet.).
[60] *See* TEX. R. APP. P. 33.1(a)(2)(A); *Dagley v. Haag Eng'g Co.*, 18 S.W.3d 787, 795 n.1 (Tex. App.—Houston [14th Dist.] 2000, no pet.).
[61] *Cincinnati Life Ins. v. Cates*, 927 S.W.2d 623, 625 (Tex. 1996).
[62] *Embrey v. Royal Ins. Co. of America*, 22 S.W.2d 415, 415-16 (Tex. 2000).
[63] *Worthy v. Collagen Corp.*, 967 S.W.2d 360, 365-66 (Tex. 1998).
[64] *Fletcher v. Edwards*, 26 S.W.3d 66, 74 (Tex. App.—Waco 2000, pet. denied).
[65] *Walker v. Gonzales County Sheriff's Dept.*, 35 S.W.3d 157, 160 (Tex. App.—Corpus Christi 2000, pet. denied); *White v. Wah*, 789 S.W.2d 312, 319 (Tex. App.—Houston [1st Dist.] 1990, no writ).
[66] *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 494 (Tex. 1991).
[67] *Dolenz v. A.B.*, 742 S.W.2d 82, 83-84 n.2 (Tex. App.—Dallas 1987, writ denied).
[68] *Dolcefino v. Randolph*, 19 S.W.3d 906, 926 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).
[69] *Chapman Children's Trust v. Porter & Hedges, L.L.P.*, 32 S.W.3d 429, 435 (Tex. App.—Houston [14th Dist.] 2000 pet. denied) (party failed to preserve error because it did not obtain a final written ruling on its objection to the opposing party's summary judgment evidence).
[70] *Compare Frazier v. Yu*, 987 S.W.2d 607, 610 (Tex. App.—Fort Worth 1999, pet. denied) *with Trusty v. Strayhorn*, 87 S.W.3d 756, 760-61 (Tex. App.—Texarkana 2002, no pet.) (holding that only when the trial court could not have granted summary judgment without having ruled on the evidentiary objections is there an implied ruling on such objections); *Durbin v. Culberson County*, 132 S.W.3d 650, 656-57 (Tex. App.—El Paso 2004, no pet. h.) ("[A] trial court's ruling on an objection to summary judgment evidence is not implicit in its ruling on the motion for summary judgment.").
[71] *See Brooks v. Sherry Lane Nat'l Bank*, 788 S.W.2d 874, 878 (Tex. App.—Dallas 1990, no writ); *Margione v. Gov't Personnel Mut. Life Ins. Co.*, 2002 WL 1677457, at *4-5 (Tex. App.—San Antonio 2002, writ denied) (not designated for publication) (same).
[72] *Trusty v. Strayhorn*, 87 S.W.3d 756, 763-64 (Tex. App.—Texarkana 2002, no pet.).
[73] *Id.*
[74] *See Moore v. Wood*, 809 S.W.2d 621 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding).
[75] *See Martin v. Cohen*, 804 S.W.2d 201, 203 (Tex. App.—Houston [14th Dist.] 1991, no writ).
[76] *Barnes v. Whittington*, 751 S.W.2d 493 (Tex. 1988).
[77] *Hopkins v. NCNB Texas Nat'l Bank*, 822 S.W.2d 353 (Tex. App.—Fort Worth 1992, no writ).
[78] TEX. R. CIV. P. 296.
[79] TEX. R. APP. P. 33.1(a).
[80] *Pyles v. United Services Auto. Assn.*, 804 S.W.2d 163 (Tex. App.—Houston [14th Dist.] 1991, writ denied).
[81] *See* TEX. R. CIV. P. 251; *City of Houston v. Blackbird*, 658 S.W.2d 269 (Tex. App.—Houston [1st Dist.] 1983, writ dism'd).
[82] *Rogers v. Continental Airlines*, 41 S.W.3d 196 (Tex. App.—Houston [14th Dist.] 2001, no pet.); *Blackbird*, 658 S.W.2d at 272.
[83] TEX. R. CIV. P. 251; *See, e.g., Laughlin v. Bergman*, 962 S.W.2d 64, 65-55 (Tex. App.—Houston [1st Dist.] 1997, pet. denied); *McAx Sign Co. v. Royal Coach, Inc.*, 547 S.W.2d 368, 370 (Tex. Civ. App.—Dallas 1977, no writ).
[84] *State v. Crank*, 666 S.W.2d 91 (Tex. 1984); *Gendebien v. Gendebien*, 668 S.W.2d 905 (Tex. App.—Houston [14th Dist.] 1984, no writ).
[85] *Echols v. Brewer*, 524 S.W.2d 731 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).
[86] *See Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 409 (Tex. 1996) (emphasis added).
[87] *Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245, 252 (Tex. 2004) (emphasis added).
[88] *See Farm Servs., Inc. v. Gonzalez*, 756 S.W.2d 747, 750 (Tex. App.—Corpus Christi 1998, writ denied).
[89] *Kerr-McGee Corp.*, 133 S.W.3d at 252.
[90] *See, e.g., Methodist Hosps. of Dallas v. Corporate Communicators, Inc.*,

806 S.W.2d 879, 883 (Tex. App.—Dallas 1991, no writ).

[91] *See Huckaby v. A.G. Perry & Son, Inc*., 20 S.W.3d 194, 203-04 (Tex. App.—Texarkana 2000, pet. denied) (distinguishing a motion to exclude from a motion in limine in the expert testimony context).

[92] *Coastal Transport Co. v. Crown Central Petroleum Corp*., 136 S.W.3d 227, 231-33 (Tex. 2004).

[93] *See Remington Arms Co. v. Caldwell*, 850 S.W.2d 167, 170 (Tex. 1993) (orig. proceeding).

[94] *See, e.g., Garcia v. Mireles*, 14 S.W.3d 839, 843 (Tex. App.—Amarillo 2000, no pet.) (appellant's failure to raise the sanctions issue in the trial court and to request findings of fact and conclusions of law waives its appellate complaint); *Kiefer v. Continental Airlines, Inc*., 10 S.W.3d 34, 41 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (when an attorney does not complain of the trial court's sanction order and does not request the trial court to reconsider its order, the attorney has waived any appellate complaint about the sanctions order).

[95] 134 S.W.3d 835 (Tex. 2004),

[96] *Id*. at 844, *quoting Cummings v. Cire*, 74 S.W.3d 920, 924 n.1 (Tex. App.—Amarillo 2003).

CONSTRUCTING A JURY CHARGE—PERSPECTIVES FROM THE BENCH[1]

BY HON. CATHARINA HAYNES

SCHEDULE A LOCAL BAR ASSOCIATION CLE entitled: "The Court's Charge," and you will find a room packed with fearful trial attorneys (and a few lost transaction attorneys with birthdays that month). Other than possibly *voir dire*, nothing inspires so much fear and confusion among litigation attorneys as the court's charge. Indeed, in this issue of the Litigation Section magazine devoted to "appellate issues," one third of the articles deal with the jury charge. Other articles in this issue address the nuts and bolts of objecting to the charge and attorney perspectives on the process. I have the daunting task of being only one voice of countless trial judges—at least some of whom no doubt have a different perspective—to give "perspectives from the bench."

As a judge and lawyer, I have had the privilege of appearing before, meeting and working with many judges across the state. While we share a commitment to justice under the law, we may differ in how to get there. When in doubt, learn your judge's particular customs when it comes to charge submissions; also, ascertain how involved that judge is likely to be in preparing the charge, and then act accordingly. Although every judge has his/her own way of doing things, I hope this paper will give you some useful tips that will apply in most Texas state courts.

Lawyers spend a great deal of time learning how to "preserve error" in the charge. The judge, on the other hand, is trying to avoid error in the first place. If you look at the error preservation rules from that perspective—their purpose is to avoid error in the first place—it will help you better understand the need to object or request (or do whatever else is needed). More importantly, if you give some thought to the ultimate "consumer" of the jury charge—the jury—you will arrive at a more readable, understandable product. As a judge, my goal is to submit a charge to the jury: (1) that is correct under the law, considering the evidence presented; (2) that is understandable to the "average" juror; and (3) upon which a judgment can be entered after the verdict. Most lawyers spend most of their time on the first goal and give much less thought to the second and third goals. So, I'll spend my time on those....

More Is Less And Less Is More

More is Less/Less is More: Instructions and Definitions. In longer trials, I often receive proposed questions, instructions and definitions that are so massive they fill a separate expandable folder because they cannot fit in the regular court jacket. I have seen lawyers submit so many instructions and definitions that you forget the question by the time you get to the answer blank. Many of these instructions and definitions are technically correct statements of the law. But case law teaches us that correct, but unnecessary, statements of the law can be error (sometimes harmless, but error nonetheless). *See, e.g., First Internat'l Bank in San Antonio v. Roper Corp.*, 686 S.W.2d 602, 603-05 (Tex. 1985)(under the law at that time, sole cause instruction was surplusage in products liability case because it "emphasize[d] extraneous factors to be considered in reaching a verdict" and constituted reversible error); *Fluor Daniel, Inc. v. Boyd*, 941 S.W.2d 292, 295 (Tex. App.—Corpus Christi 1996, writ denied) (reversing verdict and stating: "A superfluous instruction amounts to an improper comment on the case as a whole when the case is 'closely contested' and the excess instruction may tilt the jury by emphasizing extraneous factors."); *see also Shihab v. Express-News Corp.*, 604 S.W.2d 204, 211 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.) ("[A] court is not required to give to the jury a general explanation of the law.").

Resist the urge to load up each question with lengthy treatises on the law. Instead ask yourself: what instructions are necessary to enable the jury to answer the question under the applicable law? When submitting definitions, ask yourself: is this word being used in a way other than its common English meaning? If so, give a definition (preferably one approved by an appellate court in an appeal of a jury charge definition). Otherwise, do not.

More is Less/Less is More: Questions. This is a tricky area for a trial judge. Generally, judges must submit all questions of fact that are requested in proper form and raised by the pleadings and evidence. *See Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 663 (Tex. 1999) ("A trial court must submit in its charge to the jury all questions, instructions, and defi-

nitions raised by the pleadings and evidence."). Thus, the same basic set of facts can lead to numerous questions under different legal theories, many of which sound strangely alike to a layperson such as a juror and some of which are plainly inconsistent with each other.[2]

It can backfire to submit multiple questions about the same thing with slight variations or multiple alternative theories. Instead of increasing your chances of winning, such an approach may instead increase your chances of confusing the jury, hanging the jury, or getting a verdict with so many inconsistencies that a judgment cannot be entered on it. *See, e.g., Ford Motor Co. v. Miles*, 141 S.W.3d 309 (Tex. App.– Dallas 2004, pet. filed) (finding an irreconcilable conflict between affirmative answer to negligence question and negative answers to strict liability questions).

With your client's consent, consider not submitting your weakest claims or defenses. This approach will strengthen those that remain and avoid the need to make arguments that detract from your main point. It's hard to argue that "the other side committed a terrible, horrible fraud and must be hugely punished, but in case you don't believe that, at least find that they innocently (but negligently) misrepresented the facts." Legally, you can argue in the alternative. Legally, you can argue intent and negligence in the same case. Practically and realistically, however, it's hard to do in front of a jury of regular citizens who don't see the world from an issue-spotting perspective.

I don't give this advice lightly. It is hard for a lawyer to decline to submit something the judge would have to submit if asked, and you certainly should make sure the client understands what you are doing and why (and consents). In the end, however, I think it will improve your chances of winning with the jury, obtaining a consistent verdict on which judgment can be entered, and holding onto that verdict on appeal.

One last thing to consider in this area is conditioning the questions. Maybe you don't need or want theories 5 and 6 if the jury says "yes" to 1, 2, 3 or 4. In that instance, you might consider conditioning those questions to avoid the need for the jury to spend time answering questions that might only muddy the waters.

More is Less/Less is More: Objections. There's actually a rule about this: "When the complaining party's objection, or requested question, definition, or instruction is, in the opinion of the appellate court, obscured or concealed by voluminous unfounded objections, minute differentiations or numerous unnecessary requests, such objection or request shall be untenable." Tex. R. Civ. P. 274. This rule essentially says "don't cover up the good objections or requests with a bunch of junk." That's good advice both legally and practically.

Every so often, I get a lawyer who tries to say his/her objections really fast and slide a good one in the midst of a bunch of meaningless legalese. I always wonder about the wisdom of so obviously trying to sandbag the judge. But beyond that, you may lose the good point because you buried it among the bad. If it's a good objection, make it clearly. Maybe it will be sustained, and you'll get a more correct charge. If you don't want an objection to be sustained, don't make it. Lawyers who say their objection is "just for the record" baffle me. The entire purpose of "the record" you are making is to ensure that the charge is right the first time—avoiding a retrial—not to trick the judge or hope for a way out on appeal.

One of my former partners always used to say: "Those lawyers who try their cases for appeal, usually do." Strive to get it right in the trial court and give the trial judge a fair opportunity to rule correctly. If the judge makes a mistake, you will then have a legitimate basis for appeal.

Persuading The Judge

Persuading the Judge—Where do you begin? Every judge probably has a slightly different way of handling the mechanics of the charge. In a relatively simple case, I often prepare a draft charge ahead of time based on the pleadings and pretrial submissions, give it to the lawyers and pro se litigants at the start of the trial, and then visit with them once or twice informally before preparing a final version for the formal charge conference based on the evidence actually presented.

In a more complex case, I often require the lawyers[3] to meet in advance and prepare a disk containing their alternative versions of questions and instructions (again based on the pleadings and the parties' various positions). I do not require anyone to sponsor a question or instruction on which they do not have the burden of proof, of course, I just want them to participate in commenting on the language and form. Alternatively, the lawyers can prepare competing disks and give those disks to me the week before or the day of trial. These disks are really just a beginning point for my preparation of the charge and not a substitute for (or the same thing as) what the lawyers file with the clerk in terms of requested questions, instructions, and definitions. Many state court judges do not have a secretary, so disks can be helpful both from a typing standpoint and from a drafting and thinking standpoint.

Ultimately, I will prepare a draft and then spend some time during the trial (usually in the evenings) working through the charge with the lawyers. That way, by the time we get to the formal charge conference, we can all approach the charge more intelligently. The lawyers, tired from a long trial, do not have to suddenly start thinking about the charge, and they are not surprised by new issues. The judge, tired from a long trial, does not have to suddenly start researching new issues. The jury, tired from a long trial, does not have to wait for a long charge conference to conclude. Everything proceeds more smoothly, and more importantly, the judge is in a position to make rulings based on a more reasoned and researched view of the law as it applies to that particular case.

Of course, other judges have different approaches that work well for them. Mine is not the only good approach. Try to find out how your judge likes to do things, and act accordingly. I think it is always wise to have a clean charge (without citations and "granted, refused, modified"") in the form a judge would submit to a jury on a disk so that if the judge requests one of the lawyers to be the scrivener, you can volunteer and help the process along. You should at least think about what your opponent's questions, instructions, and definitions should look like. It will make you a better advocate in the informal charge conference and will lead to more intelligent objections and, hopefully, a charge that fairly encompasses the case.

Persuading the Judge: The Informal Charge Conference.[4] When the judge has one or more informal charge conferences during the trial, take them seriously. These conferences present an opportunity to help shape the judge's view of the case. Bring your citations with you to the informal charge conference. Don't say: "Judge, I know there's a case on point directly opposite to what you just said, but I don't know the name or the cite." If your case is of the size and complexity that appellate counsel is likely to be involved at some stage, get him/her involved in the informal charge conference(s). It is quite disheartening to spend hours and hours with the trial counsel on the charge, only to have an appellate lawyer appear at the formal charge conference and start over. Legally, you can do that. Practically, it delays the process, wastes the jury's time, and makes the judge's job unnecessarily more difficult. If you are the appellate lawyer, ask to be involved in the informal charge conference and provide meaningful help at that stage. If the judge gives you a draft of the charge early in the case, review it, or have someone review it, so that you will be prepared to discuss it intelligently.

Persuading the Judge: The Formal Charge Conference. Just because you think the judge will overrule your objection does not mean you should say so. "Judge, I know you're going to overrule me on this, but ..." is not particularly persuasive. Make your objections clearly, correctly, and politely, and let the judge decide for himself or herself whether to overrule the objection. Of course, if you've had a number of informal conferences with the judge, you will have discussed these issues before. Nevertheless, you need to make the formal objections at the appropriate time.

Making The Charge Readable And Useable— What Does that Mean?

Read the Charge as a Whole. If you were not trained as a lawyer, could you understand the questions, instructions and definitions? Do they flow in a way that makes sense? Are definitions easy to find in the charge? I prefer to put recurring definitions at the front so they can be easily found. *See Woods v. Crane Carrier Co., Inc*., 693 S.W.2d 377, 379 (Tex. 1985) (A[W]hen terms requiring definitions are used more than once in a charge, it is preferable that the definition or instruction occur immediately after the general instructions required by Tex. R. Civ. P. 226a, III."). If the judge gave you a draft in advance or if you've prepared one, have a non-lawyer in your office read and critique it from a "readability" standpoint. Of course, some aspects of the charge are cast in the stone of case law, but charges do not have to read like legalese to be correct under the law.

Proofread. In a long charge that has undergone many revisions, there may be typos, and the numbering of the conditioning or the questions may be thrown off. Read the charge at least once, looking only for those kinds of problems. Make the judge aware of these type of mistakes before the formal charge conference. "Objecting" to a typo just delays the process unnecessarily and makes it look like you're trying to embarrass the judge

Understand the Charge. What kind of judgment would be entered if you got "yes" answers throughout? What about some "yeses" and some "nos"? Do you know what a "win" is for you under the charge? Have you included questions that are likely to lead to an inconsistent verdict? A charge should be written in such a way that the parties and the judge can discern what a judgment on the verdict would look like (even if a party plans to move for a j.n.o.v. or new trial). This can be particularly tricky when it comes to damages. You don't want a "*Casteel*" problem of having only one damage question for multiple liability questions, one of which may be thrown out later for lack of evidence. *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 388 (Tex. 2000) ("[W]hen a trial court submits a single broad-form liability question incorporating multiple

theories of liability, the error is harmful and a new trial is required when the appellate court cannot determine whether the jury based its verdict on an improperly submitted invalid theory."); *see also Harris County v. Smith*, 96 S.W.3d 230, 234 (Tex. 2002)(mixing valid and invalid damage elements in a single question is harmful error where it prevents the appellate court from reviewing whether the jury based its award on valid elements or invalid elements).

On the other hand, will the jury think the various damage questions are going to be added together? Should they be? Are the questions such that the plaintiff will have to elect a recovery? As the plaintiff's attorney, make sure to demarcate different damages for different questions if you think that both sets of damages could be recovered without election. As the defendant's attorney, be careful about seemingly similar damages phrased differently, since they may be added together in the judgment. These are the kinds of things to think about in advance, so that you can consider conditioning questions or adding instructions to avoid problems down the road.

Argue the Charge. It is amazing to see a lawyer argue passionately for the inclusion of a particular instruction in the charge and then never mention that instruction in his/her closing argument. The jury will be grappling with the charge and trying to understand how everything they've heard relates to the questions, instructions, and definitions given. It is your job as the attorney to help them make that connection. To do this, you must at least highlight the parts of the charge most important to your case and argue how the evidence supports a particular answer to a question. In courts where a Doar presenter is provided (example: Dallas), put the charge on the Doar presenter as you are talking. Make sure the jury understands how the evidence relates to the questions, and focus on critical instructions and definitions. By the time the jurors retire to deliberate, they should be familiar, even comfortable, with the charge, not intimidated by it.

Parting Words

Use Common Sense and Plan Ahead. In the end, perhaps the best advice after you've learned the rules about objecting and submitting is to remember your common sense. Plan ahead for the jury charge. The advice about "prepare your charge at the beginning of the case" is still good, even if not everyone follows it. At a minimum, think through the charge as part of your preparation for trial. In the end, your presentation of evidence—however brilliantly done—will be meaningless if the jury cannot relate it to the questions in a way that leads to the best outcome for your client under the facts.

Finally, take a deep breath. As my dad would say: "This, too, shall pass."

Formerly a trial partner at Baker Botts, LLP, Catharina Haynes has served as Judge of the 191st Civil District Court in Dallas since January of 1999.

For background reference, Judge Haynes consulted a paper entitled "The Court's Charge" presented at a January 2001 Dallas Bar CLE by George Bramblett and prepared by Mr. Bramblett and other members and associates of Haynes and Boone, LLP. Judge Haynes also thanks Craig Haynes and Scott Stolley of Thompson & Knight LLP, for their editing comments. ★

---

[1] Nothing herein should be construed as an indication of how Judge Haynes, the 191st District Court or any other judge or court would rule on a particular question presented. As a lawyer, Judge Haynes practiced in state and federal courts, but she has served as a judge only in state court. Therefore, these "views from the bench" are limited to Texas state court practice.

[2] Sometimes it can be difficult for practitioners to determine whether to submit one question or several where different legal theories have similar elements. *Compare Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 664 (Tex. 1999) ("[S]ubmission of a single question relating to multiple theories may be necessary to avoid the risk that the jury will become confused and answer questions inconsistently.") *with Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 388 (Tex. 2000) ("[W]hen a trial court submits a single broad-form liability question incorporating multiple theories of liability, the error is harmful and a new trial is required when the appellate court cannot determine whether the jury based its verdict on an improperly submitted invalid theory."). Because the topic of "broad form vs. single issue" is covered in depth in another paper in this issue, it will not be discussed in detail here.

[3] Unless otherwise indicated by the context, references to "lawyers" include parties representing themselves *pro se.*

[4] An informal charge conference is one in which all counsel (and their clients, if they wish), *pro se* litigants and the judge meet to discuss the charge in advance of or at the close of the evidence. The term is not meant to imply anything of an *ex parte* nature.

CRAFTING A CHARGE FROM THE PLAINTIFF'S PERSPECTIVE

BY VINCENT LEE "TRIPP" MARABLE III

THE IMPORTANT ISSUES RELATIVE TO jury charge submission from the plaintiff's perspective include: (1) submission of a simple, understandable charge, (2) avoiding duplicative questions, (3) avoiding questions which, if answered in a certain way, could create a fatal conflict in the jury verdict and (4) preventing any claim of reversible charge error on appeal. There is a clear tension between achievement of simplicity in the charge and obtaining a "bullet-proof" charge that is not subject to attack on appeal. Broad-form jury questions which combine multiple theories of recovery, multiple elements of causes of action, and multiple damage elements have resulted in significant in-roads to the abolition of lengthy, unduly fact-specific, and confusing granulated charges. Unfortunately, as explained in detail below, the submission of any broad-form charge which permits a defendant to argue that the jury based its verdict on an invalid legal theory or on a cause of action or damage element not supported by the evidence creates the potential for reversible error. Plaintiff practitioners must temper their efforts to submit broad-form jury charges in light of recent Texas Supreme Court precedent and current hostility to broad-form submission. The discussion in this article assumes that the defendant has timely and properly objected to the trial court's broad-form submission and/or objected on the grounds that a separate and distinct or granulated submission should have been used.

A. *Crown Life v. Casteel* and *Harris v. Smith*

Texas Rule of Civil Procedure 277 generally provides for broad-form submission, except where such broad-form submission is not feasible. ("In all jury cases the court shall, whenever feasible, submit the cause upon broad-form questions.") A series of Texas Supreme Court cases emphatically enforced the mandate in Rule 277 and directed trial courts and courts of appeals to utilize broad-form submission. *See e.g. Texas Dept. of Human Services v. E. B.*, 802 S.W.2d 647, 649 (Tex. 1990); *Island Recreational Development Corp. v. Republic of Texas Savings Assoc.*, 710 S.W.2d 551, 555 (Tex. 1986); *Lemos v. Montez*, 680 S.W.2d 798, 801 (Tex. 1984). Even though they continue to claim that they embrace broad-form submission, the current Texas Supreme Court and some courts of appeals are clearly dissatisfied with broad-form submission. *See e.g. KPH Consolidation, Inc. v. Romero*, 102 S.W.3d 135, 162 (Tex. App.–Houston [14th Dist.] 2003, pet. granted) (Seymore, J., concurring) ("I would encourage trial courts to exercise their broad discretion in favor of granulated-form submission, especially in cases involving multiple theories of liability.")

The plaintiff practitioner must consider and address the holdings of the Texas Supreme Court in *Crown Life Insurance Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000) and *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2003), in connection with the liability and damage submission of any case, irrespective of the case's complexity, the number of parties or the number of causes of action asserted. The *Casteel* case involved claims asserted by William Casteel, an independent insurance agent who sold "vanishing premium" insurance policies issued by Crown Life. 22 S.W.3d at 381. The policyholders sued both Crown Life and Casteel; Casteel filed a cross-claim against Crown alleging violations of Article 21.21 of the Texas Insurance Code and DTPA violations. *Id.* at 382. With respect to Casteel's cross-claim, the trial court submitted a single broad-form liability question which included five DTPA laundry list violations as well as multiple Insurance Code violations. *Id.* at 387. The jury answered the question "yes" finding that Crown Life was liable to Casteel and awarded over $7 million in actual damages. *Id.* at 382. With respect to the substantive viability of the claims asserted by Casteel, the Supreme Court held that he did not have standing to assert any DTPA or Insurance Code claim against Crown Life except the Article 21.21 claim for violation of DTPA § 17.46(b)(12), which makes it a violation to represent that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law. *Id.* at 387. The submission of the "invalid" liability theories based on Casteel's lack of standing constituted reversible error. The Supreme Court, relying on its decision in *Lancaster v. Fitch*, 246 S.W. 1015, 1016 (Tex. 1923), stated as follows:

> Today, we reaffirm this reasoning. When a single broad-form liability question erroneously commingles valid and invalid liability theories and the appellant's objection is timely and specific, the error is harmful

> when it cannot be determined whether the improperly submitted theories formed the sole basis for the jury's finding. We disapprove of those courts of appeals' decisions holding that this error is harmless if any evidence supports a properly submitted liability theory.

Id. at 389.

In *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2003), the Smiths (Lynn and Erica) sued for damages suffered when their automobile was hit by a patrol car driven by a Harris County deputy sheriff. *Id.* at 231. Global damage questions were submitted by the trial court for each of the plaintiffs. With respect to Lynn Smith, the jury was instructed that it could consider loss of earning capacity as an element of damages. *Id.* With respect to Erica Smith, the trial court instructed the jury that it could consider physical impairment as a damage element. *Id.* at 232. The First Court of Appeals held that there was no evidence in the record of loss of earning capacity as to Lynn Smith and no evidence of physical impairment as to Erica Smith. *Id.* The Supreme Court held that instructing the jury that it could consider an element of damages as to which there was no evidence constituted reversible error under *Casteel* and the 1923 decision in *Lancaster v. Fitch*.

> We conclude that the trial court erred in overruling Harris County's timely and specific objection to the charge, which mixed valid and invalid elements of damages in a single broad-form submission, and that such error was harmful because it prevented the appellate court from determining "whether the jury based its verdict on an improperly submitted invalid" element of damage.

Id. at 234.

Plaintiff practitioners can easily avoid the problem presented by *Harris v. Smith* by submitting separate answer blanks for every element of damages and this is probably advisable in light of damage caps and other damage limitations applicable to most types of claims. If the jury is directed to award a specific amount for each specific element of damages and the trial court or court of appeals determines that the evidence does not support an element of damages or that the element of damages is not recoverable for the cause of action asserted, the court can simply reform the judgment by deleting that specific award as to which there is a defect, evidentiary or otherwise.

The *Casteel* decision and its application to submission of liability theories is more problematic. The problem with the jury's submission in *Casteel* was described by the Supreme Court as an erroneous commingling of "valid" and "invalid" liability theories. 22 S.W.3d at 389. Certain of Casteel's liability theories were "invalid" because he lacked standing to assert the causes of action. What would have happened if Casteel had standing to assert all of the liability theories submitted in the single broad-form question, but there was no evidence to support certain of the theories of recovery? It is unclear whether *Casteel* applies where there has been an erroneous commingling of valid legal theories in the charge, some of which are not supported by legally sufficient evidence. Consider, for example, a case in which the plaintiff asserts a claim for fraud, tortious interference, and conversion. All of the theories are "valid" in the sense they are recognized by Texas law and the plaintiff has standing to assert such causes of action, but one or more of the causes of action are not supported by the evidence. The Supreme Court has never directly addressed this situation. However, in *Harris County v. Smith* the Court described an element of damages not supported by the evidence as "invalid," expressly using such language from *Casteel*. The Ninth Court of Appeals has apparently concluded that *Casteel*'s reasoning would apply to a case where a liability theory was defective or invalid because of lack of evidence. *See In the Interest of S.T.*, 127 S.W.3d 371, 380 (Tex. App.–Beaumont 2004, no pet.) ("The significance to our case of the *Harris County v. Smith* holding is that the Court applied *Casteel* harm analysis to a broad-form submission which was erroneous because an element submitted had no support in the evidence... The problem addressed in *Harris County v. Smith* is a potential difficulty to be avoided in any broad-form submission, including the type of submission approved in *E.B.* and at issue here.").

Other courts of appeals have construed *Casteel* to apply only to legal theories that are invalid in the sense that the plaintiff had no right to assert the theory, but not as a result of lack of evidence. For example, in *Haggar Apparel Co. v. Leal*, 100 S.W.3d 303, 311-312 (Tex. App.–Corpus Christi 2002, pet. requested), the Thirteenth Court of Appeals addressed a complaint that the trial court submitted a broad-form question which allowed the jury to find liability if the defendant either discharged the plaintiff or discriminated against her. The Corpus Christi Court of Appeals found that *Casteel* was not applicable "because both termination and discrimination were legally valid theories regardless of the state of the evidence." *Id.* at 312. In *El Paso Refining, Inc. v. Scurlock Permian Corporation*, 77 S.W.3d 374, 386 (Tex. A"pp.– El Paso 2002, pet. denied), the Court of Appeals similarly stated as follows: "Under *Casteel*, remand is only required when a theory should

never have been presented to the jury because there was no valid *legal*, as opposed to *factual*, basis for such submission." (emphasis in original) These two decisions were issued by the Thirteenth and Eighth Courts of Appeals prior to the Supreme Court's decision in *Harris County v. Smith*. The plaintiff practitioner should assume that any legal theory or cause of action asserted in the jury charge which is not supported by the evidence is "invalid" as described in *Casteel*. For that reason, the plaintiff practitioner needs to submit separate questions or checklists for these multiple causes of action to allow the plaintiff the opportunity to argue that even if one of the theories is legally invalid due to lack of evidence, the jury returned findings on causes of action that were supported by the evidence which will support the judgment.

Another question left unanswered by *Casteel* involves the situation where the plaintiff asserts a single cause of action, but the defendant claims that certain of the acts or conduct relied upon by the plaintiff to support the single cause of action fail as a matter of law. To illustrate this situation, consider an automobile accident case in which the plaintiff alleges simple negligence, but asserts that the defendant engaged in multiple acts which constituted such negligence. For example, in such a case the plaintiff may assert that the defendant failed to keep a proper lookout, was driving too fast and failed to properly maintain his automobile.

The situation arises in more complicated cases. For example, consider a medical malpractice case. It is very common for the plaintiff's expert to testify to multiple acts or omissions constituting negligence by healthcare personnel. Similarly, in business cases a plaintiff may assert a fraudulent inducement claim based on multiple, independent omissions or representations made at different periods of time. What happens in any of these cases if the single liability question is submitted in broad-form and the defendant successfully convinces the trial court or the court of appeals that while certain of the acts or events relied upon constitute sufficient evidence to support the liability findings, other events relied upon by the plaintiff constitute no evidence under the legal theory submitted? The Fort Worth Court of Appeals recently addressed this very issue in *Columbia Medical Center of Las Colinas v. Bush*, 122 S.W.3d 835, 857-859 (Tex. App.–Fort Worth 2003, pet. denied), a medical malpractice case. The trial court submitted a broad-form negligence question against the hospital and nurse employees. On appeal, the appellants argued that there was charge error "because some of the specific negligent acts pleaded by Scott within his negligence cause of action were supported by no evidence." *Id*. at 857. The Court of Appeals first concluded that *Casteel* did not apply to this case because there was only one theory of recovery submitted – negligence – and that the case did not present a situation of valid theories of recovery commingled with invalid theories. *Id*. at 858. Secondly, the Court held that there was no authority under Texas law requiring instructions from the court as to what specific acts of negligence the jury could or could not consider. The Court stated "appellants have not cited, nor has our research revealed, any case holding that limiting instructions concerning pleaded, alternative, allegedly negligent acts are required to properly submit a single negligence liability theory." *Id*. at 859. The Court of Appeals concluded as follows:

> We decline to expand the Supreme Court's holdings in *Casteel* and *Harris County* by applying them to require submission of limiting instructions concerning specific pleaded negligent acts within a single broad-form submission of a negligence theory of liability.

Id. at 859. The Supreme Court recently denied petition for review in the above case.

The arguments made by appellants in *Columbia Medical Center of Las Colinas v. Bush* are a frontal assault on broad-form submission. If their arguments were accepted, the trial court would be required to submit a separate negligence question as to every act of negligence relied upon by the plaintiff, similar to the charges seen in railroad and automobile accident cases prior to the advent of broad-form submission. Alternatively, the trial court would have to instruct the jury as to every act of alleged negligence that the jury could or could not consider in answering the question. The author of this article does not believe that this position will be readily embraced by the Texas Supreme Court. However, depending on the size of the case or the controversial nature of the case, such charge arguments could be used as a basis for obtaining a new trial or setting aside the judgment. In a medical malpractice case or other traditional negligence case which involves multiple allegations of negligence it is probably unrealistic to try to submit any type of charge which restricts the jury's consideration to certain acts of negligence. Furthermore, most defendants would probably object to such an attempt as an improper comment on the weight of the evidence, improper bolstering or a prohibited "nudge." However, the plaintiff practitioner should consider whether it would be appropriate to submit more specific questions in certain types of cases. For example, in certain types of commercial cases the plaintiff's fraud claim may be based on one or two discrete misrepresentations or a discrete instance of omission or failure to disclose. If the plaintiff has concern that certain representations or certain

omissions could be held to constitute no evidence of fraud on appeal, it may be prudent to phrase the fraud questions to specifically inquire only as to those representations that the plaintiff feels he will be able to support on appeal, rather than submitting a broad-form question which globally inquires about "fraud" defined as a false representation without any specification of the timing or content of the representation. The same analysis would apply to tortious interference cases that involve multiple acts of interference.

B. Other Practical Considerations on Submission of Affirmative Claims for Relief

Any case, especially business litigation, which involves multiple parties and multiple theories of recovery represents a challenge to the plaintiff practitioner to submit a charge that is succinct and understandable to the jury. Juries, will at times, have difficulty in answering questions which are shades and phases of each other or are virtually identical, even though the questions are intended to submit distinct causes of action or claims as to distinct parties. One way to avoid problems in this regard is to use broad-form submissions, check lists and combined questions keeping in mind the *Casteel* and *Harris v. Smith* concerns previously discussed. If the plaintiff is asserting a fraud claim against three or four separate parties, one fraud question with a separate "yes" or "no" answer for each of the parties can be used rather than four separate questions for each party. Similarly, it should be unnecessary under the current state of the law to submit a damage question for every single liability theory where the measure of damages is the same under all the theories. *See Durban v. Guajardo*, 79 S.W.3d 198, 207 (Tex. App.–Dallas 2002, no pet.) ("Third, *Casteel* is not applicable, when, as in this case, the damages from two causes of action, one valid, the other arguably invalid, are the same."); *Z.A.O. Inc v. Yarbrough Drive Ctr. Joint Venture*, 50 S.W3d 531, 549 (Tex. App.–El Paso 2001, no pet.). For example, if you are seeking lost profits for breach of contract and for fraudulent inducement, one damage submission should be sufficient. It is difficult for the jury to understand why the court submits six damage questions for six different theories where the plaintiff's attorney argues that the jury should put the same number in every single answer blank. Despite instructions to the jury that the Court will not permit double recovery and that the jury should not reduce damages in one question because of its answer to another damage question, there is a tendency for the jury to allocate the amount of damages they intend to award over the different damage questions, rather than simply awarding the full amount of damages in each question attributable to each theory of recovery.

It is no longer advisable for a plaintiff to submit multiple causes of action unless there is some indication in the jury charge as to how the jury answered each theory or cause of action. For example, in a case involving multiple DTPA or Insurance Code violations the plaintiff needs to submit a separate question for every claimed violation or a single question which contains a checklist requiring the jury to affirmatively answer as to every claimed DTPA or Insurance Code violation. Similarly, broad-form submission of different theories of fraud (false statements of fact, false promises, failure to disclose, etc.) must be submitted separately as to each distinct fraud theory or submitted in a checklist fashion. In the event that the reviewing court either holds that a theory is not supported by the evidence or that the theory or cause of action is not cognizable under the law, the separate affirmative answers to other theories of recovery should be sufficient to support the judgment.

C. Practical Considerations on Submission of Defensive Theories

Similar reasoning applies to attempts by defendants to submit broad-form defensive theories. Plaintiff's counsel should consider objecting to and requiring that each defensive theory be submitted separately or the jury be asked to affirmatively answer each defensive theory through a checklist answer. The strategy call for plaintiff's counsel is that in most business cases, every defendant will plead the vague and amorphous affirmative defense trilogy of "waiver, estoppel and ratification." If the evidence on those defenses is fairly weak, it is often advantageous for the plaintiff's counsel to have them submitted in one broad "yes or no" question with definitions of waiver, estoppel and ratification. Plaintiff's counsel can simply argue to the jury to answer the question "no," without having to focus on each separate definition. If the jury answers such a broad-form question "yes," plaintiff is faced with the prospect on appeal of demonstrating that *none* of the three defenses submitted within the question are supported by the evidence. By submitting the question separately or through checklist fashion, plaintiff's counsel will only have to attack the defenses as to which the jury actually found in favor of the defendant.

D. *KPH Consolidation, Inc. v. Romero*

As discussed above, there are strategies for the plaintiff to deal with the holdings of *Casteel* and *Harris v. Smith*. One of the most troubling opinions for the plaintiff practitioner is the recent opinion of the Fourteenth Court of Appeals in *KPH Consolidation, Inc. v. Romero*, 102 S.W.3d 135 (Tex. App.–Houston [14th Dist.] 2003, pet. granted). In that case, Mr. Romero suffered severe neurological and physical injuries

following a surgery performed by Dr. Merrimon Baker at Columbia Kingwood Medical Center. Mr. Romero settled with the doctors and went to trial only against the Hospital and the nurse-anesthetist involved in the surgery. Romero asserted two distinct claims against the Hospital. One was based on the hospital's negligence in connection with its delivery of blood products to the operating room. *Id.* at 141. The other claim against the Hospital was a malicious credentialing claim asserting that the Hospital knew that Dr. Baker was a drug addict and an incompetent surgeon. *Id.* The first jury question in the case asked whether the Hospital, the nurse-anesthetist, Dr. Baker or the anesthesiologist (Dr. Huie) were negligent. *Id.* at 157. The jury found that the Hospital, Dr. Baker and Dr. Huie were all negligent. *Id.* In Question No. 2, the jury was asked if the Hospital acted with malice in credentialing Dr. Baker. *Id.* The jury answered that question "yes." *Id.* Question 3 apportioned responsibility between the defendants. *Id.* at 158. The jury apportioned responsibility as follows: Hospital 40%; Dr. Baker 40%; Dr. Huie 20%.

The trial court subsequently rendered a judgment for $23 million against the Hospital. The Court of Appeals held there was charge error and remanded the case for new trial. *Id.* at 159-160. Initially, the Court of Appeals found that there was no evidence to support the cause of action against the Hospital based on malicious credentialing. The Court of Appeals concluded that there was no *Casteel* problem with the charge because the plaintiffs had submitted separately the cause of action against the Hospital based on malicious credentialing and the cause of action based on negligence. *Id.* at 159. The Court of Appeals reversed because it held that the invalid malicious credentialing cause of action tainted the jury's percentage allocation of responsibility in Question No. 3. The Court's statement on the issue is as follows:

> The jury found the Hospital liable for both negligence (question 1) and malicious credentialing (question 2). The jury also found the Hospital 40% liable (question 3) for Romero's injuries. We find it hard to believe that the 40% liability the jury attributed to the Hospital in question 3 was not based (1) partly on the liability it found for negligence (question 1), and (2) partly on the liability it found for malicious credentialing (question 2). In fact, we find it inconceivable that the jury would find liability based on the two different acts, but not attribute some responsibility to both acts. It may be that 39% of the responsibility was attributed to malicious credentialing and 1% to negligence, or that 39% was attributed to negligence and only 1% to malicious credentialing. Regardless, the error is present.
>
> The actual damages also are permeated by this problem because the actual damages question – like liability – was predicted on the jury finding either negligence or malicious credentialing or both. The jury found both. Since the question was predicated on either or both acts, the jury was given the impression that it could base damages on either or both acts.

Id. at 159-160.

The charge submitted in *Romero* was in express accordance with the Pattern Jury Charge and in express accordance with numerous other Texas cases. It is unclear how the jury charge could have been submitted in any fashion to preclude remand under the Court of Appeals' reasoning once the malicious credentialing finding was determined to be invalid. The only way that one could probably address the problem would be to ask the jury to make separate percentage apportionments based on each theory of recovery – a claim involving four separate and distinct theories of recovery in tort would require four proportionate responsibility submissions which could potentially result in differing damage amounts when the jury's award of damages is applied to the percentage of responsibility assessed by the jury. No Texas case has ever suggested that this needs to be done, but this would appear to be the only way to have submitted this case to have satisfied the Court of Appeals. The potential applicability of the reasoning in *Romero* is broad. That is because in 1995 the Legislature amended Chapter 33 of the Texas Civil Practice & Remedies Code which addresses proportionate responsibility. Prior to 1995, Chapter 33 was limited to negligence and strict liability causes of action. With the 1995 changes, Chapter 33 became applicable, with certain very limited exceptions, to "any cause of action based on tort in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought." The expansion of Chapter 33 to any cause of action based on tort means that proportionate responsibility questions can now be submitted in any type of tort case, including fraud cases and other cases involving intentional torts. If the reasoning of *Romero* applies, any apportionment question which is based in part on a theory of recovery that is not supported by the evidence requires reversal of the judgment. The Texas Supreme Court has granted petition for review in the *Romero* case. Plaintiff practitioners should follow these proceedings closely for guidance on how to address the apportionment question in the context of valid and invalid theories of recovery.

Conclusion

The current Texas Supreme Court continues to signal that

it will review broad-form jury charges despite the mandate contained in Rule 277. Plaintiff practitioners must be sensitive not only to the specific holdings in *Casteel* and *Harris v. Smith*, but also to the reasoning underlying those two holding which demonstrate that the Court is concerned with any jury submission which contains invalid theories of recovery or theories or damage elements not supported by the evidence. Plaintiff practitioners must strive, in order to address the *Casteel* and *Harris v. Smith* concerns, to submit jury charges which will support a judgment even if a specific theory is later determined to be invalid for any reason or a specific element of damages is determined not to be supported by the evidence or not available under Texas law.

Vincent Lee "Tripp" Marable III is a shareholder in the Wharton, Texas, law firm of Paul Webb, P.C. The majority of Mr. Marable's practice is devoted to appeals and appellate related litigation on behalf of plaintiffs in commercial business disputes, personal injury cases and medical and legal malpractice proceedings. Mr. Marable's e-mail address is trippmarable@sbcglobal.net. ★

CRAFTING A COURT'S CHARGE FROM THE DEFENDANT'S PERSPECTIVE

BY ROBERT B. GILBREATH

Introduction

Defense attorneys usually want one of three types of charges, in descending order of preference:

(i) a charge that is favorable to the defendant, but not so much so that it contains reversible error (strategy one);
(ii) a balanced charge that gives the defendant a fighting chance (strategy two); or
(ii) a charge containing error that would require reversal of a judgment for the plaintiff (strategy three).

In this paper, I will offer suggestions on how to implement the three strategies outlined above during each phase of the charge process: the pre-trial filing of the proposed charge, the informal charge conference, and the formal charge conference.

I. Preparing the pre-trial proposed charge.

There are a lot of misconceptions about what should be prepared in response to a trial court's request that the parties file a proposed charge at the start of or before the trial. These misconceptions are dispelled by keeping one thing in mind: You do not preserve error by filing a proposed charge with the court.[1] Courts ask for a proposed charge at or before the start of the case so they can get an idea of what the parties think the jury charge should look like. The proposed charge is nothing more than a starting point for the laborious process of preparing the actual jury charge.

A. File a proposed charge that looks like something the court could give the jury with few changes.

Your goal should be for the court to use your proposed charge as the template for the actual charge. In other words, you want the court to open the informal charge conference by announcing, "I've looked at both of the proposed charges, and I'd like to work off of the defendant's because it comes the closest to what I think should actually be submitted to the jury."[2] Achieving that goal requires you to make your proposed charge look like an actual jury charge, *i.e.*, something the court could hand to the jury with few revisions. To do that you should:

- give the court a computer diskette containing your proposed charge (find out in advance whether the court prefers Word® or Wordperfect®)
- include the boilerplate instructions concerning the deliberations from the Pattern Jury Charge (PJC);
- place the instructions and definitions with the question they will accompany (when it comes time to preserve error with written proposals at the formal charge conference, instructions and definitions should be separated from the questions);
- submit both the PJC version of the plaintiff's questions, definitions, and instructions as well as defensive questions, definitions, and instructions;
- in commercial cases, include a carefully-conceived measure of damages that is legally correct and, if at all possible, enables the jury to consider not just the defendant's damage model, but also the plaintiff's,[3]
- avoid submitting every imaginable affirmative defensive and instead submit only those that are likely to be supported by the law and the evidence;
- avoid larding up the charge with a plethora of non-PJC instructions designed to nudge the jury in favor of the defense; and
- omit the "Given, Refused, Modified" blanks that typically accompany a written request tendered to the court in the formal charge conference.

You may be asking, "But don't I need the "Given, Refused, Modified" blanks for error preservation purposes?" The answer is yes, but you don't need them in the proposed charge filed at the start of the case. You need them on the individual submissions that you will tender during the formal charge conference. The formal charge conference is when you preserve error by tendering individual requests for questions, instructions, and definitions. And handing the judge a page torn out of your proposed charge may not preserve error if a portion of what is contained on that page is already in the charge.[4]

Ordinarily, the only thing I include in my proposed charge that would not appear in an actual jury charge is the authority for my proposed submissions. But I try to make the authorities

as unobtrusive as possible so that they do not detract from the overall look of my proposal as something that could be handed to the jury without any significant alterations. I do so by placing the authorities at the bottom of the page, well separated from the questions, definitions, and instructions. I also make clear which instruction or definition each authority supports.

My theory is that if the plaintiff's proposed charge is overtly slanted, just plain sloppy, or contains only the plaintiff's questions, definitions, and instructions, the court is more likely to view my complete and cleaner-looking proposed charge as the starting place for the negotiations on what the actual charge should look like. Again, I want the judge to be thinking, "this one looks like a charge I could hand to the jury with few or no changes."

A Miranda warning about the proposed charge — it can and will be used against you. Once you put something in your proposed charge, it will be hard to back away from it later. You can file an amended proposed charge, but that won't stop the plaintiff's attorney from pointing to your original proposal and arguing: "Your honor, even defense counsel believed that instruction was proper." Plaintiff's counsel can make the same argument on appeal if you are attacking as reversible error an instruction or definition you included in your proposed charge.

This is not to say that your proposed charge shouldn't, as general rule, contain the PJC version of the questions submitting the plaintiff's legitimate claims; you can always argue later that the plaintiff failed to follow through by introducing legally sufficient evidence to support those claims. What I'm suggesting is that you shouldn't, for example, include a DTPA question if you intend to argue that the plaintiff does not qualify as a "consumer" under the DTPA. Or, if the plaintiff has asserted a fraud claim and is alleging both affirmative misrepresentations and failure to disclose, you shouldn't submit the PJC definition of fraud by omission if it is your position that the defendant owed no duty to disclose information to the plaintiff.

B. Implementing strategies one and two in the proposed charge.

When drafting a proposed charge, the defense attorney should be pursuing strategy one — a charge that is favorable to the defendant, but not so much so that it contains reversible error — or strategy two — a balanced charge that gives the defendant a fighting chance. Pursuing strategy three at this stage is a bad idea even if you think your client is going to lose the trial. Appellate courts do not countenance attempts to lead a trial court into error.[5]

(i) *Strategy one.*

Implementing strategy one — a charge that nudges the jury to find for the defendant — requires careful lawyering. The charge should not be manifestly unfair to the plaintiff. If you are too aggressive, you may create reversible error, either through a single instruction that by itself gives too strong of a nudge or through the cumulative effect of too many pro-defense instructions.[6] Bear in mind that former Texas Supreme Court Justice Kilgarlin's admonition — "The jury need not and should not be burdened with surplus instructions" — remains on the books.[7] The key is to craft a few well-chosen instructions that find support in the law and *gently* urge the jury to embrace the defendant's position.

In one case, for example, the controlling issue was whether any reasonable method of extracting uranium from a particular piece of land would destroy the surface of the land. The trial court instructed the jury that "to be 'reasonable,' a method does not have to be the best or the most economical method, nor does it mean that the uranium must be removed by that method." The Texas Supreme Court acknowledged that this nudging instruction was "counter" to the "evidentiary arguments" asserted by the party challenging the instruction, but nonetheless held that it was not reversible error: "Although the instruction might incidentally comment on the evidence, a court's charge is not objectionable on the ground that it incidentally constitutes a comment on the weight of the evidence when it is properly a part of an instruction or definition."[8]

If you use Westlaw,® you can often find a case from which you can craft a definition or instruction by using a search term like this: "WP(ratification)." "WP" means "words and phrases," and a "WP(term)" search will pull up cases that define the term within the parentheses. You can then find the case containing the most defense-oriented definition of the legal concept you intend to rely on.

In addition, published opinions addressing facts and issues similar to those in your case may be a useful source for favorable instructions. Consider, for example, a case in which you are defending a stockbroker against allegations that he deceived an elderly plaintiff into making inappropriate investments. In that situation, you might want to include an instruction paraphrasing the Texas Supreme Court's holding that a stockbroker does not owe a duty to determine the mental capacity of an elderly client.[9]

(ii) *Strategy two.*
Even when you are pursuing a strategy two — a balanced charge that gives the defendant a fighting chance — you must sometimes depart from the PJC. For example, in the stockbroker hypothetical mentioned above, if you anticipate that the plaintiff's attorney is going to actively portray the stockbroker as having taken advantage of a mentally-impaired plaintiff, fairness may require an instruction advising the jury that the defendant had no duty to determine the plaintiff's mental capacity.

Another example is the PJC instruction accompanying a breach of fiduciary duties question. One commentator has observed that even Mother Theresa could not have gotten through that instruction unscathed.[10] You should therefore consider whether the facts and the law would support an argument that the defendant was not an absolute fiduciary and therefore owed only limited fiduciary duties to the plaintiff. If so, then it is reversible error to submit the PJC's "Mother Theresa" instruction.[11]

You should also check to see whether any recent cases have effectively rendered the PJC question or instruction applicable to your case incorrect. For example, in 2001, the Texas Supreme Court held that to recover for tortious interference with a prospective business relationship, a plaintiff must prove that the defendant's conduct was independently tortious or wrongful.[12] That change was not reflected in the PJC until the 2002 edition was issued.[13] And in the 2002 edition, the Committee on Pattern Jury Charges "expresses no opinion on the proper submission of the cause of action."[14]

Additionally, consider whether a contract between the parties requires a departure from the standard PJC submissions. For example, the parties may have agreed to limit the type of damages recoverable by the non-breaching party, which would require a special measure of damages instruction.[15] Or, the parties may have entered into a preliminary agreement specifying that certain events must occur before the parties will be bound by a contemplated contractual arrangement.[16] In that case, the PJC contract formation question should be accompanied by an instruction advising the jury what events were required to occur before the parties may be deemed to have entered into a binding contract.[17]

II. The informal charge conference.
Near the end of the trial, the court will hold an informal charge conference to discuss with the attorneys what the charge ought to contain. Ordinarily, the informal charge conference is off the record and is not intended to be a forum for preserving error; the court will conduct a separate "formal" charge conference on the record so that the attorneys can make objections and requests for the purpose of preserving error. If the court asks the court reporter to record the "informal" charge conference, you should ask whether there will be a separate formal charge conference for the purpose of preserving error. If not, you must treat the conference as the formal charge conference and follow the preservation of error rules.

If you've handled a few charge conferences, you know that this part of the process can be a frustrating ordeal. An indecisive judge can make your life miserable by allowing the attorneys to argue for hours about the instructions, definitions, and questions. And if the defense attorney who will be giving the closing argument must participate in this ordeal, it can be a serious distraction. Ideally, a second chair counsel and, if possible, an appellate attorney, should handle the charge conference while lead counsel prepares the closing argument.

A. Implementing strategy one in the informal charge conference.
In a strategy one situation, where the goal is to get a charge that gently nudges the jury to rule in the defendant's favor, you must be prepared to forcefully argue that your version of an instruction, definition, or question should be submitted in addition to, or in place of, the recommended PJC question, instruction, or definition. For example, in its 2001 decision addressing tortious interference with prospective contractual relationships, the Texas Supreme Court explained that "'in an economic system founded upon the principle of free competition, competitors should not be liable in tort for seeking a legitimate business advantage.'"[18] Accordingly, you might want to argue that it is error to submit an interference with prospective business relations claim without instructing the jury as follows: "Conduct that is merely 'sharp' or unfair is not tortious interference."[19]

I am not suggesting that the informal charge conference should become a shouting match. Often, however, the attorney who argues the most doggedly prevails. Figure out which style works best for you with your particular judge. If the calm and rational approach works, let the plaintiff's attorney be the one who puts the judge off with loud and abusive arguments. But if the table-pounding approach appears to be the style that carries the day, then by all means fight tooth and nail, and come to the informal charge conference well armed with authority showing why your non-PJC question, definition, or instruction is necessary and proper.

B. Implementing strategy two in the informal charge conference.

Let's assume you've got a judge who actively participates in preparing the charge rather than simply urging the lawyers to work it out and then ultimately ceding drafting responsibility to the plaintiff's attorney. In that case, you will probably be dealing with a judge who wants a balanced charge and is inclined to stick with the recommended submissions in the various PJC publications. In that strategy two situation, your arguments during the informal charge conference will consist mostly of comments like, "it's straight out of PJC, your honor." Nine times out ten, that argument will win the day.

A word of caution: If you will be asking the court for an instruction or definition that is not contained in PJC, don't set yourself up by arguing that PJC is the final word on what ought to be contained in the charge. If you even imply the PJC is controlling, the plaintiff attorney will jump all over you when you ask for a non-PJC submission — "Oh, *now* he's saying that PJC isn't controlling, your honor." And if the judge is already inclined to stick with the PJC, then that snide little remark is likely to be persuasive.

In those instances where you need to depart from the PJC to ensure that the charge is fair and balanced, be prepared to offer a strong defense of your substitute by citing authority. You might even want to direct the court's attention to one of the Texas Supreme Court cases indicating that the PJC is not always correct.[20]

An example of a situation where you may need to argue for a non-PJC submission is a case where the plaintiff is seeking exemplary damages and neither party has introduced evidence of the defendant's net worth. The PJC instruction accompanying the exemplary damages question lists the defendant's net worth as a factor the jury may consider in determining the amount of exemplary damages to award.[21] In the absence of net worth evidence, however, the jury will be forced to speculate. If the defendant is a corporation, for example, the jury might erroneously conclude the defendant's net worth is far higher than it really is. In that case, you may want to ask the court to strike net worth of the defendant from the list of factors the jury may consider.

Another example: the PJC appears to suggest that a finding of fraud by clear and convincing evidence is a proper predicate for exemplary damages even when the underlying liability theory is fraud.[22] But a jury that has found fraud once is likely to find it again despite the supposedly higher, but actually vague, "clear and convincing evidence" burden of proof.[23] If you believe that a malice finding is the appropriate predicate when the underlying theory of recovery is fraud, you must be prepared to argue that the legislature could not possibly have intended a finding of "fraudulent fraud" to open the door to exemplary damages.

When presenting your arguments to a judge who takes an active role in preparing the charge to ensure that it is even-handed, you must appeal to the judge's sense of fair play. Don't destroy your credibility by insisting on submissions that are unsupported by the evidence or the law. And don't be obstinate. Make acceptable concessions and present yourself as the voice of reason.

For example, most judges will submit a theory of recovery unless it is absolutely clear that the theory is legally untenable as a matter of law or lacks any support in the evidence. You may be convinced that a theory of recovery should not be submitted, but if the court has stated that it will seriously consider disregarding a finding for the plaintiff on that claim, you might want to save your powder for a more important problem elsewhere in the charge: make your position known and move on.[24]

On the other hand, sometimes there are good reasons to fight hard against submission of a claim with questionable legal or evidentiary support. The trial court might not follow through with a threat to disregard a "yes" answer on that claim. Also, in some instances even the mere submission of a claim might prejudice the jury against your client. For example, improperly submitting a breach of fiduciary duties claim could give the jury an erroneous impression that your client owed a heightened duty to the plaintiff; the jury might subconsciously hold your client to a stricter standard of care when answering other liability questions. In a situation like that, calmly explain that the Texas Supreme Court has stated that improperly submitting a claim for which there is no evidence can be harmful error if the jury is misled or confused.[25]

C. Handling the "strategy three" situation in the informal charge conference.

Now let's deal with the situation where the court incorrectly believes it is "the plaintiff's charge," not "the court's charge." You'll know you're in that situation when the court responds to one of your arguments by saying something like this: "It's the plaintiff's case, and if they're willing to risk reversible error, I'll let them have that instruction." When that happens, you will probably have no choice but to implement strategy three.

(1) *Let the plaintiff's attorney "overrule" your valid objections for the court.*

It is wrong to lead a trial court into error. But when there is no hope of persuading the court that it isn't "the plaintiff's charge," I do not believe it is the defense counsel's job to prevent the plaintiff's attorney from running amok by creating a charge that contains reversible error. A judge who abdicates responsibility for preparing the court's charge by letting the plaintiff's attorney have whatever he or she wants probably isn't very interested in hearing what the defense counsel has to say about the charge. When the judge has made it clear that he or she isn't going to heed your suggestions anyway, state your objections in a calm and unemotional manner and let the plaintiff's attorney "overrule" them for the court.[26]

One objection plaintiff's attorneys will often "overrule" is that there is no pleading to support the submission of a question or instruction. The plaintiff's attorney will usually argue that the issue has been "tried by consent." Under Texas case law, however, there is no trial by consent if the defendant objects to the submission of an issue in the charge.[27] "Even if the complaining party did not object to testimony on an issue not pled, if he objects to the submission of that issue on some tenable grounds, he cannot be regarded as having impliedly consented to the trial of such issue."[28] Instead of resisting the objection, the plaintiff's attorney should ask for a trial amendment, which ordinarily should be freely granted.[29] If the plaintiff's attorney does not seek a trial amendment, and there truly is no pleading to support the submission of a question or instruction, the defendant will have a strong argument for reversal.[30]

Another objection that plaintiff's attorneys will sometimes "overrule" is a "Casteel" objection. After the Texas Supreme Court's recent decisions in *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000) and *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002), it is extremely risky for a plaintiff's attorney to resist a request for separate answer blanks in a question submitting multiple theories of liability or elements of damage. If the plaintiff's attorney "overrules" a Casteel objection and one or more of the various theories of liability or elements of damages should not have been submitted, the defendant will have a strong argument for reversal.

(2) *But don't sandbag the court.*

Fortunately, the vast majority of judges are too conscientious to simply defer to the wishes of the plaintiff's attorney. Usually, the judge will want to have a good idea of the objections you are going to make in the formal charge conference. That way, he or she can correct a problem before the formal charge conference, which usually occurs shortly before the closing arguments while the jury members are cooling their heels in the jury room. If you didn't make your objection known during the informal charge conference, then during the formal charge conference you may be on the receiving end of an angry outburst from a judge who thinks you've been lying behind the log and who must now make the jury wait while changes are made to the charge.

By the way, during the formal charge conference do not ignore inaccurate comments by plaintiff's counsel that you said or did something during the informal charge conference that is inconsistent with your objection or request. Respond on the record to prevent the plaintiff's attorney from later arguing that you invited the error. Conversely, if the plaintiff's attorney suddenly changes his or her tune in the formal charge conference, consider making a statement on the record indicating what his or her position was in the informal charge conference. The court of appeals will be less interested in helping a party whose attorney sandbagged the trial court.

III. The formal charge conference.

Once the court is ready for the formal charge conference, there is little chance of persuading the judge to revise the charge. Still, if you have decided to go with strategy one or two, the formal charge conference does give you one last long-shot opportunity to secure a favorable or at least balanced charge through the use of "ethos":

> The ancient Greeks knew that whatever the context, there are elements common to any argument that will determine its effectiveness. One of the most significant of these elements, in fact Aristotle called it the most potent, is ethos—the character of the advocate as perceived by the listener. In other words, ethos concerns the persuasive effect that results from what the audience thinks of the speaker.[31]

The theory of ethos suggests that if you can demonstrate that you, unlike opposing counsel, know how to preserve error, the judge may realize he or she has bet on the wrong horse and agree to make one or more of the changes you want.

It will quickly become apparent which attorney knows how to preserve error. The attorney who knows how to preserve error speaks clearly so that the court reporter can hear and understand what is being said and begins with a preamble such as:

> Comes now defendant, in the presence of the Court and opposing counsel, and before the charge has been submitted to the jury, and makes the following objections and requests with respect to the Court's charge.

The attorney who knows how to preserve error makes a note of the exact time the final draft of the court's charge was given to the attorneys. If the court has not allowed sufficient time to formulate objections and has refused an off-the-record request for more time, the attorney prefaces his objections with a statement on the record of how much time was given and follows it up with a request for additional time to formulate objections and requests.

The attorney who knows how to preserve error makes precise objections that inform the court of the basis of the complaint. Vague and general objections, such as "defendant objects to the definition of 'agent'" or "that instruction will prejudice the defendant" are not made.[32] Nor are spurious objections, such as: "Question 1 should not be submitted because the evidence is factually insufficient to support that ground of recovery."[33] An objection to one part of the charge is not incorporated by reference for another part of the charge.[34] And the attorney who knows how to preserve error makes sure to get a ruling on his or her objections and may even dictate an order for the court, such as:

> The above objections were duly and timely presented to the court by dictation to the court reporter in the presence of the court and all counsel, before submission of the charge to the jury, and are hereby in all things: "Overruled" (by the court).[35]

An attorney who knows how to preserve error does not make an en masse tender of his various written requests; instead, they are tendered one at a time.[36] Requests are made on a piece of paper that does not include anything already contained in the charge and does not include more than one instruction, definition, or question.[37] The attorney does not tender the request and ask that it be "overruled" but instead that the request be "granted."

The attorney who knows how to preserve error makes sure that the court signs each refused request. And after tendering all of his or her written requests, the attorney asks the court to "place defendant's written requests with the papers of the cause" and also asks permission to photocopy the endorsed requests (in case the originals are misplaced or lost by the court staff).

Most attorneys do not follow these rules and conventions, and their presentations during the formal charge appear feckless at best. If the plaintiff attorney's objections and requests are presented haphazardly, and you are very lucky, the trial court may realize that you knew what you were talking about during the informal charge and take the time to correct one or more of errors set out in your objections and requests.

Conclusion

Securing a favorable court's charge is as much an exercise in amateur psychology as it is good lawyering. At every step of the process, you must consider your audience. If the judge is likely to be put off by any attempt to secure a non-PJC submission, then consider whether the comments accompanying a PJC recommendation will support an argument in favor of a slight, pro-defense deviation from the suggested submission. If the judge believes it's "the plaintiff's charge" rather than the court's charge, then consider whether you can turn opposing counsel's aggressiveness to your advantage by letting him or her "overrule" your objections and create a charge that contains reversible error. No matter which strategy you employ, however, remember the theory of "ethos" and never sacrifice your credibility by inviting error or misleading the court.

Robert B. Gilbreath is a shareholder, Jenkens & Gilchrist, A Professional Corporation; Board Certified in Civil Appellate Law by the Texas Board of Legal Specialization. ★

---

[1] *See F.S. New Products, Inc. v. Strong Indus., Inc.* 129 S.W.3d 606 (Tex. App.—Houston [14th Dist.] 2004, no pet. h.).

[2] *See Patlyek v. Brittain*, __ S.W.3d __ (Tex. Civ. App.—Austin 2004, no pet. h.) ("An informal charge conference began on July 8, and because Brittain's attorney had a more comprehensive proposed charge on a computer diskette, his was used as the court's working copy.").

[3] Frequently, the plaintiff's damages model cannot be reconciled with the facts and/or the governing law and therefore should not be reflected in the measure of damages you submit. *See Browning Oil Co. v. Luecke*, 38 S.W.3d 625, 643 (Tex. App.—Austin 2000, pet. denied) ("The court's charge must be sufficiently instructive to enable the jury to make an award of damages on proper grounds and correct principles of law. The trial court should limit the jury's consideration to the specific facts that are properly a part of the damages allowable. Failure to guide the jury on a proper legal measure of damages results in a fatally defective submission.") (citations omitted); *see also Chrysler Corp. v. McMorries*, 657 S.W.2d 858, 862 (Tex. App.—Amarillo 1983, no writ).

[4] *See Wright v. Cardox Corp.*, 774 S.W.2d 407, 409-10 (Tex. App.—Houston [14th Dist.] 1989, writ denied); *Riddick v. Quail Ridge Condominium Assoc., Inc.,* 7 S.W.3d 663, 674 (Tex. App.—Houston [14th

Dist.] 1999, no pet.); *Wal-Mart Stores, Inc. v. Deggs*, 971 S.W.2d 72, 81 (Tex. App.—Beaumont 1996), *rev'd on other grounds*, 968 S.W.2d 354 (Tex. 1998); *Munoz v. The Bierne Group, Inc.*, 919 S.W.2d 470, 471-72 (Tex. App.—San Antonio 1996, no writ).

[5] *See General Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 920 (Tex. 1993).

[6] *See, e.g., Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 756 (Tex. 1998) ("Given the vigorous evidentiary dispute over the significance of written notice and counsel's closing argument, we conclude that the surplus instruction probably did improperly and unduly nudge the jury to find against Cain. Accordingly, we agree with the court of appeals that the district court's error in instructing the jury regarding Section 92.052 was reversible error."); *see also Lemos v. Montez*, 680 S.W.2d 798, 800-801 (Tex.1984).

[7] *Acord v. General Motors, Inc.*, 669 S.W.2d 111, 116 (Tex. 1984).

[8] *Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 791 (Tex. 1995); *see also Raiford v. May Dept. Stores Co.*, 2 S.W.3d 527, 532 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (instruction added to PJC's recommended submission may have been incidental comment on the weight of the evidence but was not harmful error).

[9] *See Edward D. Jones & Co. v. Fletcher*, 975 S.W.539, 545 (Tex. 1998).

[10] Keith B. O'Connell, *Fraud, Conspiracy, Breach of Fiduciary Duty and Plaintiff's Conduct as a Defense to Intentional Torts: Issue Submission under Pattern Jury Charge Vol. IV* at p. 15, Texas Association of Defense Counsel Spring Meeting (1999).

[11] *Jochec v. Clayburne*, 863 S.W.2d 516 (Tex. App.–Austin 1993, writ denied).

[12] *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 726 (Tex. 2001).

[13] *See* Texas Pattern Jury Charges 106.2 (State Bar of Texas 2002).

[14] *Id.*

[15] *See, e.g., COC Services, Ltd. v. CompUSA Inc.*, __ S.W.3d __ (Tex. App.—Dallas 2004, no pet. h.) (holding that contract clause precluding recovery of lost profits was enforceable).

[16] *See id.*

[17] *See Texaco v. Pennzoil*, 729 S.W.2d 768, 812 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).

[18] *Sturges*, 52 S.W.3d at 716 (citation omitted).

[19] *Id.* at 726.

[20] *See, e.g., Exxon Corp. v. Perez*, 842 S.W.2d 629, 630 n.1 (Tex. 1992).

[21] Texas Pattern Jury Charges 110.34 (State Bar of Texas 2002).

[22] Texas Pattern Jury Charges 110.33 (State Bar of Texas 2002).

[23] *Huckabee v. Time Warner Entertainment Co, L.P.*, 19 S.W.3d 413, 422 (Tex. 2000) ("We have defined clear and convincing evidence as 'that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.' Clearly, this standard is vague.") (citations omitted).

[24] "No evidence" points may be raised by either (i) a motion for instructed verdict, (ii) a motion for judgment notwithstanding the verdict, (iii) an objection to the submission of the issue to the jury, (iv) a motion to disregard the jury's answer to a vital fact issue or (v) a motion for new trial. *Aero Energy, Inc. v. Circle C Drilling Co.*, 699 S.W.2d 821, 822 (Tex. 1985).

[25] *City of Brownsville v. Alvarado,* 897 S.W.2d 750, 752 (Tex.1995) ("When determining whether a particular question could have confused or misled the jury, we 'consider its probable effect on the minds of the jury in the light of the charge as a whole.'").

[26] *See, e.g., Castle Texas Production Ltd. Partnership v. The Long Trusts*, 134 S.W.2d 267, 287 (Tex. App.—Tyler 2003, pet. denied) (plaintiff's attorney created harmful error by insisting on instruction that attributed to plaintiffs contractual rights they did not have and that effectively deprived defendant of its rightful defenses).

[27] *See Texas Indus., Inc. v. Vaughan*, 919 S.W.2d 798, 803 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

[28] *Hirsch v. Hirsch,*770 S.W.2d 924, 926 (Tex. App.—El Paso 1989, no writ).

[29] Tex. R. Civ. P. 66; *Greenhalgh v. Service Lloyds Ins. Co.*, 787 S.W.2d 938, 939 (Tex. 1990)

[30] *See* Tex. R. Civ. P. 278; *Jenkins v. Hennigan*, 298 S.W.2d 905, 911 (Tex. Civ. App.—Beaumont 1957, writ ref'd n.r.e.); *Harvey v. Crockett Drilling Co.*, 242 S.W.2d 952, 954 (Tex. Civ. App.—Waco 1951, no writ).

[31] Ronald J. Waicukauski, JoAnne Epps, Paul Mark Sandler, *Ethos and the Art of Argument*, 26 Litigation 31 (1999).

[32] *See Carousel's Creamery, LLC v. Marble Slab Creamery, Inc.*, 134 S.W.3d 385, 403-05 (Tex. App.—Houston [1st Dist.] 2004, pet. pending).

[33] Whether to submit or not is determined on "no evidence – some evidence" grounds, not on factual sufficiency grounds. *See Strauss v. LaMark*, 366 S.W.2d 555 (Tex. 1963).

[34] *See* Tex. R. Civ. P. 274.

[35] *See* Louis S. Muldrow, *Mechanics of Charging the Jury A-5, St. Mary's Tenth Annual Procedural Law Institute, Jury Charges* (November 1988).

[36] *See Gutierrez v. County of Zapata*, 951 S.W.2d 831, 843 (Tex. App.—San Antonio 1997, no pet.) ("Requested issues and instructions submitted en masse will not be considered by the trial court and result in waiver.").

[37] *See id.*

PRESERVING ERROR IN THE CHARGE

BY DAVID F. JOHNSON

THE CHARGE IS THE CONTROLLING DOCUMENT that the jury uses to decide the factual issues of the case. If this document is wrong, then the jury's verdict is likely wrong. Thus, in Texas the charge is "a prolific source of reversals."[1] However, before a party can complain on appeal about an error in the charge, the error must be preserved. Historically, the charge preservation of error rules found in the Texas Rules of Civil Procedure were fairly certain. True, these rules are somewhat complicated in practice—but not impossibly so. Without expressly amending the Texas Rules of Civil Procedure, the Texas Supreme Court ambiguously loosened the charge preservation of error rules in the case of *State Department of Highways & Public Transportation v. Payne*.[2] This article will address the historical requirements for preserving error in the charge and the current interpretation of those requirements after the *Payne* decision.

I. THE BIG PICTURE TO CHARGE PRESERVATION OF ERROR

The Texas Rules of Civil Procedure require charge error to be preserved by objections and requests. Objections and requests, however, do not serve the same purpose or function and generally are not interchangeable—one will not preserve error when the other is required.[3] "We may generalize at this point and observe that objections preserve complaints of errors of commission, while requests preserve complaints of omission."[4] Proper objections are required to preserve complaints about questions, instructions, or definitions actually submitted in the charge, i.e., acts of commission.[5] A substantially correct written request is required to preserve error for the failure to submit questions relied upon by the requesting party, i.e., acts of omission.[6] Further, a written request is required to preserve error for the failure to submit any instruction or definition, regardless of which party relied upon the omission.[7] However, proper objections can also preserve error for failure to submit a question relied upon by an opposing party.[8] These are the basic "big picture" rules of charge preservation of error.

"We may generalize at this point and observe that objections preserve complaints of errors of commission, while requests preserve complaints of omission."

II. *PAYNE* STANDARD

In 1992 the Texas Supreme Court determined in *State Department of Highways and Transportation v. Payne* that a defendant preserved charge error when precedent and the Texas Rules of Civil Procedure held otherwise.[9] Basically, to preserve error the defendant was required to object to the negligence question and instructions as they were not a correct statement of the law—they left out a required element. The defendant did not make a specific objection. Rather, it submitted a proposed jury question on the missing element that was affirmatively incorrect as it misplaced the burden of proof. Under prior precedent, the defendant waived its complaint.

Notwithstanding, the Texas Supreme Court held that the defendant did preserve error because its "request is clearer than such an objection because it calls attention to the very element... omitted from the charge." The Court stated:

> The issue is not whether the trial court should have asked the jury the specific question requested by the State; rather, the issue is whether the State's request called the trial court's attention to the State's complaint... sufficiently to preserve error.... *There should be one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling.*[10]

The Court justified the outcome in *Payne* by stating that the charge preservation of error rules were just too difficult to understand and apply under a broad form submission practice.[11] Instead of clarifying the rules by taking more cases dealing with charge preservation of error or by amending the charge rules, the Court set out a vague one sentence standard for preserving error in the charge. The big debate is whether the formal charge rules mean what they say, or whether charge error is preserved by the less demanding *Payne* standard.

The Texas Supreme Court's post-*Payne* analysis of charge preservation of error has been inconsistent regarding what preserves error in the charge. On some occasions, the Court has relied upon the *Payne* standard and its loosened standards in holding that error was preserved.[12] On other occasions, the Court required a party to preserve error under the more exacting standards of the Texas Rules of Civil Procedure.[13] For example, though the Court allowed a defective instruction to preserve error in *Payne* because it allegedly made the trial court "aware" of the complaint, it was much stricter in finding that a party did not preserve error when it submitted a substantially correct instruction that was not specifically linked to the complained of question.[14] Correspondingly, the courts of appeals have been inconsistent in using the *Payne* standard versus the Texas Rules of Civil Procedure.

III. CURRENT STATE OF PRESERVATION OF ERROR

A. The Distinction Between Requests and Objections

The main conclusion from *Payne* is that there is no longer a distinction between a request and an objection so long as the error is "plainly" brought to the trial court's attention. Indeed, as in Payne, the Supreme Court has recently relied upon a combination of a request that was not in substantially correct wording and a vague objection in finding that a defendant preserved charge error.[15] The courts of appeals have been inconsistent in determining whether the distinction between a request and an objection still has any effect upon preservation of error. In some cases, the courts of appeals have held that there is still a distinction between an objection and a request and that one will not preserve error for the other.[16] In other cases, the courts of appeals have held that the distinction no longer affected preservation of error so long as the trial court was made aware of the party's complaint.[17]

B. The Request

Under the Texas Rules of Civil Procedure, unless an omitted question is relied upon by the opposing party, a party must request a question or error in the omission of the request is waived.[18] However, the party opposing the claim or defense can either request or object to preserve error as to the omitted element.[19] Additionally, a party must submit a request for an omitted instruction or definition or else error is waived.[20] Requests must be made before the case is submitted to the jury but separate and apart from the objections to the charge.[21]

Under the Texas Rules of Civil Procedure, a request must be in writing.[22] After *Payne*, the Texas Supreme Court reaffirmed that requests must be in writing.[23] However, under the *Payne* standard some courts of appeals no longer require a request to be in writing so long as the omission is brought to the attention of the trial court.[24] For example, in *In re Stevenson*, the court of appeals held that a party preserved error in an omitted instruction by: 1) orally requesting it at the charge conference, 2) referring to its en masse charge submitted before trial, and 3) by reading the request into the record at the formal charge conference.[25] However, other courts of appeals hold that an oral or dictated request does not preserve an error of omission.[26]

Under the Texas Rules of Civil Procedure, requests must be in substantially correct wording—in a form that would allow their submission as worded and that they are not affirmatively incorrect.[27] The requirement that a request be in substantially correct wording seems to have been overruled by *Payne* so long as the request brings the error to the attention of the trial court. Correspondingly, the Texas Supreme Court found that a request that was not in substantially correct wording still preserved error.[28] However, as late as 2002, the Court went the opposite direction and stated that a request must accurately state the law and be in substantially correct wording:

> An instruction is proper if it (1) assists the jury, (2) accurately states the law, and (3) finds support in the pleadings and evidence. Failure to submit [an instruction] shall not be deemed a ground for reversal of the judgment unless a substantially correct [instruction] has been requested in writing and tendered by the party complaining of the judgment.[29]

After *Payne*, some courts of appeals have required that requests be in substantially correct wording,[30] and others have not.[31]

Under the Texas Rules of Civil Procedure, a party may not offer requests en masse, i.e., tendering a complete charge.[32] The reasoning was that a trial court should not have to sift through voluminous requests in order to submit those that are proper.[33] After *Payne*, the Texas Supreme Court held that requests offered en masse can preserve error so long as they are not obscured.[34] Similarly, some courts of appeals have held that an en masse request did preserve error so long as it was not obscured.[35] However, some courts of appeals have held that a party fails to preserve error by merely relying upon an en masse charge.[36]

Prior to *Payne* some courts incorrectly held that when the complained of error is the omission of a question, instruction, or definition, the complaining party must both tender a substantially correct request and object to its omission.[37] Texas Supreme Court precedent would contradict the dual

requirement of a request and objection in this situation.[38] Under the more liberal *Payne* standard, it would seem that this dual requirement would no longer be recognized—however, some courts of appeals seem to ignore *Payne* and find waiver where the party did not both request and object to an omission.[39]

C. The Objection

Under the Texas Rules of Civil Procedure, affirmative errors in the charge must be preserved by objection.[40] It does not matter which party has the burden of proof as to the submission, if a submission in the charge is incorrect, an objection will preserve error.[41] Further, error in the omission of an opposing party's claim or defense via a question can be preserved by making an objection.[42] Objections should be presented to the court in writing or may be dictated to the court reporter in the presence of the judge and opposing counsel.[43] Objections dictated outside the presence of the judge are not preserved.[44] The objection must be specific—it must point out with particularity the error and the grounds of complaint.[45] The objection must be stated such that an appellate court can conclude that the trial court was "fully cognizant of the ground of the complaint" and deliberately chose to overrule it.[46] Under *Payne,* however, a request—even a defective request—can clarify, add specificity to, or replace a charge objection.[47]

A party cannot adopt by reference prior objections to the charge.[48] Generally, a party must make its own charge objections;[49] however, a party can adopt another party's objections if the trial court expressly allows it.[50] A party must raise its objections before the charge is read to the jury.[51] Agreements to make objections after the charge has gone to the jury will not be enforced.[52] Objections are not required until the court submits the charge to the attorneys for inspection, and the court must give a reasonable time for inspection.[53]

Normally, it is only the formal charge conference that is relevant in determining whether a party has preserved error.[54] However, the Texas Supreme Court has held that objections raised earlier in a trial—pretrial or pre-charge conference—can be reviewed to add specificity to an otherwise vague charge objection.[55] For example in *Holubec v. Brandenberger,* the Court held that a defendant did preserve error after relying upon the defendant's argument at a pre-trial summary judgment hearing to add specificity to a vague charge objection.[56] Courts of appeals have similarly appeared to have loosened up on the requirement that a party submit its requests and objections at the formal charge conference.[57] Therefore, on appeal, a party should cite to all portions of the record that may provide more specificity to its charge objection in defending a claim that the objection was vague or conclusory.

Finally, an objection may be waived if it is obscured by voluminous unfounded objections.[58] A party should not make an objection that is groundless, e.g., there is factually insufficient evidence to support the submission of a question (questions must be submitted even if there is factually insufficient evidence to support them so long as there is some evidence).[59] The test is whether by making voluminous objections, a party deprives the trial court of the real opportunity to correct errors in the charge.[60] It is not so much the number of objections that obscure, it is the number of frivolous and patently meritless objections that obscure an objection.[61]

IV. RULINGS ON REQUESTS OR OBJECTIONS

Under the Texas Rules of Civil Procedure, the trial court must give express rulings on objections and requests. A trial court should sign each request and either deny it, grant it, or modify the request and grant it as modified.[62] The party must then file the request with the court's clerk.[63] There must be a written ruling on each request.[64] After making specific objections that inform the court of the objectionable language in the charge and why such is objectionable, the party should ask the court to give an express ruling on its objections.[65]

However, the Texas Rules of Appellate Procedure now allow for preservation of error where there is an express or an *implicit* ruling.[66] Under Rule 33.1, a trial court can rule either expressly or implicitly—an implied ruling will suffice to preserve error.[67] The real issue is whether error is preserved when a party objects or requests to a charge, the court does not expressly overrule it, but the court does not alter the charge. The Texas Rules of Civil Procedure would suggest that error is not preserved.[68] However, in *Acord v. G.M. Corp.*, the Texas Supreme Court stated: "We interpret the presumptive provision of Rule 272 to mean that if an objection is articulated and the trial court makes no change in the charge, the objection is, of necessity, overruled."[69] Accordingly, there can be implied or implicit rulings on charge objections where the objections were unambiguously presented to the trial court and the trial court failed to change the charge.[70]

Regarding rulings on requests, the Texas Supreme Court held that although the Rules require the trial court to endorse "refused" on requests and sign them, that error is also

preserved by having an oral ruling.[71] The issue is whether there can also be implicit rulings to denied requests where there are no express oral or written rulings. One court of appeals has held that where there is no written ruling and no oral ruling, any error was waived.[72] However, other courts have held that where there is a showing in the record that the trial court considered the request but did not include it in the charge, error was preserved.[73] Several courts have held that simply filing a request with the clerk, where the record does not show that it was ever presented to the trial court, did not preserve error.[74] Therefore, a party should always note on the record that it is submitting its requests. Of course, it is always the safest course to obtain an express ruling by the trial court on any complaints.

V. PRESERVATION OF BROAD FORM COMPLAINTS

Texas Rule of Civil Procedure 272 provides that issues should be submitted in broad form "whenever feasible." Recently, the Texas Supreme Court held that this rule is not absolute, and submitting liability or damage issues in broad form can be reversible error.[75] The complaining party has the burden to timely and specifically object to the improper use of a broad form question.[76] "To preserve [a complaint as to the use of a broad form question], a party must make '[a] timely objection, plainly informing the court that a specific element... should not be included in a broad-form question because there is no evidence to support its submission.'"[77] This objection should specifically be directed to the use of the broad form question, i.e., the broad form question will prevent the party from determining whether the jury decided the case on an impermissible theory.[78] Accordingly, the party should make two objections: 1) that the theory is incorrectly submitted because is not recognized, has no evidence to support it, or is incorrectly defined; and 2) that theory should be submitted separately and distinctly because its inclusion in the broad form question will prevent the party from determining whether the jury relied upon it or a proper theory in answering the broad form question. Otherwise, the party may waive a complaint as to the use of broad form.[79]

Conclusion

As the cases above indicate, there is confusion and uncertainty in charge preservation of error. This uncertainty may help parties that fail to properly preserve error under the Texas Rules of Civil Procedure, but nothing is guaranteed. If one of the rules in the Texas Rules of Civil Procedure "does not mean what it says," then the Supreme Court has a duty to change it.[80] Pursuant to this statement, in the early 1990s, the Court commissioned a committee to revise the charge rules.[81] The committee first offered the Court its recommended new charge rules in 1994, the Court made edits and sent the rules back to the committee, and in 1996 the committee resubmitted its final draft of the rules.[82] However, eight years later, the Court has still not acted upon the committee's recommendation. Texas charge practice should either move back to more special issues and adherence to the Texas Rules of Civil Procedure, or it should move forward with more liberal, but certain, charge rules.

Mr. Johnson is a shareholder with Winstead Sechrest & Minick P.C. in Fort Worth. He is Board Certified in Civil Appellate Law and Personal Injury Trial Law by Texas Board of Legal Specialization. ★

---

[1]*Jury Trial: Charge*, MCDONALDS TEXAS CIVIL PRACTICE, § 22:1 (1992).

[2]838 S.W.2d 235, 240 (Tex. 1992).

[3]*See Hernandez v. Montgomery Ward & Co.*, 652 S.W.2d 923, 925 (Tex. 1983), *overruled on other grounds, Acord v. General Motors Corp.*, 669 S.W.2d 111 (Tex. 1984); *Texas Employers' Ins. Assoc. v. Jones*, 393 S.W.2d 305 (Tex. 1965); *Texas Employers' Ins. Assoc. v. Mallard*, 143 Tex. 77, 182 S.W.2d 1000 (1944).

[4]*See Louis S. Muldrow, Avoiding and Preserving Errors in the Charge*, (1993); *see also, Religious of Sacred Heart v. Houston*, 836 S.W.2d 606, 614 (Tex. 1992); *R&R Contrs. v. Torres,* 88 S.W.3d 685, 695 (Tex. App.–Corpus Christi 2002, pet. dism.); *Lyles v. Texas Employers' Ins. Ass'n.*, 405 S.W.2d 725, 727 (Tex. Civ.App.–Waco 1966, writ ref'd n.r.e.) (". . .a request for submission is the method of preserving the right to complain of omission of, or failure to submit an issue which is relied on by the complaining party. Objection, however, is the proper method of preserving complaint as to an issue actually submitted, but claimed to be defective.").

[5]*See* TEX. R. CIV. P. 274; *Hernandez v. Montgomery Ward & Co.*, 652 S.W.2d 923, 924 (Tex. 1983); *Schultz v. Southern Union Gas Co.*, 617 S.W.2d 299, 302 (Tex. Civ. App.–Tyler 1981, no writ).

[6]*See* TEX. R. CIV. P. 278; *W.O. Bankston Nissan, Inc. v. Walters,* 754 S.W.2d 127, 128 (Tex. 1988); *University of Texas v. Ables*, 914 S.W.2d 712, 715 (Tex. App.–Austin 1996, no writ).

[7]*See* TEX. R. CIV. P. 278; *Department of Human Services v. Hinds*, 904 S.W.2d 629, 637-38 (Tex. 1995).

[8]*See* TEX. R. CIV. P. 278; *Lyles v. T.E.I.A.*, 405 S.W.2d at 727.

[9]838 S.W.2d 235 (Tex. 1992).

[10]*Id.*

[11]*Id.* at 240-41.

[12]*See e,g., Holubec v. Brandenberger,* 111 S.W.3d 32, 38-39 (Tex. 2002); *Miga v. Jenson,* 96 S.W.3d 207 (Tex. 2002); *S.E. Pipe Line Co. v. Tichacek,* 997 S.W.2d 166, 172-73 (Tex. 1999); *Texas Department of Human Services v. Hinds*, 904 S.W.2d at 637-38.

[13]*See e.g., St. Joseph Hospital v. Wolff,* 94 S.W.3d 513, 525 (Tex. 2002); *Union Pacific Railroad Company v. Williams,* 85 S.W.3d 162 (Tex. 2002); *Dallas Mkt. Ctr. Dev. Co. v. Liedeker,* 958 S.W.2d 382, 386 (Tex. 1997), *overruled in part on other grounds, Torrington v. Stutzman*,

46 S.W.3d 829 (Tex. 2001); *Spencer v. Eagle Star Ins. Co. of America,* 876 S.W.2d 154 (Tex. 1994).

[14]*See Universal Services Co. v. Ung*, 904 S.W.2d 638 (Tex. 1996).

[15]*See Holubec v. Brandenberger,* 111 S.W.3d 32, 38-39 (Tex. 2002).

[16]*See Doe v. Mobile Tapes, Inc*., 43 S.W.3d 40, 50-51 (Tex. App.–Corpus Christi 2001, no pet.); *Conde v. Gardner,* No. 14-99-01102-CV, 2001 Tex. App. LEXIS 5579 (Tex. App.–Houston [14th Dist.] August 9, 2001, no pet.) (not desig. for pub.); *Operation Rescue-National v. Planned Parenthood*, 937 S.W.2d 60 (Tex. App.–Houston [14th Dist.] 1996), *aff'd as modified*, 975 S.W.2d 546 (Tex. 1998); *Pitman v. Lightfoot*, 927 S.W.2d 496 (Tex. App.–San Antonio 1996, writ denied); *Mason v. Southern Pacific Transportation Co*., 892 S.W.2d 115 (Tex. App.–Houston [1st Dist.] 1994, writ denied); *Gilgon Inc. v. Hart*, 893 S.W.2d 562 (Tex. App.–Corpus Christi 1994, writ denied); *Mason v. Southern Pac. Transp. Co*., 892 S.W.2d 115, 117 (Tex. App.–Houston [1st Dist.] 1994, writ denied); *Boorham-Fields, Inc., Burlington Northern R. Co.,* 884 S.W.2d 530 (Tex. App.–Texarkana 1994, no writ); *Kirkpatrick v. Memorial Hosp. of Garland*, 862 S.W.2d 762 (Tex. App.–Dallas 1993, writ denied); *Lopez v. Southern Pac. Trans. Co*., 847 S.W.2d 330 (Tex. App.– El Paso 1993, no writ); *see also, Contreras v. Sec. Well Serv., Inc*., No. 04-03-00149-CV, 2004 Tex. App. LEXIS 1977 *10 (Tex. App.–San Antonio March 3, 2004, pet. dism.).

[17]*See U.S. Rest. Props. Operating L.P. v. Motel Enters., Inc.,* 104 S.W.3d 284, 291 (Tex. App.–Beaumont 2003, pet. denied); *Primrose Operating Co., Inc. v. Jones*, 102 S.W.3d 188(Tex. App. –Amarillo 2003, pet. denied); *Celanese Ltd. v. Chem. Waste Mgmt., Inc.,* 75 S.W.3d 593, 600-01 (Tex. App.–Texarkana 2002, pet. denied); *Samedan Oil Corp. v. Intrastate Gas Gathering, Inc*., 78 S.W.3d 425, 445 (Tex. App.–Tyler 2001), *jmt. vacated without ref. to merits*, 2002 Tex. LEXIS 143 (Tex. June 13, 2002); *General Agents Ins. Co. of America, Inc. v. Home Ins. Co. of America*, 21 S.W.3d 419, 425 (Tex. App.–San Antonio 2000, pet. dism'd by agr.); *Matthiessen v. Schaefer,* 900 S.W.2d 792 (Tex. App.–San Antonio 1995, writ denied); *Stewart & Stevenson v. Serv.-Tech., Inc.*, 879 S.W.2d 89, 110 (Tex. App.–Houston [14th Dist.] 1994, writ denied).

[18]*See* TEX. R. CIV. P. 278; *Island Rec. Dev. Corp. v. Republic of Texas Sav.*, 710 S.W.2d 551 (Tex. 1986); *Texas Employers' Ins. Ass'n v. Mallard*, 182 S.W.2d 1000, 1002 (Tex. 1944).

[19]*See Morris v. Holt*, 714 S.W.2d 311 (Tex. 1986).

[20]*See* TEX. R. CIV. P. 278; *Universal Servs. Co. v. Ung,* 904 S.W.2d 638, 640 (Tex. 1995); *Jarrin v. Sam White Oldsmobile Co*., 929 S.W.2d 21, 25 (Tex. App.–Houston [1st Dist.] 1996, writ denied).

[21]*See* TEX. R. CIV. P. 273; *Woods v. Crane Carrier Co*., 693 S.W.2d 377, 379 (Tex. 1985); *Templeton v. Unigard Security Ins. Co*., 550 S.W.2d 267, 269 (Tex. 1976); *T.E.I.A. v. Eskeu*, 574 S.W.2d 814 (Tex. Civ. App.–El Paso 1978, no writ).

[22]*See* TEX. R. CIV. P. 278; *Fairfield Estates L.P. v. Griffin,* 986 S.W.2d 719, 724 (Tex. App.--Eastland 1999, no pet.); *Jarrin v. Sam White Oldsmobile Co*., 929 S.W.2d 21, 25 (Tex. App.–Houston [1st Dist.] 1996, writ denied).

[23]*See Union Pacific Railroad Company v. Williams,* 85 S.W.3d 162 (Tex. 2002); *Texas Department of Human Services v. Hinds*, 904 S.W.2d 629, 637-38 (Tex. 1995); *Alaniz v. Jones & Neuse, Inc*., 907 S.W.2d 450, 451 (Tex. 1995).

[24]*See In re M.P.*, 126 S.W.3d 228, 230-31 (Tex. App.–San Antonio 2003, no pet.) (Under *Payne,* dictated request preserved error).

[25]27 S.W.3d 195, 200-01 (Tex. App.--San Antonio 2000, pet. denied).

[26]*See Gragson v. ME & E Welding & Fabrication, Inc*., No. 06-00-00044-CV, 2001 Tex. App. LEXIS 6749 (Tex. App.–Texarkana October 10, 2001, pet. denied) (not desig. pub.) ("Dictating a requested instruction to the court reporter is not sufficient to support an appeal based on the trial court's refusal to submit requested material."); *Yazi v. Republic Ins. Co*., 935 S.W.2d 875, 878 (Tex. App.--San Antonio 1996, writ denied); *Hartnett v. Hampton Inns, Inc*., 870 S.W.2d 162 (Tex. App.–San Antonio 1993, writ denied).

[27]*See* TEX. R. CIV. P. 278; *Placencio v. Allied Indus. Int'l., Inc*., 724 S.W.2d 20 (Tex. 1987); *Vu v. Rosen*, No. 14-02-00809-CV, 2004 Tex. App. LEXIS 2795, n. 1 (Tex. App.–Houston [14th Dist.] March 30, 2004, pet. denied); *Yellow Cab Co. v. Smith*, 381 S.W.2d 197, 198 (Tex. App.–Waco 1964, writ ref'd n.r.e.).

[28]*See e.g., Texas Department of Human Services v. Hinds*, 904 S.W.2d 629, 637-38 (Tex. 1995).

[29]*Union Pacific Railroad Company v. Williams*, 85 S.W.3d 162, 166 (Tex. 2002); *see also, Texas Workers' Compensation Insurance Fund v. Mandlbauer,* 34 S.W.3d 909, 912 (Tex. 2000).

[30]*See Barnett v. Coppell N. Tex. Const. Ltd.,* 123 S.W.3d 804, 826 (Tex. App.–Dallas 2003, pet. denied); *City of Weatherford v. Canton*, 83 S.W.3d 261, 271-72 (Tex. App.–Fort Worth 2002, no pet.). *Conde v. Gardner,* No. 14-99-01102-CV, 2001 Tex. App. LEXIS 5579 (Tex. App.–Houston [14th Dist.] August 9, 2001, no pet.) (not desig. for pub.); *Shamrock Communications, Inc. v. Wilie*, No. 03-99-00852-CV, 2000 Tex. App. LEXIS 8284 (Tex. App. –Austin 2000, pet. denied) (not desig. for pub.); *City of Austin/Travis County Landfill Co., L.L.C. v. Travis County Landfill Co., L.L.C*., 25 S.W.3d 191, 203 (Tex. App.–Austin 1999), *rev'd on other grounds*, 73 S.W.3d 234 (Tex. 2001); *Texas Natural Resource Conserv. Comm'n v. McDill*, 914 S.W.2d 718 (Tex. App. –Austin 1996, no writ); *Jarrin v. Sam White Oldsmobile Co.,* 929 S.W.2d 21 (Tex. App.–Houston [1st Dist.] 1996, writ denied); *Oliver v. Marsh*, 899 S.W2d 353 (Tex. App.– Tyler 1995, no writ); *Mason v. Southern Pac. Trans. Co.,* 892 S.W.2d 115 (Tex. App.–Houston [1st Dist.] 1994, writ denied); *Texas Commerce Bank v. Lebco Constructors*, 865 S.W.2d 68 (Tex. App.–Corpus Christi 1993, writ denied).

[31]*State Farm Lloyds v. Williams*, 960 S.W.2d 781, 790 (Tex. App.–Dallas 1997, writ dism.).

[32]*See Munoz v. The Berne Group,* 919 S.W.2d 470 (Tex. App.–San Antonio 1996, no writ); *National Fire Ins. v. Valero Energy,* 777 S.W.2d 501 (Tex. App.–Corpus Christi 1989, writ denied); *Crisp v. Southwest Bancshares Leasing Co*., 586 S.W.2d 610 (Tex. Civ. App.–Amarillo 1979, writ ref'd n.r.e.).

[33]*See Tempo Tanner, Inc. v. Crow-Houston Four Ltd*., 715 S.W.2d 658, 666-67 (Tex. App.–Dallas 1986, writ ref'd n.r.e.); *Armellini Exp. Lines of Florida v. Ansley,* 605 S.W.2d 297, 307 (Tex. Civ. App.–Corpus Christi 1980, writ ref'd n.r.e.); *Freedom Homes of Texas, Inc. v.*

Dickinson, 598 S.W.2d 714, 719 (Tex. Civ. App.–Corpus Christi 1980, writ ref'd n.r.e.); *Davis v. Massey*, 324 S.W.2d 242 (Tex. Civ. App.–Waco 1959, no writ); *Griffey v. Travelers Ins. Co*., 452 S.W.2d 725 (Tex. Civ. App.–Amarillo 1970, writ ref'd n.r.e.).

[34]*See Lester v. Logan*, 907 S.W.2d 452 (Tex. 1995); *.Alaniz v. Jones & Neuse*, 907 S.W.2d 450 (Tex. 1995).

[35]*See e.g., Primrose Operating Co., Inc. v. Jones*, 102 S.W.3d 188 (Tex. App.–Amarillo, 2003, pet. denied); *Samedan Oil Corp. v. Intrastate Gas Gathering, Inc.*, 78 S.W.3d 425, 452-53 (Tex. App.–Tyler 2001), *jmt vacated without ref. to merits*, 2002 Tex. LEXIS 143 (Tex. June 13, 2002); *Texas Natural Resource Conservation Commission v. McDill*, 914 S.W.2d 718, 723-24 (Tex. App.–Austin 1996, no writ).

[36]*See e.g., Luensmann v. Zimmer-Zampese & Assocs. Inc.*, 103 S.W.3d 594, 599 (Tex. App.–San Antonio 2003, no pet.); *Hoffman-La Roche, Inc. v. Zeltwanger,* 69 S.W.3d 634, 652 (Tex. App.–Corpus Christi 2002, pet. granted); *Riddick v. Quail Harbor Condominium*, 7 S.W.3d 663, 673 (Tex. App.–Houston [14th Dist.] 1999, no pet.); *Munoz v. The Berne Group*, 919 S.W.2d 470 (Tex. App.–San Antonio 1996, no writ).

[37]*See Texas Power & Light Co. v. Barnhill*, 639 S.W.2d 331, 335 (Tex. App.–Texarkana 1992, writ ref'd n.r.e.); *Jim Howe Homes, Inc. v. Rogers*, 818 S.W.2d 901, 903 (Tex. App.–Austin 1991, no writ); *Wright Way Constr. Co. v. Harlingen Mall Co*., 799 S.W.2d 415, 418-19 (Tex. App.–Corpus Christi 1990, writ denied); *Johnson v. State Farm Mut. Auto Ins.*, 762 S.W.2d 267, 270 (Tex. App.–San Antonio 1988, writ denied).

[38]*See Morris v. Holt*, 714 S.W.2d 311, 312-13 (Tex. 1986); *American Teachers Life v. Bruggette*, 728 S.W.2d 763, 763 (Tex. 1987).

[39]*See Fraxier v. Baybrook Bldg. Co.*, No. 01-02-00290-CV, 2003 Tex. App. LEXIS 4956 *7-*8 (Tex. App.–Houston [1st Dist.] June 12, 2003, pet. denied); *Equitable Res. Mktg. Co. v. U.S. Gas Transp., Inc.,* No. 05-99-00619-CV, 2001 Tex. App. LEXIS 3274 (Tex. App.–Dallas May 21, 2001, no pet.) (not design. for pub.); *Busse v. Pac. Cattle Feeding Fund No 1., Ltd.,* 896 S.W.2d 807, 818 (Tex. App.–Texarkana 1995, writ denied); *Mason v. Southern Pac. Transp. Co*., 892 S.W.2d 115, 117 (Tex. App.–Houston [1st Dist.] 1994, writ denied).

[40]*See* TEX. R. CIV. P. 272, 274; *Spencer v. Eagle Star Ins. Co*., 876 S.W.2d 154, 157 (Tex. 1994); *Religious of Sacred Heart v. City of Texas v. City of Houston*, 836 S.W.2d 606, 613-14 (Tex. 1992).

[41]*See Holubec v. Brandenberger,* 111 S.W.3d 32, 38-39 (Tex. 2002); *Religious of Sacred Heart v. City of Houston*, 836 S.W.2d at 613-14.

[42]*See* TEX. R. CIV. P. 278.

[43]*See* TEX. R. CIV. P. 272; *Bonney v. San Antonio Transit Co*., 160 Tex. 11, 325 S.W.2d 117, 120 (1959) (written objection sufficient).

[44]*See Brantley v. Spargue*, 636 S.W.2d 224 (Tex. App.–Texarkana 1982, writ ref'd n.r.e.).

[45]*See* TEX. R. CIV. P. 274; *Castleberry v. Branscrum*, 721 S.W.2d 270 (Tex. 1986) ("[T]he purpose of rule 274 is to afford trial courts an opportunity to correct errors in the charge, by requiring objections both to clearly designate the error and to explain the grounds for complaint . . . An objection that does not meet both requirements is properly overruled and does not preserve error on appeal."); *Wilgus v. Bond*, 730 S.W.2d 670 (Tex. 1987); *David v. Campbell*, 572 S.W.2d 660 (Tex. 1978); *Haley v. GPM Gas Corp.*, 801 S.W.3d 114, 119 (Tex. App.–Austin 2002, no pet.).

[46]*McDonald v. New York Central Mut. Fire Ins. Co*., 380 S.W.2d 545, 550 (Tex. 1964); *see also Bell Missouri-Kansas-Texas Ry. Co. of Texas*, 334 S.W.2d 513 (Tex. Civ. App.–Fort Worth 1960, writ ref'd n.r.e.).

[47]838 S.W.2d 235 (Tex. 1992); *see also, First Valley Bank Of Los Fresnos v. Martin*, No. 01-0910, Tex. LEXIS 779 (Tex. September 3, 2004) (Wainwright, J. concurring); *but see, City of Weatherford v. Catron*, 83 S.W.3d 261, 272 (Tex. App.–Fort Worth 2002, no pet.) (waived complaint due to vague objection and request not in substantially correct wording).

[48]*See* TEX. R. CIV. P. 274; *Robinson Drilling Co. v. Thomas*, 385 S.W.2d 725, 728 (Tex. Civ. App.–Eastland 1964, no writ).

[49]*See C.M. Asfahl Agency v. Tenor Inc.,* 135 S.W.3d 768 (Tex. App.–Houston [1st Dist.] 2004, no pet.); *Bohls v. Oakes*, 75 S.W.3d 473, 477 (Tex. App.–San Antonio 2002, pet. denied).

[50]*See Villegas v. TexDOT*, 120 S.W.3d 26, 37 (Tex. App.–San Antonio 2003, no pet.); *Owens-Corning Fiberglas Corp. v Malone*, 916 S.W.2d 551, 556 (Tex. App.–Houston [1st Dist.] 1996), *aff'd*, 972 S.W.2d 35 (Tex. 1998); *Celotex Corp v. Tate*, 797 S.W.2d 197, 201-02 (Tex. App.–Corpus Christi 1990, writ dism. by agr.).

[51]*See* TEX. R. CIV. P. 272; *Missouri Pac. Ty. Co. v. Cross*, 501 S.W.2d 868, 873 (Tex. 1973); *Academy Corp. v. Interior Buildout & Turnkey Const. Inc.*, 21 S.W.3d 732, 743 (Tex. App.–Houston [14th Dist.] 2000, no pet.); *Summit Machine Tool Manufacturing Corp. v. Great Northern Ins. Co.,* 997 S.W.2d 840 (Tex. App.–Austin 1999, no pet.); *Melendez v. Exxon Corp.,* 998 S.W.2d 266, 281 (Tex. App.–Houston [14th Dist.] 1999, no pet.).

[52]*See Methodist Hosp. Of Dallas v. Corporation Communications, Inc.*, 806 S.W.2d 879 (Tex. App.–Dallas 1991, writ denied); *Suddreth v. Howard*, 560 S.W.2d 511, 516 (Tex. App.–Amarillo 1978, writ ref'd n.r.e.).

[53]*See Dillard v. Dillard*, 341 S.W.2d 668, 675 (Tex. Civ. App.–Austin 1960, writ ref'd n.r.e.) (15 minutes too short, but error was harmless).

[54]*See e.g., INA of Tex. v. Torres*, 808 S.W.2d 291 (Tex. App.–Houston [1st Dist.] 1991, no writ) (objection at pretrial conference was untimely).

[55]*See S.E. Pipe Line Co. v. Tichacek*, 997 S.W.2d 166, 172-73 (Tex. 1999).

[56]111 S.W.3d 32, 38-39 (Tex. 2002).

[57]In *R&R Constrs. v. Torres*, the court of appeals used pre-trial briefing and arguments to support charge objection. 88 S.W.3d 685, 695-96 (Tex. App.–Corpus Christi 2002, no pet.). In *Samedan Oil Corp. v. Intrastate Gas Gathering, Inc.*, the court of appeals held that a written objection filed before the charge conference and before the final charge was submitted to the parties by the trial court preserved error where the party re-urged its prior written objections in general at the charge conference. 78 S.W.3d 425, 452-53 (Tex. App.–Tyler 2001), *jmt vacated without ref. to merits*, 2002 Tex. LEXIS 143 (Tex. June 13, 2002). In *Green Tree Finance Corp. v. Garcia*, the court of appeals held that a party preserved error by objecting to

the omission of an instruction at an informal charge conference. 988 S.W.2d 776, 781-82 (Tex. App.–San Antonio 1999, no pet.). In *In re Stevenson*, the court of appeals considered the discussion of a request during the informal charge conference in determining that error in its omission had been preserved. 27 S.W.3d 195, 202 (Tex. App.–San Antonio 2000, pet. denied). In *General Agents Ins. Co. of America, Inc. v. The Home Ins. Co. of Illinois*, the court held that an argument made in opposition to a summary judgment motion assisted in clarifying an arguably vague objection at the charge conference. 21 S.W.3d 419 (Tex. App.–San Antonio 2000, pet. dism'd by agr.).

[58]*See* TEX. R. CIV. P. 274; *see also, Monsanto Co v. Milam*, 494 S.W.2d 534 (Tex. 1973); *Clarostat Mfg. Inc. v. Alcor Aviation, Inc*., 544 S.W.2d 788 (Tex. Civ. App.–San Antonio 1976, writ ref'd n.r.e.); *Metal Structures Corp. v. Plains Textiles, Inc*., 470 S.W.2d 93 (Tex. Civ. App.–Amarillo 1971, writ ref'd n.r.e.); *Mahan Volkswagen, Inc. v. Hall*, 648 S.W.2d 324, 330 (Tex. App.–Houston [1st Dist.] 1982, writ ref'd n.r.e.).

[59]*See Strauss v. LaMark*, 366 S.W.2d 555 (Tex. 1963) ("The district judge was required to submit [the issue] to the jury even though a negative answer might be contrary to the overwhelming preponderance of the evidence."); *Long Island Owner's Ass'n v. Davidson*, 965 S.W.2d 674, 680 (Tex. App.–Corpus Christi 1998, pet. denied); *Hinote v. Oil, Chem. & Atomic Workers Int'l Un.,* 777 S.W.2d 134, 143 (Tex. App.–Houston [14th Dist.] 1989, writ denied); *Smith v. State*, 523 S.W.2d 1 (Tex. Civ. App.–Corpus Christi 1975, writ ref'd n.r.e.).

[60]*See Northcutt v. Jarrett*, 585 S.W.2d 874 (Tex. Civ. App.–Amarillo 1979, writ ref'd n.r.e.).

[61]*See Tefsa v. Stewart*, 135 S.W.3d 272, 275-76 (Tex. App.–Fort Worth 2004, pet. filed) (four general objections waived objection on appeal); *Texas Nat. Resource Com'n. v. McDill*, 914 S.W.2d 718 (Tex. App.–Austin 1996, no writ) (1 in 11 objections was not obscured); *Baker Material Handling Corp. v. Cummings*, 692 S.W.2d 142 (Tex. App.–Dallas 1985, writ dism) (1 in 17 objections was not obscured).

[62]*See* TEX. R. CIV. P. 276; *University of Texas v. Ables*, 914 S.W.2d 712, 715 (Tex. App.–Austin 1996, no writ); *McLendon v. McLendon,* 862 S.W.2d 662 (Tex. App. Dallas 1993, writ denied) (request must have endorsement); *Hirsch v. Hirsch*, 770 S.W.2d 924, 926 (Tex. App.–El Paso 1989, no writ).

[63]*See* TEX. R. CIV. P. 276.

[64]*See Greenstein, et. al. v. Burgess Marketing*, 744 S.W.2d 170 (Tex. App.--Waco 1987, writ ref'd n.r.e.).

[65]TEX. R. CIV. P. 272.

[66]TEX. R. APP. P. 33.1.

[67]*See* TEX. R. APP. P. 33.1(a)(2)(A); *Lenz v. Lenz*, 79 S.W.3d 10, 13 (Tex. 2002); *Frazier v. Khai Loong Yu*, 987 S.W.2d 607, 610 (Tex. App.–Fort Worth 1999, pet. denied).

[68]*See* TEX. R. CIV. P. 272, 273, 276.

[69]669 S.W.2d 111, 114 (Tex. 1984) (Rule 272 provides that "it shall be presumed, unless otherwise noted in the record, that the party making such objections presented the same at the proper time and excepted to the ruling thereon.").

[70]*See e.g., Miga v. Jensen*, 96 S.W.3d 207, 213 (Tex. 2001)(oral objection preserved where charge not changed); *compare, Kirkpatrick v. Memorial Hosp. Of Garland*, 862 S.W.2d 762 (Tex. App.–Dallas 1993, writ denied) (written objection not preserved where not shown in record it was presented to court).

[71]*See Dallas Mkt. Ctr. Dev. Co. v. Liedeker,* 958 S.W.2d 382, 386-87 (Tex. 1997), *overruled on other grounds, Torrington Co. v. Stutzman*, 46 S.W.2d 829 (Tex. 2000).

[72]*See Riddick v. Quail Harbor Condo Ass'n.*, 7 S.W.3d 663, 675-76 (Tex. App.–Houston [14th Dist.] 1999, no pet).

[73]*See e.g., Primrose Operating Co. v. Jones,* 102 S.W.3d 188, 197-98 (Tex. App.–Amarillo 2003, pet. denied); *Rossell v. Central West Motor Stages, Inc.*, 89 S.W.3d 643, 657 (Tex. App.–Dallas 2002, pet. denied); *Oechsner v. Ameritrust Tex., N.A*., 840 S.W.2d 131 (Tex. App. – El Paso 1992, writ denied).

[74]*See F.S. New Prods. v. Strong Indus*., 129 S.W.3d 606, 622-23 (Tex. App.–Houston [1st Dist.] 2004, pet filed); *Hoffman La Roche, Inc. v. Zeltwanger,* 69 S.W.3d 634, 652-53 (Tex. App.–Corpus Christi 2002, pet. granted); *Munoz v. The Berne Group,* 919 S.W.2d 470 (Tex. App.-San Antonio 1996, no writ); *but see, Matthiessen v. Schaefer,* 900 S.W.2d 792, 797 (Tex. App.–San Antonio 1995, writ denied).

[75]*See Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002); *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 390 (Tex. 2000). The scope of this article does not include a detailed discussion of when or how broad form practice can be error.

[76]*See In the Interest of B.L.D*., 113 S.W.3d 340 (Tex. 2003); *In re AV,* 113 S.W.3d 355, 362-63 (Tex. 2003).

[77]*In re A.V*., 113 S.W.3d at 362.

[78]*See In the Interest of B.L.D.*, 113 S.W.3d at 349; *Tefsa v. Stewart*, 135 S.W.3d 272, 275-76 (Tex. App.–Fort Worth 2004, pet. filed); *see also, Keetch v. Kroger Co*., 845 S.W.2d 262, 267 (Tex. 1992); *but see Walmart Stores v. Redding,* 56 S.W.3d 141, 150 n.5 (Tex. App.--Houston [14th Dist.] 2001, no pet.) (broad form objection was preserved where defendant simply objected that there was no evidence to support future damages).

[79]*See e.g.., Norfolk S. Ry. Co. v. Bailey*, 92 S.W.3d 577, 583 (Tex. App.–Austin 2002, no pet.); *Durban v. Guajardo*, 79 S.W.2d 198, 206-07 (Tex. App.–Dallas 2002, no pet.).

[80]*McConnell v. Southside I.S.D.*, 858 S.W.2d 337 (Tex. 1993).

[81]Charles R. Watson, Jr., *The Court's Charge to the Jury*, ADVANCED CIVIL TRIAL COURSE, pg. 17 (State Bar of Texas 2003).

[82]*Id.*; *William V. Dorsaneo, III, Revision and Recodification of the Texas Rules of Civil Procedure Concerning the Jury Charge*, 41 S. TEX. L. REV. 675, 706 (2000).

NEW DIRECTIONS IN TEXAS CHARGE PRACTICE: LESSONS FROM FEDERAL COURT

BY RUSSELL S. POST

IN RECENT YEARS, TEXAS HAS significantly changed its approach to broad-form submission. Although the Texas Supreme Court continues to insist that it favors broad-form submission "whenever feasible," *see Golden Eagle Archery v. Jackson*, 116 S.W.3d 757, 776 (Tex. 2003), the circumstances under which broad-form submission is not "feasible" have grown much more prominent—and more challenging for trial lawyers —in the last few years.

In particular, the feasibility of submitting multiple theories of recovery or defense in a single broad-form question has become risky in Texas practice, as a result of decisions altering the harmful error analysis for multi-theory submissions. Before 2000, an affirmative finding on a multi-theory question could be affirmed, notwithstanding error in one part of the question, provided there was any valid basis to uphold the finding. Sometimes called the "two-issue rule," that approach to harm analysis in multi-theory submission was consistent with the approach taken in many other state courts. *See* Elizabeth G. Thornburg, *The Power and the Process: Instructions and the Civil Jury*, 66 FORDHAM L. REV. 1837, 1883 & n.169 (1998). In addition, that approach was consistent with one of the animating purposes of broad-form submission, which was intended to minimize the need for new trials and maximize the ability of courts to uphold judgments if they could be affirmed on any valid basis.

> "In 2000, that long-settled approach to harmless error analysis underwent a 180-degree shift."

In 2000, that long-settled approach to harmless error analysis underwent a 180-degree shift. Texas now follows a rule of "presumed harm" or "prima facie harm" in which a single error in a multi-theory question is presumed to be harmful and requires the answer to be set aside, even if other theories included in the question were correct.

This new era was heralded by *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000). In that case, the Texas Supreme Court held that the inclusion of a "legally invalid" theory in a multi-theory question infected the entire verdict, even though other valid theories were included in the same question. Because it was impossible to know whether the jury had based its verdict on a "legally valid" or a "legally invalid" theory, the Court presumed the error was harmful. According to the Court, when a question "erroneously commingles valid and invalid liability theories and the appellant's objection is timely and specific, the error is harmful when it cannot be determined whether the improperly submitted theories formed the sole basis for the jury's finding." *Id.* at 388.

Next, in *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002), the Texas Supreme Court extended the *Casteel* rule to reach sufficiency challenges. *Harris County* involved a damage question that commingled several damage elements, one of which was supported by no evidence. The Texas Supreme Court held it was impossible to know whether the jury had based its verdict on elements of damages that had no legally sufficient evidence, and reversed the entire finding. *Id.* at 233-34.

Taken together, *Casteel* and *Harris County* have dramatically changed the landscape for multi-theory submissions in Texas. By now, most Texas lawyers know about this "new" rule. What you may not know, however, is that this "new" rule has a long pedigree in federal court. The federal experience offers several lessons for the future of Texas charge practice, including (1) a variety of opportunities for application of the presumed harm rule, (2) a strong majority rule of harmless error analysis in this area, (3) a surprising hint that federal courts might be retreating from the rule of presumed harm in cases (like *Harris County*) involving insufficient evidence; and (4) a deep division about preservation of error. These lessons

from federal courts will assist Texas lawyers and judges as they chart new directions in Texas charge practice.

I. The Rule of Presumed Harm in Federal Court.

Although the rule of presumed harm came as a shock to a generation of Texas lawyers who came of age under the generous approach of broad-form submission, it has a long pedigree in federal court. The case that is most often cited as the genesis of the rule in federal court is *Maryland v. Baldwin*, 112 U.S. 490 (1884). *Baldwin* was a diversity case involving claims by a putative heir against the administrators of an estate, in which the putative heir sought to recover a share of the estate. The administrators of the estate defended the case on several different bases, all of which were submitted to the jury in a general verdict. *Id*. at 492-93. Justice Stephen Field, writing for the Court, concluded that one of the defensive theories had been tainted by hearsay. Observing that it was "impossible to say what effect it may have had on the minds of the jury," *id*. at 494, Justice Field framed the holding in terms that anticipated the presumed harm rule:

> On the trial evidence was introduced bearing upon all the issues, and, if any one of the pleas was, in the opinion of the jury, sustained, their verdict was properly rendered, but its generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld, for it may be that by that evidence the jury were controlled under the instructions given.

Id. at 493.

The *Baldwin* principle next manifested itself in *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60 (1907). *Wilmington* was a diversity case involving wrongful death claims brought by the survivors of a laborer killed in a mine explosion. The plaintiffs alleged eight alternative theories of negligence, and the jury returned a general verdict. *Id*. at 64-66. The Supreme Court found insufficient evidence to support three of the eight theories of negligence. *Id*. at 77-78. "Under this condition of things we find it impossible to say that prejudicial error did not result." *Id*. at 78. Thus, *Wilmington* extended the rule of *Maryland v. Baldwin* to errors involving insufficient evidence.

The third important decision in the development of the presumed harm doctrine was *United New York and New Jersey Sandy Hook Pilots Ass'n v. Halecki*, 358 U.S. 613 (1959). *Halecki* was a wrongful death suit involving allegations of both unseaworthiness and negligence. *Id*. at 614. Because unseaworthiness is a strict liability regime, the jury was instructed it could find for the plaintiff "even if they should find that the shipowner had exercised reasonable care." *Id*. at 618. But the Court held that the case did not come within the unseaworthiness doctrine, and "it was error to instruct the jury" on that theory of liability. *Id*. Because the jury had returned a general verdict, the Court remanded the case for a new trial "for there is no way to know that the invalid claim of unseaworthiness was not the sole basis for the verdict." *Id*. at 619.

A fourth case, *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co*., 370 U.S. 19 (1962), reaffirmed the rule of *Maryland v. Baldwin*. *Sunkist* was an antitrust action alleging a conspiracy among agricultural associations, which were entitled to immunity from antitrust law under specific provisions of the Clayton Act. *Id*. at 27-29. In light of this statutory immunity, the Supreme Court concluded that the conspiracy instruction was erroneous and held that the erroneous jury instruction required reversal of the general verdict:

> Since we hold erroneous one theory of liability upon which the general verdict may have rested... it is unnecessary for us to explore the legality of the other theories. As was stated of a general verdict in *Maryland v. Baldwin*, 112 U.S. 490, 493, 5 S. Ct. 278, 280, 28 L. Ed. 822 (1884), "(I)ts generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld."

Id. at 29.

As these four cases illustrate, the Supreme Court has applied its presumed harm rule to multi-theory verdicts tainted by (1) inadmissible evidence (*Baldwin*); (2) insufficient evidence (*Wilmington*); and (3) erroneous jury instructions (*Halecki* and *Sunkist*). This presumed harm rule has been applied by federal courts in a wide variety of circumstances, including:

- Multiple liability theories combined in a single question, one of which is legally erroneous.[1]
- Multiple factual allegations combined in a single question on one liability theory, where one of the factual allegations is not legally actionable.[2]
- Multiple liability theories combined in a single

question, one of which is not supported by sufficient evidence.[3]

- Multiple factual allegations combined in a single question on one liability theory, where one of the factual allegations is not supported by sufficient evidence.[4]
- Multiple liability theories combined in a single question, coupled with a failure to instruct on a defensive theory asserted against one theory of liability.[5]
- Multiple instructions concerning affirmative defenses combined in a single question, one of which was legally improper or based on legally insufficient evidence.[6]
- Lump-sum damage awards including an unrecoverable element of damages.[7]
- Commingled damage elements in one question resulting in an excessive verdict.[8]

In short, a century of experience in federal court reveals that the presumed harm rule of *Casteel* and *Harris County* is not revolutionary—it is the prevailing rule in federal practice. Moreover, as the foregoing summary illustrates, federal appellate courts have applied the rule in contexts that have not yet been explored by the Texas courts. As Texas courts and practitioners explore the frontiers of this doctrine, they should look to the federal experience for guidance.

One area presents an obvious opportunity for future development. As explained above, the genesis of the presumed harm doctrine was a case about inadmissible evidence that tainted one defensive theory in a multi-theory question. *Maryland v. Baldwin*, 112 U.S. 490, 493 (1884) ("If, therefore, upon any one issue error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld, for it may be that by that evidence the jury were controlled under the instructions given."). Federal courts continue to cite *Baldwin* in cases involving multiple theories of liability or defense in a single question, one of which is tainted by inadmissible evidence.[9] As the Eighth Circuit put it, "there is no material distinction between a situation... in which one of several theories of liability should not have been submitted to a jury at all, and a situation, like that here, in which one of several theories of liability is not sustainable because of an erroneous and prejudicial admission of evidence. The essential inquiry in either case is whether the appellate court is fairly convinced that the jury proceeded on a sound basis." *Mueller v. Hubbard Milling Co.*, 573 F.2d 1029, 1039 (8th Cir. 1978). In light of these cases, Texas practitioners should consider extending the rule of *Casteel* and *Harris County* to cases in which one theory in a broad-form question is tainted by inadmissible evidence.

In short, the federal experience offers a wealth of potential applications for the rule of *Casteel* and *Harris County.* But it also offers limiting principles, such as harmless error analysis.

II. Harmless Error Analysis in Federal Court.

Despite its strong tradition, the federal presumed harm doctrine is not without exceptions. Virtually every circuit recognizes some version of harmless error analysis when faced with error in a multi-theory submission. *See*, *e.g.*, *Davis v. Rennie*, 264 F.3d 86, 104-10 (1st Cir. 2001); *Bruneau ex rel. Schofield v. South Kortright Cent. Sch. Dist.*, 163 F.3d 749, 759 (2d Cir. 1998); *Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 120 (3d Cir. 1999); *Harwood v. Partredereit AF*, 944 F.2d 1187, 1193 (4th Cir. 1991); *Braun v. Flynt*, 726 F.2d 1205, 1206 (5th Cir. 1984); *Collum v. Butler,* 421 F.2d 1257, 1260 (7th Cir. 1970); *E.I. DuPont de Nemours v. Berkley & Co.*, 620 F.2d 1247, 1258 n.8 (8th Cir. 1980); *Traver v. Meshriy*, 627 F.2d 934, 938 (9th Cir. 1980); *Asbill v. Housing Auth.*, 726 F.2d 1499, 1504 (10th Cir. 1984).

The presumed harm rule arose in *Maryland v. Baldwin*, in an era before harmless error analysis became a prevalent part of federal appellate practice. During the twentieth century, changing judicial philosophies and the press of growing caseloads led the federal courts to place increasing reliance on the harmless error rule. *See, e.g.*, FED. R. CIV. P. 61 (harmless error rule); 28 U.S.C. § 2111 (harmless error statute). Over the last generation, federal courts have extended the harmless error principle to encompass errors in multi-theory submissions.

The Fifth Circuit was the first federal court to use harmless error analysis in this context. In *American Airlines, Inc. v. United States*, 418 F.2d 180 (5th Cir. 1969), the Fifth Circuit confronted a general verdict in a plane crash case involving 30 alternative theories of liability. The court found insufficient evidence to support one liability theory, but concluded that the other 29 theories were adequately supported by the evidence. In light of this overwhelming evidence, the Fifth Circuit held that the inclusion of a single unsupported theory was harmless. *Id.* at 195. The Fifth Circuit reached that conclusion even though the case fell within the rule of *Wilmington* (presumed harm rule for sufficiency errors)—signaling that the rule is not without limits.

Over the next generation, a series of federal decisions applied harmless error analysis to a variety of complaints about multi-theory questions.[10] By 1984, the Fifth Circuit had recognized the evolution of a mainstream rule, explaining that errors in multi-theory questions are harmless "'where it is reasonably

certain that the jury was not significantly influenced by issues erroneously submitted to it.'" *Braun v. Flynt*, 731 F.2d 1205, 1206 (5th Cir. 1984) (citing cases). This "reasonable certainty" formula represents the mainstream rule in federal court.

Harmless error analysis is always a case-specific inquiry, so it is impossible to synthesize the "reasonable certainty" decisions with precision. But certain trends do emerge from the cases. First, on rare occasions, the jury takes some action that pierces the veil of the general verdict and allows the court to determine the basis for the verdict with reasonable certainty. For example, when the jury sends out a note inquiring about a defective theory in a multi-theory question, error is likely to be harmful.[11] Likewise, if the jury makes a finding that necessarily depends on a defective theory in a multi-theory question, error is likely to be harmful.[12]

On the other hand, if the jury answers other questions in a way that signals its verdict was based on a valid theory, the inclusion of a defective theory in a multi-theory question is more likely to be harmless.[13] These are the "easy" cases. But in most cases involving multiple theories in a single question, there is no objective evidence of the basis for the jury's verdict. In those cases, federal courts must fall back on the presumption of harm and the "reasonable certainty" exception.

The "reasonable certainty" exception is rarely satisfied if the case involves a legal error in the jury instructions,[14] if the invalid theory is hotly disputed and it becomes a focus of the trial,[15] or if the attorneys dwell on the invalid theory during the closing arguments.[16] In those situations, the risk that the jury based its verdict on the invalid theory is significant, and federal courts often find the inclusion of the invalid theory harmful.

By contrast, federal courts are most likely to find an error in a multi-theory question harmless when the error involves a defect in the evidence to support one theory in the question. The paradigm illustration of that scenario is the *American Airlines* case—the first case in which harmless error analysis was applied in this context–where the Fifth Circuit refused to reverse a general verdict based on a defect in the evidence to support one theory out of 30 liability theories submitted in a single interrogatory. *See American Airlines, Inc.*, 418 F.2d at 195. Admittedly, most courts have not articulated this rule explicitly, but the cases reveal an unmistakable trend towards harmless error analysis in this situation.[17] As we shall see momentarily, that trend is the harbinger of a theoretical debate that is now percolating in the federal courts about application of the presumed harm rule to sufficiency complaints.

The development of a harmless error test is consistent with the deferential approach taken by federal courts to charge error generally. For example, the Fifth Circuit will find error only if the charge "'as a whole leaves us with substantial and ineradicable doubt whether the jury has been properly guided in its deliberations.'" *Bender v. Brumley*, 1 F.3d 271, 276 (5th Cir. 1993) (citation omitted); *accord F.D.I.C. v. Mijalis*, 15 F.3d 1314, 1318 (5th Cir. 1994). Even then, the Fifth Circuit "will not reverse if we determine, based upon the entire record, that the challenged instruction could not have affected the outcome of the case." *Mijalis*, 15 F.3d at 1318; *Bender*, 1 F.3d at 276-77. As the Fifth Circuit has explained, errors in the charge often prove harmless in hindsight: "Inaccurate statements that prove in retrospect to have been demonstrably irrelevant are just that—irrelevant and inconsequential errors—not unusual attendants to long and hard fought trials." *Bolton v. Tesoro Petroleum Corp.*, 871 F.2d 1266, 1273 (5th Cir. 1989). That same philosophy was apparent in one of the first cases to pioneer harmless error analysis in multi-theory submissions: "To permit… issues which occupied positions of… relative insignificance in the trial to be treated now as so important as to make their submission to the jury prejudicial would not serve the interest of justice." *Collum v. Butler*, 421 F.2d 1257, 1260 (7th Cir. 1970); *accord Braun v. Flynt*, 731 F.2d 1205, 1206 (5th Cir. 1984) (quoting *Collum*). Thus, the harmless error approach in the context of multi-theory questions is perfectly consistent with the prevailing federal philosophy about charge error.

> "Although the rule of presumed harm came as a shock to a generation of Texas lawyers who came of age under the generous approach of broad-form submission, it has a long pedigree in federal court."

Likewise, the harmless error approach is fully consistent with the mandate of Rule 61, which instructs the federal courts to "disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." FED. R. CIV. P. 61; *see also* 28 U.S.C. § 2111 (harmless error statute). There is little reason to believe that errors in multi-theory questions should be treated as exceptions to the general rule of harmless error analysis in federal court.

For this reason, it is a mistake to read the Supreme Court cases as a rule of *per se* harm, requiring reversal any time

any error, of *any* magnitude, afflicts *any* multi-theory submission. The seminal case, *Maryland v. Baldwin*, was decided in an era before the enactment of Rule 61 and before harmless error analysis became a prevalent part of American appellate practice. Properly applied within the modern framework of Rule 61, *Baldwin* and its progeny simply erect a prima facie showing of harm, which is subject to a rebuttal that the error was in fact harmless. As the U.S. Supreme Court explained in its seminal opinion on harmless error in criminal cases, distinguishing harmful from harmless errors is part of the art of appellate judging:

> That faculty cannot ever be wholly imprisoned in words, much less upon such a criterion as what are only technical, what substantial rights; and what really affects the latter hurtfully. Judgment, the play of impression and conviction along with intelligence, varies with judges and also with circumstance. What may be technical for one is substantial for another; what minor and unimportant in one setting crucial in another.... The task is not simple, although the admonition is. Neither is it impossible. By its very nature no standard of perfection can be attained. But one of fair approximation can be achieved. Essentially the matter is one for experience to work out. For, as with all lines which must be drawn between positive and negative fields of law, the precise border may be indistinct, but case by case determination of particular points adds up in time to discernible direction.

Kotteakos v. United States, 328 U.S. 750, 761-62 (1946).

Texas courts have not yet seriously examined the notion of a harmless error exception to the presumed harm rule of *Casteel* and *Harris County*—but that is the next question that will face Texas courts and practitioners in the evolution of the *Casteel* rule. It is a serious question. Every rule about "reversible error" involves a policy judgment balancing the interest in maximizing efficiency and minimizing new trials against the interest in accurate decision-making. Legal systems can justifiably choose to prefer one interest over the other as a background rule—for example, adopting a rule of presumed harm to maximize the interest in accurate fact-finding, or adopting the two-issue rule to maximize the interest in judicial efficiency—but there is no reason for an absolute rule that eliminates any ability to alter the balance in an individual case. The "reasonable certainty" test fairly balances the competing policies of efficiency and accuracy. For this reason, it would be unwise to adopt a wooden rule of *per se* harm that deprived courts of their traditional duty to gauge whether an error is harmful or harmless on a case-by-case basis. As the contours of the Texas rule continue to evolve, Texas courts and practitioners should look to the federal experience for guidance in deciding whether and how harmless error analysis should apply in the new world of *Casteel* and *Harris County.*

III. The Simmering Debate about Sufficiency Complaints.

The first two parts of this article revealed two countervailing trends in the federal courts. First, federal courts have traditionally applied the presumed harm rule to sufficiency complaints, most notably in *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60 (1907). On the other hand, when the defect in a multi-theory question involves insufficient evidence to support one theory, federal courts are more willing to apply harmless error analysis. What is going on here?

These two competing lines of cases reveal a simmering debate in the federal courts about application of the presumed harm rule to complaints about insufficient evidence. Theoretically, there is a difference between a legal defect in a multi-theory question and a mere defect in proof. There are good reasons to presume that the jury will be misled by a legally incorrect instruction, because the jury has no legal expertise and it is presumed to follow the trial court's instructions. *See*, *e.g.*, *Douglas v. Dyn McDermott Petroleum Op. Co.*, 163 F.3d 223, 235 (5th Cir. 1998) (discussing the rule that a jury is presumed to follow the instructions).

By contrast, there is less reason to presume that a jury would base its answer on a theory without any factual support, especially not when other theories are supported by the evidence. Indeed, given the presumption that the jury will follow its instructions–including the standard instruction on the burden of proof—there is a fair argument that a jury should be presumed to overlook factually unsupported theories in favor of theories that are supported by the evidence. "The jury will conclude for itself that there is insufficient evidence to support an application of the instruction, and thus reject it as 'mere surplusage.'" *Buhrmaster v. Overnite Transport. Co.*, 61 F.3d 461, 463-64 (6th Cir. 1995) (citations omitted); *Davis v. Rennie*, 264 F.3d 86, 100-10 (1st Cir. 2001) (quoting *Buhrmaster*). Based on that distinction, one might conclude that, provided there is sufficient evidence to support the jury's finding on any theory submitted in a multi-theory question, the appellate court should presume that theory was the basis for the affirmative finding and ignore theories that were not supported by the evidence. *Id.*

Justice Scalia adopted this approach for criminal convictions in *Griffin v. United States*, 502 U.S. 46 (1992). In a thorough opinion, Justice Scalia reviewed the common-law tradition governing multi-count criminal convictions and drew a distinction between legal errors and mere defects in the evidence; the former infects a multi-count conviction and requires it to be set aside, while the latter does not. *Id.* at 49-59. As Justice Scalia explained the difference:

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law—whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors *are* well equipped to analyze the evidence.

Id. at 59.

The Supreme Court has not yet considered whether the *Griffin* rule applies to civil cases. Relying on *Griffin*, however, Judge Richard Posner has taken that step:

> [A theory without evidentiary support] should be excluded from the case altogether by a grant of partial summary judgment or by a partial directed verdict. Letting the jury consider it is just an invitation to jury lawlessness. But it doesn't follow from this that the jury's verdict must be set aside. The invitation isn't always taken. It cannot just be *assumed* that the jury *must* have been confused and therefore that the verdict is tainted, unreliable. It's not as if, here, the judge had failed to give an instruction to which [appellant] was entitled, or had given an erroneous instruction. This is just a case of surplusage, where the only danger is confusion, and reversal requires a showing that the jury *probably* was confused.

Eastern Trading Co. v. Refco, Inc., 229 F.3d 617, 621-22 (7th Cir. 2000) (emphasis in original) (citing cases). Judge Posner contrasts legal errors, like the erroneous jury instruction in *Sunkist*, with mere complaints about the sufficiency of the evidence:

> It is different when, as in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30, 82 S. Ct. 1130, 8 L.Ed.2d 305 (1962), the jury is instructed on an erroneous theory of liability and there is no basis for determining whether it relied on that theory. Since the jury is to take the law as the judge instructs it, however erroneous the instruction is, an erroneous theory of liability supported by the facts is quite likely to commend itself to the jury. The presumption is reversed when, as in this case, the jury is instructed on a theory (here of defense, but that is immaterial) for which there is no evidence and which probably, therefore, it rejected.

Id.

Judge Posner's philosophy appears to be consistent with the prevailing approach in the Seventh Circuit, which holds that a general verdict may be upheld if there is sufficient evidence to support any theory in a multi-theory submission. *See, e.g.*, *McGrath v. Zenith Radio Corp.*, 651 F.2d 458, 464 (7th Cir. 1981); *Cross v. Ryan*, 124 F.2d 883, 887 (7th Cir. 1941). However, that was not the traditional approach, as Judge Alex Kozinski has declared in no uncertain terms. *See Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 790 (9th Cir. 1990) (Kozinski, J., dissenting) ("The Seventh Circuit, for reasons of its own, has adopted a maverick rule precisely the opposite of that repeatedly announced by the Supreme Court.").

The Supreme Court has not yet addressed whether the *Wilmington* rule—applying the presumed harm rule of *Baldwin* to a complaint about insufficient evidence in a general verdict—survived the enactment of Rule 61 and its later decision in *Griffin*. Based on the logic of *Griffin*, however, it is hard to understand why the same rule should not apply to a civil case; if anything, one might expect courts to find harmless error more readily in civil cases than in criminal cases, out of respect for constitutional interests. The question remains controversial.

The federal courts are divided about whether the *Griffin* rule applies to civil cases. Contrary to Judge Posner's reasoning, the Sixth Circuit refuses to extend *Griffin* to civil cases. *See, e.g.*, *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 11 F.3d 660, 667 (6th Cir. 1993). By contrast, the Fifth Circuit appears to hold that the *Griffin* rule applies equally to civil cases. *See Walther v. Lone Star Gas Co.*, 952 F.2d 119, 126 (5th Cir. 1992) (applying the *Griffin* rule in a civil case to find factually unsupported jury instruction harmless error), *opinion on rehearing*, 977 F.2d 161, 162 (5th Cir. 1992) ("Jurors are

well equipped to analyze the evidence and reach a decision despite the availability of a factually unsupported theory in the jury instructions."); *Prestenbach v. Rains*, 4 F.3d 358, 361 n.2 (5th Cir. 1993) ("a jury verdict may be sustained even though not all the theories on which it was submitted had sufficient evidentiary support"); *Rodriguez v. Riddell Sports, Inc.*, 242 F.3d 567, 577 n.8 (5th Cir. 2001) (citing *Walther* for the proposition that the *Griffin* rule applies to civil cases). Although it has not explicitly overruled its earlier decisions applying the presumed harm rule to cases involving sufficiency complaints, the Fifth Circuit appears to apply the *Griffin* rule to civil cases.

> "Although it has not explicitly overruled its earlier decisions applying the presumed harm rule to cases involving sufficiency complaints, the Fifth Circuit appears to apply the *Griffin* rule to civil cases."

In *Harris County*, the Texas Supreme Court declined to adopt the *Griffin* approach for civil cases involving insufficient evidence on the ground that *Griffin* is limited to criminal cases. As Chief Justice Phillips explained, "the United States Supreme Court itself has acknowledged that a different reversible error analysis applies in civil cases." *Harris County*, 96 S.W.3d at 234 (relying on *Baldwin*, *Wilmington*, *Sunkist*, *and Halecki*). *Harris County* did not directly grapple with the logic of Judge Posner and Justice Scalia's opinions distinguishing between legal error and insufficient evidence, nor did it consider the possibility that *Wilmington* could be obsolete—and it did not address the recent line of Fifth Circuit authority applying *Griffin* to civil cases. The Texas Supreme Court cannot be faulted for refusing to predict the future of federal law, especially since that future is far from certain. But it remains an open question whether the Supreme Court will follow *Griffin* or *Wilmington* in civil cases involving insufficient evidence, and as a result, the premise of the *Harris County* decision may prove to be mistaken. Therefore, Texas courts and appellate practitioners should directly address the rationale for the *Griffin* rule—particularly the logic of Justice Scalia, Judge Posner, and the more recent Fifth Circuit opinions—in developing the Texas version of the presumed harm rule.

Finally, it is important to recognize that the essential insight of *Griffin*—that jurors are less likely to be confused and misled by a defect in the proof than a legal error in the charge—can be reconciled with the background rule of *Harris County* by adopting a harmless error rule. As discussed above, federal courts are most likely to find errors in multi-theory submissions harmless when there is little or no evidence concerning the invalid theory and there is some other corroborating factor to provide reasonable certainty that the verdict was based on a valid theory. However, there is no need for a bright-line, mechanical rule; as every Texas lawyer and judge knows, juries *do* base their verdicts on unsupported theories in some cases. Harmless error analysis would preserve the prima facie harm rule of *Casteel* and *Harris County* as the background rule, while still preserving the ability of appellate courts to find the error harmless in specific cases. Given the federal experience and the force of the *Griffin* rule, we would expect harmless error analysis to apply most often in cases involving sufficiency complaints, but not in every case. This approach would strike an appropriate balance between *Harris County* and *Griffin*.

IV. Preservation of Complaints about Broad-Form Errors in Federal Court.

The final area in which the federal experience can offer guidance to the Texas courts involves preservation of complaints about errors infecting one theory in a multi-theory question. The Texas Supreme Court appears to have decided this question in *In re A.V.*, 113 S.W.3d 355 (Tex. 2003), but the federal experience still provides a useful body of knowledge.

The question is: Must a party object specifically to the form of a broad-form question and point out that it will prevent the appellate court from reviewing the accuracy of the verdict, or is it sufficient simply to object to the substantive defect in the question, without any reference to the form of the charge? The answer is not obvious. It is not self-evident whether complaints that an error in a multi-theory question fatally infected the charge are simply demonstrations of *harm* flowing from a defect in the *substance* of the charge (which may be preserved simply by an objection to the substantive defect) or separate assertions of *error* in the *form* of the charge (which must be preserved separately). There are powerful arguments for either alternative. Surprisingly, after a century of experience, the question is not settled in federal court.

Judge Thomas Gee once called this preservation issue "a close and difficult question," *Pan Eastern Exploration Co. v. Hufo Oils*, 855 F.2d 1106, 1124 (5th Cir. 1988), and it has not grown any easier with time. Federal decisions are relatively rare, and they are divided.

One line of federal cases suggests a complaint about error in a multi-theory submission is a complaint about the form of the charge, and that precise complaint must be preserved at trial.[18] Judge Alex Kozinski has defended this approach as a

deterrent against speculating on the verdict and a safeguard against "procedural brinksmanship":

> Litigants like [appellant] who wish to challenge the sufficiency of the evidence as to some, but not all, specifications of negligence must present an appropriate record for review by asking the jury to make separate factual determinations as to each specification. Any other rule would unnecessarily jeopardize jury verdicts that are otherwise fully supported by the record on the mere theoretical possibility that the jury based its decision on unsupported specifications. We will not allow litigants to play procedural brinksmanship with the jury system and take advantage of uncertainties they could well have avoided.

McCord v. Maguire, 873 F.2d 1271, 1274, *amended by* 885 F.2d 650 (9th Cir. 1989).

Likewise, Judge Richard Posner has hinted strongly that he would reach the same result, observing in dictum that a defendant who fails to request special interrogatories in the face of an invalid multi-theory submission has "only itself to blame for its inability to demonstrate" harm. *Eastern Trading Co. v. Refco, Inc.*, 229 F.3d 617, 622 (7th Cir. 2000). Thus, there is a strong body of federal authority supporting the view that a separate, specific objection must be made to the form of the charge in order to preserve a complaint about error in a multi-theory question.

On the other hand, another line of federal cases has reviewed complaints asserting that error infected one theory in a multi-theory question without requiring a separate objection to the form of the charge or a request for special verdicts.[19] In addition, many of the cases do not even discuss preservation, leaving the impression that these courts would not require a separate objection to the form of the charge as long as the substantive defect in the instruction or the evidence had been preserved. Thus, the state of the law concerning preservation in the federal courts is confused, at best.

The Fifth Circuit does not appear to require separate objections to the form of the verdict. In *Jones v. Miles*, 656 F.2d 103 (5th Cir. 1981), the Fifth Circuit noted the appellants had failed to complain about the use of a general verdict or request a special verdict at trial, concluding that "they have waived their right to raise this point on appeal." *Id.* at 106 n.2. But at the same time, the court observed that the appellants had preserved their complaint about the underlying error, *id.* at 106, and reversed the judgment on that basis. *Id.*; *see also Crist v. Dickson Welding, Inc.*, 857 F.2d 1281, 1286-87 (5th Cir. 1992) (error preserved by objection to a substantive defect in the charge during the charge conference). *Jones* and *Crist* appear to stand for the proposition that the Fifth Circuit requires parties to preserve only complaints about the substantive defect, not complaints about the form of the charge. That approach is consistent with the prediction made by Judge Gee in the *Pan Eastern* case:

> It seems that in the case of a potentially ambiguous general verdict all the complaining party must do to protect his rights is to object to the charge and the submission *vel non* of the questionable theory or theories; probably he need not object to the *ambiguity* inherent in its submission, as the ambiguity arises from the nature of general verdicts and no party has a right to a particular *kind* of verdict, general or special.

Pan Eastern, 855 F.2d at 1124. Judge Gee was not forced to decide this "close and difficult" question in *Pan Eastern*, *id.*, and the Fifth Circuit has never addressed it directly. In future cases, practitioners might find it fruitful to litigate this question in the Fifth Circuit.

The Texas Supreme Court appears to have adopted the former rule, requiring an objection about the form of the jury charge to preserve a *Casteel-Harris County* complaint. *See In re A.V.*, 113 S.W.3d 355, 363 (Tex. 2003) ("In *Harris County v. Smith* and *Crown Life v. Casteel,* we emphasized the importance of a specific objection to the charge to put a trial court on notice to submit a granulated question to the jury."). For the time being, therefore, Texas practitioners should assume that objections to both form and substance are required. It remains to be seen, however, whether the Texas Supreme Court might refine its preservation rule in future cases.

Conclusion

The cross-pollination between state and federal court is always a fertile source of new ideas for practitioners, and that should be especially true in the case of the presumed harm rule. Given the ancient pedigree of the presumed harm rule in federal court, Texas courts and practitioners will be well-served to draw on the federal experience as they chart new directions in Texas charge practice.

Russell Post is a member of the Beck, Redden and Secrest, LLP,Appellate Section. He is Board-Certified in Civil Appellate Law by the Texas Board of Legal Specialization, and he has appeared as lead counsel in the Texas Supreme Court, the Texas

Courts of Appeals, and the United States Court of Appeals for the Fifth Circuit. Before entering private practice, Mr. Post served as a law clerk for the Honorable Jerry E. Smith of the United States Court of Appeals for the Fifth Circuit. ✯

---

[1] *E.g.*, *Zaffuto v. City of Hammond*, 308 F.3d 485, 488-92 (5th Cir. 2002); *Imperial Premium Finance v. Khoury*, 129 F.3d 347, 352-55 (5th Cir. 1998); *Levinsky's, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 134 (1st Cir. 1997); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1227-31 (10th Cir. 1996); *Harwood v. Partredereit AF*, 944 F.2d 1187, 1193 (4th Cir. 1991); *Asbill v. Housing Auth.*, 726 F.2d 1499, 1504 (10th Cir. 1984); *Avins v. White*, 627 F.2d 637, 646 (3d Cir. 1980); *E. I. du Pont de Nemours & Co. v. Berkley and Co.*, 620 F.2d 1247, 1257 (8th Cir. 1980); *Morrissey v. National Maritime Union*, 544 F.2d 19, 25-27 (2d Cir. 1976).

[2] *E.g.*, *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 957 F.2d 1318, 1326 (6th Cir. 1992), *modified*, 11 F.3d 660, 667 (6th Cir. 1993); *Ward v. Succession of Freeman*, 854 F.2d 780, 790-93 (5th Cir. 1988).

[3] *E.g.*, *Jones v. Miles*, 656 F.2d 103, 106 n.4 (5th Cir. 1981); *Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1055 (11th Cir. 1994); *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842, 853-54 (5th Cir. 1989); *Dudley v. Dittmer*, 795 F.2d 669, 673 (8th Cir. 1986); *Syufy Enter. v. American Multicinema, Inc.*, 793 F.2d 990, 1001 (9th Cir. 1986); *Doherty v. American Motors Corp.*, 728 F.2d 334, 344 (6th Cir. 1984); *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 56 (2d Cir. 1980); *Simko v. C&C Marine Maint. Co.*, 594 F.2d 960, 967 (3d Cir. 1979); *Smith v. Southern Airways, Inc.*, 556 F.2d 1347 (5th Cir. 1977); *Fatovic v. Nederlandsch-Ameridaansche Stoomvaart*, 275 F.2d 188, 190 (2d Cir. 1960); *Albergo v. Reading Co.*, 372 F.2d 83, 85-86 (3d Cir. 1966).

[4] *E.g.*, *Katara v. D.E. Jones Commodities*, 835 F.2d 966, 971 (2d Cir. 1987); *Pan Eastern Explor. Co. v. Hufo Oils*, 855 F.2d 1106, 1124 (5th Cir. 1988); *Ratner v. Sioux Natural Gas Corp.*, 770 F.2d 512, 518-19 (5th Cir. 1985).

[5] *E.g.*, *Jones v. Miles*, 656 F.2d 103, 1106-08 (5th Cir. 1981).

[6] *E.g.*, *BAII Banking Corp. v. UPG, Inc.*, 985 F.2d 685, 704 (2d Cir. 1993); *Crist v. Dickson Welding, Inc.*, 957 F.2d 1281, 1286-88 (5th Cir. 1992); *Farrell v. Klein Tools, Inc.*, 866 F.2d 1294, 1298-1301 (10th Cir. 1989).

[7] *E.g.*, *Kassel v. Gannett Co.*, 875 F.2d 935, 950 (1st Cir. 1989).

[8] *E.g.*, *In re Air Crash Disaster*, 795 F.2d 120, 1236 (5th Cir. 1986); *Gill v. Rollins Protective Servs. Co.*, 722 F.2d 55, 58-59 (4th Cir. 1983); *but see Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1373 (9th Cir. 1987) ("Proof of damages is governed by a less strict standard than proof of liability.").

[9] *E.g.*, *Carden v. Westinghouse Elec. Corp.*, 850 F.2d 996, 1000-03 (3d Cir. 1988); *Bone v. Refco, Inc.*, 774 F.2d 235, 242-43 (8th Cir. 1985); *Mueller v. Hubbard Milling Co.*, 573 F.2d 1029, 1039 (8th Cir. 1978).

[10] *See Collum v Butler*, 421 F.2d 1257, 1260 (7th Cir. 1970); *Gardner v. General Motors Corp.*, 507 F.2d 525, 529 (10th Cir. 1974); *Morrissey v. National Maritime Union*, 544 F.2d 19, 27 (2d Cir. 1976); *Mueller v. Hubbard Milling Co.*, 573 F.2d 1029, 1038-39 (8th Cir. 1978); *Simko v. C&C Marine Maintenance Co.*, 594 F.2d 960, 967 (3d Cir. 1979); *E.I. Du Pont de Nemours v. Berkley & Co.*, 620 F.2d 1247, 1257 n.8 (8th Cir. 1980).

[11] *E.g.*, *Box v. Ferrellgas, Inc.*, 942 F.2d 942, 945 (5th Cir. 1991); *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 56 (2d Cir. 1980); *Morrissey v. National Maritime Union*, 544 F.2d 19, 27 (2d Cir. 1976).

[12] *E.g.*, *Jones v. Miles*, 656 F.2d 103, 1106-08 (5th Cir. 1981).

[13] *E.g.*, *Braun v. Flynt*, 731 F.2d 1205, 1206 (5th Cir. 1984); *Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652, 662 (1st Cir. 1981).

[14] *E.g.*, *Imperial Premium Finance v. Khoury*, 129 F.3d 347, 352-55 (5th Cir. 1998); *Crist v. Dickson Welding, Inc.*, 857 F.2d 1281, 1286-88 (5th Cir. 1992).

[15] *E.g.*, *Fleet Nat'l Bank v. Anchor Media Television, Inc.*, 45 F.3d 546, 555 (1st Cir. 1995); *Box v. Ferrellgas, Inc.*, 942 F.2d 942, 945 (5th Cir. 1991); *Kassel v. Gannett Co.*, 875 F.2d 935, 950 (1st Cir. 1989); *Woods v. Sammisa Co.*, 873 F.2d 842, 853-54 (5th Cir. 1989); *Ratner v. Sioux Natural Gas Corp.*, 770 F.2d 512, 519 n.9 (5th Cir. 1985); *Asbill v. Housing Auth.*, 726 F.2d 1499, 1504 (10th Cir. 1984); *Mueller v. Hubbard Milling Co.*, 573 F.2d 1029, 1039 (8th Cir. 1978); *Morrissey v. National Maritime Union*, 544 F.2d 19, 27 (2d Cir. 1976).

[16] *E.g.*, *Fleet Nat'l Bank v. Anchor Media Tele., Inc.*, 45 F.3d 546, 555 (1st Cir. 1995); *Mueller v. Hubbard Milling Co.*, 573 F.2d 1029, 1039 (8th Cir. 1978); *Morrissey v. National Maritime Union*, 544 F.2d 19, 27 (2d Cir. 1976).

[17] *E.g.*, *Braun v. Flynt*, 731 F.2d 1205, 1206 (5th Cir. 1984); *Davis v. Rennie*, 264 F.3d 86, 109 (1st Cir. 2001); *Eastern Trading Co. v. Refco, Inc.*, 229 F.3d 617, 622 (7th Cir. 2000); *Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 121 (3d Cir. 1999); *Buhrmaster v. Overnite Transportation Co.*, 61 F.3d 461, 463 (6th Cir. 1995). Nonetheless, if the case is complicated and the court cannot say with the confidence that the jury ignored the unsupported theory, courts will feel constrained to reverse in cases involving insufficient evidence. *E.g.*, *Rutherford v. Harris County*, 197 F.3d 173, 185 (5th Cir. 1999); *Woods v. Sammisa Co.*, 873 F.2d 842, 854 (5th Cir. 1989); *Ward v. Succession of Freeman*, 854 F.2d 780, 790 (5th Cir. 1988).

[18] *See, e.g.*, *Davis v. Rennie*, 264 F.3d 86, 106-07 (1st Cir. 2001); *Kossman v. Northeast Ill. Regional Commuter R.*, 211 F.3d 1031, 1037 (7th Cir. 2000); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1054 (8th Cir. 2000); *Mitsubishi Elec. Corp. v. Ampex Corp.*, 190 F.3d 1300, 1304 (Fed. Cir. 1999); *Landes Constr. Co. v. Royal Bank*, 833 F.2d 1365, 1373-74 (9th Cir. 1987); *General Industries Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 801-02 (8th Cir. 1987); *Union Pac. R.R. v. Lumbert*, 401 F.2d 699, 701 (10th Cir. 1968).

[19] *See, e.g.*, *Lattimore v. Polaroid Corp.*, 99 F.3d 456, 468 (1st Cir. 1996); *Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1056 n.15 (11th Cir. 1994); *Counts v. Burlington N. R.R.*, 952 F.2d 1136, 1140 (9th Cir. 1991); *Anixter v. Home-Stake Production Co.*, 77 F.3d 1215, 1228-32 (10th Cir. 1996); *Doherty v. American Motors Corp.*, 728 F.2d 334, 344 (6th Cir. 1984) (citing *Avins v. White*, 627 F.2d 637 (3d Cir. 1980)); *Asbill v. Housing Auth.*, 726 F.2d 1499, 1502 n.3 (10th Cir. 1984).

POST-VERDICT PRESERVATION OF ERROR

BY EILEEN K. WILSON

AFTER A JURY OR NON-JURY TRIAL, the Texas Rules of Civil Procedure enable parties to attempt to persuade trial courts to render a particular judgment. The rules also provide various opportunities to preserve error for appeal. If a party fails to file a particular motion or otherwise comply with the applicable procedural rules, it later may discover that it has waived its complaint on appeal.

The discussion set forth below addresses some of the actions that can be pursued to obtain corrective action at the trial level and/or to preserve error for appeal. In addition, the paper highlights various practice tips for avoiding problems on appeal.

I. Post-Verdict

The Texas Rules of Civil Procedure discuss various motions that can be filed after a jury returns a verdict, but before the trial court signs the judgment. They include: (1) a motion for judgment on the verdict; (2) a motion for judgment notwithstanding the verdict; and (3) a motion to disregard the jury's findings. *See* TEX. R. CIV. P. 301, 305.

A. Motion for Judgment on the Verdict

After a jury reaches its verdict, any party may file a motion for judgment. *See* TEX. R. CIV. P. 305; *see also* TEX. R. CIV. P. 300, 301. A party that intends to complain about the judgment on appeal, however, must be extremely cautious if it moves for judgment on the verdict. The motion is an affirmation that the jury reached the correct verdict. *See Litton Indus. Products, Inc. v. Gammage,* 668 S.W.2d 319, 321-22 (Tex. 1984). The movant will be prohibited from taking a position on appeal that is inconsistent with that part of the judgment. *Id.* at 322. Therefore, unless there is some pressing need to expedite the appellate process, the losing party should not move for judgment.

The Texas Supreme Court has recognized the trap this rule poses for the unwary litigant. The court has provided a solution for a party that is anxious to initiate the appellate process, but is partially or completely dissatisfied with the verdict. *See First Nat'l Bank of Beeville v. Fojtik,* 775 S.W.2d 632, 633 (Tex. 1989) (per curiam). Namely, where a judgment is adverse to the movant, the motion for judgment must reserve the party's right to complain about the judgment on appeal. *Id.* In *Fojtik,* the court held the party had not waived error regarding the sufficiency of the evidence because the motion for judgment recited that the party disagreed with the jury's findings; that it thought there was a fatal defect to support a motion for new trial; that it agreed only to the form of the proposed judgment; and that its actions should not be construed as concurring with the content and result. *Id.; see also Chappell Hill Bank v. Lane Bank Equip. Co.,* 38 S.W.3d 237, 247 (Tex. App.—Texarkana 2001, pet. denied) (if party specifically preserves objections to verdict in motion for judgment, right to appeal preserved).

"The court has provided a solution for a party that is anxious to initiate the appellate process, but is partially or completely dissatisfied with the verdict."

Where a party fails to voice its objections to the verdict, the extent of its waiver is unclear. Some courts hold that, where a party moves for judgment without reserving its appellate rights, only legal and factual sufficiency challenges are waived on appeal. *See Harry v. University of Tex. Sys.,* 878 S.W.2d 342, 344 (Tex. App.—El Paso 1994, no writ); *Chuck Wagon Feeding Co. v. Davis,* 768 S.W.2d 360, 366 (Tex. App.—El Paso 1989, writ denied); *see also Stewart & Stevenson Servs., Inc. v. Enserve, Inc.,* 719 S.W.2d 337, 340-41 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.) ("cannot have it both ways" by moving for judgment and later attempting to preserve legal and factual sufficiency points in a motion for new trial).

On the other hand, there are appellate court decisions holding that the waiver is far broader. *See Casu v. Marathon Refining Co.,* 896 S.W.2d 388, 389-90 (Tex. App.—Houston [1st Dist.] 1995, writ denied). By filing an unqualified motion for judgment, these courts hold a party is precluded from attacking the judgment on appeal. *See id.* at 390; *see also Mailhot v. Mailhot*, 124 S.W.3d 775, 777 (Tex. App.—Houston [1st Dist.] 2003, no pet.); *Tex-Hio Partnership v. Garner,* 106 S.W.3d 886, 892-93 (Tex. App.—Dallas 2003, no pet.) (party cannot pursue motion for judgment on verdict and then try to

contradict judgment on appeal); *Nipper-Bertram Trust v. Aldine I.S.D.,* 76 S.W.3d 788, 794 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (appellate complaint waived where parties agreed to judgment). Until the Texas Supreme Court settles this issue, a party that loses at trial should assume that, if it moves for judgment and does not specifically reserve its complaints for appeal, it will be prohibited from challenging the judgment.

Even where a party has not moved for judgment, it should refrain from signing a proposed judgment that agrees to both the form and the substance of the judgment if it intends to complain on appeal about the judgment. At best, the losing party should agree only to the form of the proposed judgment. *See Mailhot,* 124 S.W.3d at 777-78 (to preserve error, party who signs judgment must specify that it agrees only to the form, not the substance and the outcome); *Tex-Hio Partnership,* 106 S.W.3d at 892-93; *see also Nipper-Bertram Trust,* 76 S.W.3d at 794.

An order "merely" granting a motion for judgment is not an actual judgment. *See Naaman v. Grider,* 126 S.W.3d 73, 74 (Tex. 2003) (per curiam). The order "adjudicates nothing." *Id.*

B. Motion for Judgment Notwithstanding the Verdict

Rule 301 of the Texas Rules of Civil Procedure governs motions for judgment notwithstanding the verdict. *See* TEX. R. CIV. P. 301. Rule 301 provides that, upon motion and reasonable notice, the court may render a j.n.o.v. if a directed verdict would have been proper. *Id.*

The Texas Rules of Civil Procedure do not provide a deadline for filing a motion for j.n.o.v. *See* TEX. R. CIV. P. 301, 329b; *see Kirschberg v. Lowe,* 974 S.W.2d 844, 846 (Tex. App.—San Antonio 1998, no pet.) (neither Rule 301 nor any other rule provides a filing deadline). The majority of courts hold that the motion can be filed before or after judgment and may be decided up to the time a motion for new trial has been overruled, whether by an order or operation of law. *Spiller v. Lyons,* 737 S.W.2d 29, 29 (Tex. App.—Houston [14th Dist.] 1987, no writ); *see Kirschberg,* 974 S.W.2d at 846. *But see Commonwealth Lloyd's Ins. Co. v. Thomas*, 825 S.W.2d 135, 140-41 (Tex. App.—Dallas 1992), *vacated by agr.,* 843 S.W.2d 466 (Tex. 1993) (must file within thirty days of judgment and appellate timetable extended).

A motion for j.n.o.v. attempts to persuade the trial court to disregard the jury's answers. *See Tiller v. McLure,* 121 S.W.3d 709, 710, 713 (Tex. 2003) (per curiam). A trial court may grant a j.n.o.v. if there is no evidence to support one or more of the jury's findings on liability. *See id.* A j.n.o.v. also is proper where a legal principle precludes recovery and/or the evidence is conclusive, and the movant is entitled to judgment as a matter of law. *See Hoffmann-LaRoche, Inc. v. Zeltwanger,* 144 S.W.3d 438, 442 (Tex. 2004); *TRT Dev. Co.-KC v. Meyers,* 15 S.W.3d 281, 285 (Tex. App.—Corpus Christi 2000, no pet.); *Ceniceros v. Hernandez,* No. 08-98-00309-CV, 2000 WL 1038157, at *3 (Tex. App.—El Paso 2000, pet. denied) (not designated for publication); *Farias v. Laredo Nat'l Bank,* 985 S.W.2d 465, 468 (Tex. App.—San Antonio 1997, pet. denied). If a court grants a j.n.o.v., the adverse party can raise, by cross-point, any ground, including factual sufficiency and improper argument of counsel, that would have vitiated the verdict or prevented an affirmance. TEX. R. CIV. P. 324(c); TEX. R. APP. P. 38.2(b)(1).

Even if a party does not think a trial court will grant a j.n.o.v., the motion is useful for preserving legal sufficiency challenges on appeal. *See T.O. Stanley Boot Co. v. Bank of El Paso,* 847 S.W.2d 218, 220 (Tex. 1992). If a party waits to raise a legal sufficiency complaint in a motion for new trial, an appellate court only can remand the case if the party prevails, rather than render judgment. *See Horrocks v. Texas Dep't of Transp.,* 852 S.W.2d 498, 498-99 (Tex. 1993) (per curiam).

The Texas Supreme Court recently carved out an exception to the long-standing rule that errors raised on appeal must first be brought to the trial court's attention. *See Coastal Transp. Co. v. Crown Central Petroleum,* 136 S.W.3d 227, 229, 233 (Tex. 2004); TEX. R. APP. P. 33.1. The court held that, when a challenge regarding an expert witness is restricted to the face of the record, such as speculative or conclusory testimony "on its face," a party may challenge the legal sufficiency of the evidence "even in the absence of any objection to its admissibility." *Coastal Transp. Co.,* 136 S.W.3d at 233.

The law is unclear whether a motion for j.n.o.v. extends the appellate timetable. There is authority holding that any post-judgment motion or other instrument that is filed within the thirty day deadline for filing a motion for new trial and that assails the trial court's judgment will extend the appellate timetable. *Kirschberg,* 974 S.W.2d at 847-48; *Thomas*, 825 S.W.2d at 141. To avoid any problem on appeal, a party should file its motion for j.n.o.v. promptly and preserve its legal sufficiency and any other applicable points. In addition, a party should file a motion for new trial preserving its factual sufficiency and other issues because, as set forth below, the motion for new trial definitely extends the appellate deadlines. *See* Tex. R. App. P. 26.1(a)(1), 35.1(1).

C. Motion to Disregard

Rule 301 of the Texas Rules of Civil Procedure also controls motions to disregard. *See* TEX. R. CIV. P. 301. The rule permits, that "upon like motion and notice," the trial court may disregard any jury finding that does not have support in the evidence. *Id.*

A motion to disregard shares the same timing, notice, and other requirements as a motion for j.n.o.v. A motion to disregard differs from a motion for j.n.o.v., however, because it does not seek to displace the entire verdict. *See Anderson, Greenwood & Co. v. Martin,* 44 S.W.3d 200, 216 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). Instead, a motion to disregard asks the trial court to reject only some of the jury's answers. *See id.*

A trial court can disregard a jury finding where it is not supported by the evidence or is immaterial. *See Spencer v. Eagle Star Ins. Co.,* 876 S.W.2d 154, 157 (Tex. 1994). A question is immaterial when it should not have been submitted. *Id.* An issue also is immaterial when it was properly submitted, but rendered immaterial by other findings. *Id.* A question that calls for a finding beyond the jury's province, such as a question of law, may be deemed immaterial. *Id.; see also Anderson, Greenwood & Co.,* 44 S.W.3d at 216. A motion to disregard also can be used to preserve no evidence points. *See T.O. Stanley Boot Co.,* 847 S.W.2d at 221.

II. Judgment

The date the judgment or order is signed is critical. *See* TEX. R. CIV. P. 306a(1). This date marks the beginning of the trial court's plenary power to grant a new trial or to vacate, modify, correct, or reform a judgment. *Id.* Also, the date the court signs the judgment or order triggers the filing deadlines for several motions or pleadings, including motions for new trial, motions to modify the judgment, motions to reinstate after a dismissal for want of prosecution, motions to vacate the judgment, and requests for findings of fact and conclusions of law. *See id.*

Motions for new trial, motions to correct, modify, vacate, or reform the judgment, and verified motions to reinstate will extend a trial court's plenary jurisdiction. *See 3V, Inc. v. JTS Enters., Inc.,* 40 S.W.3d 533, 538 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (because motion to reinstate must be verified, courts hold that, where there is no verification, neither trial court's plenary power nor time to perfect appeal extended); *In re Garcia,* 94 S.W.3d 832, 832 (Tex. App.—Corpus Christi-Edinburg 2002, orig. proceeding); TEX. R. CIV. P. 165a, 329b.

The motions must be timely, or the court's plenary power will not be extended. *See L.M. Healthcare, Inc. v. Childs,* 929 S.W.2d 442, 444 (Tex. 1996). Where a timely motion is filed, the maximum length of the trial court's plenary power is 105 days. *L.M. Healthcare, Inc.,* 929 S.W.2d at 444; *see In re A.N.,* 126 S.W.3d 320, 323 (Tex. App.—Amarillo 2004, pet. denied).

Requests for findings of fact and conclusions of law will not extend the trial court's plenary power. *In re Gillespie,* 124 S.W.3d 699, 703 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding); *Pursley v. Ussery,* 982 S.W.2d 596, 599 (Tex. App.—San Antonio 1998, pet. denied). As discussed more fully below, however, the deadline for perfecting the appeal will be extended where a proceeding satisfies certain criteria and findings of fact and conclusions of law have been requested. *See IKB Indus. v. Pro-Line Corp.,* 938 S.W.2d 440, 441, 443 (Tex. 1997); TEX. R. APP. P. 26.1(4).

III. Post-judgment

A. Motion for New Trial

A new trial may be granted and the judgment set aside for good cause where a party files a motion or on the court's own motion. TEX. R. CIV. P. 320. As a general rule, a motion for new trial is not required to preserve error on appeal in either a jury or non-jury case. *See* TEX. R. CIV. P. 324(a).

Rule 324 does require a motion for new trial in certain situations. *See* TEX. R. CIV. P. 324(b). To secure the right to complain on appeal, a motion for new trial must be filed where:

(1) evidence must be heard, such as jury misconduct, newly discovered evidence, or the failure to set aside a default judgment;
(2) the evidence is factually insufficient to support a jury finding;
(3) a jury finding is against the great weight and preponderance of the evidence;
(4) the jury's damages award is inadequate or excessive; and/or
(5) incurable jury argument occurred, if the trial court did not rule on it.

See TEX. R. CIV. P. 324(b).

There are additional reasons for filing a motion for new trial. One of the classic grounds is where a party seeks to set aside a default judgment. *See Craddock v. Sunshine Bus Lines,* 134 Tex. 388, 133 S.W.2d 124 (1939); *Wal-Mart Stores, Inc. v. Kelley,*

103 S.W.3d 642, 644 (Tex. App.—Fort Worth 2003, no pet.); *cf. Carpenter v. Cimarron Hydrocarbons Corp.,* 98 S.W.3d 682, 683-84, 686 (Tex. 2002) (*Craddock* inapplicable to a motion for new trial filed after default summary judgment where respondent has notice of hearing and other procedural alternatives exist to obtain extension). A motion for new trial also provides a party with the opportunity to assert any complaint that may not have been presented to the trial court.

As a practical matter, a motion for new trial is often filed to preserve factual sufficiency complaints and/or to extend the appellate timetable. *See* TEX. R. APP. P. 26.1(a); TEX. R. CIV. P. 324. Although it is not required to preserve error, a motion for new trial even can be used to extend the appellate deadlines in a summary judgment proceeding. *See Holmes v. Home State County Mut. Ins. Co.,* 958 S.W.2d 381, 381 (Tex. 1997).

A motion for new trial must be in writing and signed. TEX. R. CIV. P. 320. A party should make certain that whatever complaint it raises is specifically described in the motion. *See* TEX. R. CIV. P. 321, 322 (generality to be avoided). Each point must briefly refer to the court's ruling, the actual or refused jury charge, and/or the admission or exclusion of the evidence. TEX. R. CIV. P. 321. Regardless of the complaint, the objection must be drafted so that the issue is clearly identified and understood by the trial court. *Id.* A trial court cannot consider general objections, such as that the court erred in the charge. *See* TEX. R. CIV. P. 322.

The motion must be filed within thirty days after the date the judgment or other order complained of is signed. *Naaman,* 126 S.W.3d at 73, 74 n.2; TEX. R. CIV. P. 329b(a). A premature motion is treated as though it had been filed on the date of, but subsequent to, the signing of the judgment it assails. TEX. R. CIV. P. 306c.

A party is free to amend its motion for new trial without leave, provided the earlier motion has not been overruled and the amended motion is filed within thirty days of the date the judgment or other order complained of is signed. TEX. R. CIV. P. 329b(b); *see Moritz v. Preiss,* 121 S.W.3d 715, 719 (Tex. 2003).

A trial court cannot enlarge the time period for filing a motion for new trial. *See Moritz,* 121 S.W.3d at 719-20*; see also* TEX. R. CIV. P. 5, 329b(b). Nevertheless, although the deadline cannot be extended and although the denial of an untimely motion cannot be appealed, the court, in its discretion, may grant a new trial under its inherent authority before it loses plenary power. *Moritz,* 121 S.W.3d at 720. In other words, the court can use the untimely motion for guidance while exercising its inherent authority. *Id.*

A party must be certain to pay the filing fee when it files a motion for new trial. If a party fails to do so, the motion will extend the appellate deadlines, but the litigant runs the risk of waiving error on appeal. *See Garza v. Garcia,* 137 S.W.3d 36, 37-38 (Tex. 2004). The Texas Supreme Court recently held a factual sufficiency complaint was waived where the appellant had raised the issue in a motion for new trial, but failed to pay the filing fee. *Id.* at 38. Therefore, for those points that must be preserved in a motion for new trial, the failure to pay the filing fee will forfeit the opportunity for the trial court, and later the appellate court, to consider the motion and its complaints. *See id.* at 37-38.

If a court grants a motion for new trial, the law currently provides that the new trial normally is not subject to review by either a direct appeal or mandamus from that order or a subsequent final judgment. *Cummins v. Paisan Constr. Co.,* 682 S.W.2d 235, 236 (Tex. 1984) (per curiam); *Sommers v. Concepcion,* 20 S.W.3d 27, 36 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) ("case law... very clear" that, if new trial granted during plenary power, it is not subject to review); *see Johnson v. Fourth Court of Appeals,* 700 S.W.2d 916, 918 (Tex. 1985) (mandamus not available for order granting new trial where order not void and where order not based on conflicting jury answers); *see also In re Martinez,* 77 S.W.3d 462, 465 (Tex. App.—Corpus Christi 2002, orig. proceeding) (writ of mandamus conditionally granted where trial court's new trial order was void); *In re Luster,* 77 S.W.3d 331, 336 (Tex. App.—Houston [14th Dist.] 2002, orig. proceeding) (writ of mandamus conditionally granted where new trial order void); *In re Steiger,* 55 S.W.3d 168, 171 (Tex. App.—Corpus Christi 2001, orig. proceeding) (trial court cannot "ungrant" new trial more than seventy-five days after judgment signed). As set forth below, however, a case is pending before the Texas Supreme Court that involves whether a party can challenge the granting of a new trial.

If the trial court fails to issue a written ruling on a motion for new trial within seventy-five days from the date the judgment was signed, the motion is overruled by operation of law. TEX. R. CIV. P. 329b(c). The same rule applies where an amended motion for new trial has been filed. *Id.*

Where a party timely files a motion for new trial, the court's plenary power is extended an additional thirty days after the motion is overruled. *Moritz,* 121 S.W.3d at 720. During that time, the court can grant a new trial or vacate, modify,

correct, or reform the judgment. TEX. R. CIV. P. 329b(e); *see Moritz,* 121 S.W.3d at 720. Courts are expressly prohibited, however, from granting either party more than two new trials due to the insufficiency or the weight of the evidence. TEX. R. CIV. P. 326.

If a timely motion for new trial has been filed, the deadline for filing a notice of appeal is typically extended from thirty to ninety days after the judgment is signed. *Naaman*, 126 S.W.3d at 74 n.2; TEX. R. APP. P. 26.1(a). A motion for new trial, however, does not extend the deadline for accelerated appeals. *In re C. S.*, No. 04-04-00491-CV, 2004 WL 2046623, at *1 (Tex. App. –San Antonio Sept. 15, 2004, no pet.) (per curiam) (not designated for publication); *Digges v. Knowledge Alliance, Inc.,* No. 01-04-00710-CV, 2004 WL 2610978, at *1 (Tex. App.—Houston [1st Dist.] Nov. 18, 2004, no pet.h.) (per curiam); TEX. R. APP. P. 26.1; *see* TEX. R. APP. P. 28.1 (where appeal allowed from interlocutory order, a motion for new trial will not extend deadline to perfect appeal; trial court may choose to file findings of fact and conclusions of law within thirty days after order signed); *see also Lushann Energy Int'l v. General Elec. Energy Rentals Inc.,* No. 14-04-00652-CV, 2004 WL 1899795, at *1 (Tex. App.—Houston [14th Dist.] Aug. 26, 2004, no pet.) (per curiam) (not designated for publication) (motions for new trial and requests for findings of fact and conclusions of law do not extend twenty day deadline for filing notice of appeal). *But see Rudder v. Washington Mut. Bank,* No. 2-04-151-CV, 2004 WL 1535216, at *1 (Tex. App.—Fort Worth 2004, no pet.) (per curiam) (dismissing accelerated appeal because "[n]o post-judgment motion was filed to extend the appellate deadline").

> "If a timely motion for new trial has been filed, the deadline for filing a notice of appeal is typically extended from thirty to ninety days after the judgment is signed. "

B. Cases Pending Before the Texas Supreme Court

At least two cases should be watched that are pending before the Texas Supreme Court relating to motions for new trial. One case involves whether a second motion for new trial was required to extend the appellate timetable where the court granted a summary judgment and dismissed another defendant without prejudice. *Wilkins v. Methodist Health Care Sys.,* 108 S.W.3d 565, 567 (Tex. App.—Houston [14th Dist.] 2003), *pet. for review granted*, 47 Tex. Sup. Ct. J. 416 (Apr. 9, 2004). The plaintiff filed a motion for new trial raising new arguments and attaching additional proof. *Id.* In a detailed order, the trial court granted the motion, considered the new arguments and proof, and then entered the same judgment. *Id.* The plaintiff did not file anything until her notice of appeal ninety days later. *Id.* The Fourteenth Court of Appeals concluded a second motion was not necessary because the first motion "assailed" the subsequent judgment and, therefore, extended the appellate timetable. *Id.* The case was argued on September 8, 2004.

The other pending issue is whether an order granting a new trial can be reviewed on appeal after the second trial. *See Volkswagen of Am., Inc. v. Ramirez,* 79 S.W.3d 113 (Tex. App.—Corpus Christi 2002), *pet. for review granted,* 46 Tex. Sup. Ct. J. 489 (Mar. 6, 2003). The defendant prevailed in the first personal injury trial, but after the trial court granted a new trial "in the interest of justice," the jury awarded the plaintiffs approximately $17.2 million in the second trial. *Id.* at 118. The case was argued on April 23, 2003.

Notably, in an earlier mandamus proceeding in *Volkswagen of Am., Inc.* as well as in another original proceeding, Justice Hecht, joined by Justice Owens, dissented on the basis that, although trial courts should have broad discretion to grant new trials in the interest of justice, the discretion should not be insulated from all review, and trial courts should be forced to state the reasons for their rulings. *In re Volkswagen of Am., Inc.,* 22 S.W.3d 462, 462 (Tex. 2000) (orig. proceeding) (Hecht, J., dissenting); *see In re BMW,* 8 S.W.3d 326, 329 (Tex. 2000) (orig. proceeding) (Hecht, J., dissenting).

C. Motion for Remittitur

Rule 315 of the Texas Rules of Civil Procedure addresses voluntary remittiturs, and the procedure where a prevailing party is willing to remit a portion of the judgment. *See* TEX. R. CIV. P. 315. The party can do so in open court or in writing. *See id.*

An adverse party can raise the issue of remittitur in a motion for new trial and/or file a separate motion for remittitur. *See Landmark Am. Ins. Co. v. Pulse Ambulance Serv., Inc.,* 813 S.W.2d 497, 498 (Tex. 1991) (per curiam); *C.M. Ashfahl Agency v. Tensor, Inc.,* 135 S.W.3d 768, 797 (Tex. App.—Houston [1st Dist.] 2004, no pet.); TEX. R. CIV. P. 320, 324. A trial court may suggest a remittitur, conditioned on the granting of a new trial, if the plaintiff refuses a remittitur, but a trial court cannot compel a remittitur. *See Snoke v. Republic Underwriters Ins. Co.,* 770 S.W.2d 777, 777 (Tex. 1989) (per curiam).

The Texas Rules of Civil Procedure do not provide a deadline

for filing the motion. To ensure the appellate deadlines are extended, however, the motion should be filed within thirty days from the date the judgment is signed, particularly where the issue is raised in a motion for new trial. Under those circumstances, the thirty day deadline is firm. *See* TEX. R. CIV. P. 329b(a).

D. Motions to Modify, Correct, or Reform the Judgment

A motion to modify, correct, or reform the judgment must be filed within thirty days after the trial court signs the judgment. TEX. R. CIV. P. 329b(a),(g); *see L.M. Healthcare, Inc.,* 929 S.W.2d at 443.

A motion to modify, correct, or reform the judgment must be in writing and signed. TEX. R. CIV. P. 329b(a), (g). The motion must specify why the judgment should be modified, corrected, or reformed. *Id.* If the motion is overruled, it does not preclude the filing of a motion for new trial, and the opposite is true. *Id.* If the court has overruled a motion for new trial, a party is still entitled to file a motion to modify, correct, or reform the judgment. *Id.* Also, the overruling of a motion for new trial has no impact on the court's plenary power to resolve a motion to modify, correct, or reform the judgment. *See L.M. Healthcare,* 929 S.W.2d at 443-44.

The trial court must sign a written order regarding a motion to modify, correct, or reform the judgment within seventy-five days of the date the judgment is signed, or the motion is overruled by operation of law on that date. TEX. R. CIV. P. 329b(c). If the court modifies, corrects, or reforms the judgment "in any respect," the time for appeal starts from that date. *Landmark Am. Ins. Co.*, 813 S.W.2d at 498; TEX. R. CIV. P. 329b(h)*; see Naaman*, 126 S.W.3d at 74 (any change in judgment resets appellate timetables); *Lane Bank Equip. Co. v. Smith So. Equip., Inc.,* 10 S.W.3d 308, 312 (Tex. 2000) (post-judgment motion seeking to add sanctions to judgment sufficient to extend trial court's plenary power over judgment); *cf.* TEX. R. CIV. P. 316 (if correction to record made pursuant to Rule 316 after plenary power expires, cannot raise complaint on appeal that could have been presented in an appeal from original judgment). During the court's plenary period, any change in the judgment is treated as a modified or reformed judgment that presumptively vacates the prior judgment unless the record indicates a contrary intent. *See Owens-Corning Fiberglass Corp. v. Wasiak,* 883 S.W.2d 402, 411 (Tex. App.—Austin 1994, no writ).

Similar to a motion for new trial, a motion to modify correct, or reform the trial court's judgment extends the court's plenary power and the time for perfecting an appeal. TEX. R. CIV. P. 329b(g). A notice of appeal must be filed within ninety days after the judgment is signed. TEX. R. APP. P. 26.1(a).

E. Findings of Fact and Conclusions of Law

For cases tried in the county or district courts "without a jury," any party may request the court to enter findings of fact and conclusions of law. *See* TEX. R. CIV. P. 296. If requested, findings of fact and conclusions of law are mandatory. *Gene Duke Builders, Inc. v. Abilene Hous. Auth.,* 138 S.W.3d 907, 908 (Tex. 2004) (per curiam); TEX. R. CIV. P. 296. The purpose for the findings and conclusions is to allow the trial court time to state the basis for its judgment so that a party can determine whether to appeal. *IKB Indus.,* 938 S.W.2d at 442-43. In addition, the findings and conclusions provide the appellate court with a useful tool for appellate review. *Gene Duke Builders, Inc.,* 138 S.W.3d at 908.

A party that loses should ensure that it obtains findings of fact and conclusions of law. If it fails to do so, all findings necessary to support the judgment will be implied. *See Pharo v. Chambers County,* 922 S.W.2d 945, 948 (Tex. 1996) (where findings of fact and conclusions of law not filed, appellate court will assume trial court made all findings in support of the judgment); *see Secure Comm, Inc. v. Anderson,* 31 S.W.3d 428, 430 (Tex. App.—Austin 2000, no pet.) (where findings of fact and conclusions of law are not filed, appellate court will imply them on every issue and on every legal theory). The appellate court will affirm the trial court's judgment on any legal theory that finds support in the evidence. *In re W.E.R.,* 669 S.W.2d 716, 717 (Tex. 1984) (per curiam).

If a clerk's record and a reporter's record are filed, however, the implied findings are not conclusive. *BMC Software Belgium, N.V. v. Marchand,* 83 S.W.3d 789, 795 (Tex. 2002); *Jones v. American Airlines,* 131 S.W.3d 261, 267 (Tex. App.—Fort Worth 2004, no. pet.). The findings can be challenged for legal and factual sufficiency. *BMC Software Belgium, N.V.,* 83 S.W.3d at 795; *Roberson v. Robinson,* 768 S.W.2d 280, 281 (Tex. 1989) (per curiam).

Where findings of fact and conclusions of law are sought, the applicable rules are strict regarding what must be included in the pleadings and the specific deadlines for both the court and litigants. *See* TEX. R. CIV. P. 296-299a. A pleading entitled "Request for Findings of Fact and Conclusions of Law" must be filed within twenty days after the judgment is signed. TEX. R. CIV. P. 296; *see IKB Indus.,* 938 S.W.2d at 441. The court is required to respond within twenty days after the request was filed, and if the court fails to do so, the movant must file a "Notice of Past Due Findings of Fact and Conclusions of

Law" within thirty days after the original request was filed. *See* TEX. R. CIV. P. 297. Once this notice is filed, the trial court's deadline is extended to forty days from the date the original request was filed. *See* TEX. R. CIV. P. 297.

After the court files it findings and conclusions, any party can request specific additional or amended findings or conclusions, but it must file its request within ten days after the court files its findings and conclusions. *See* TEX. R. CIV. P. 298. The court then has ten days to file any additional or amended findings or conclusions. *Id.*

Where a request for findings of fact and conclusions of law either is required under the Texas Rules of Civil Procedure or could be properly considered by the appellate court, it extends the time for filing a notice of appeal from thirty days to ninety days after the court signs the judgment. *Gene Duke Builders, Inc.,* 138 S.W.3d at 908; *see also* TEX. R. APP. P. 26.1(a)(4).

Nevertheless, not every case adjudicated without a jury qualifies as "a case tried without a jury." *IKB Indus.,* 938 S.W.2d at 441. A request in a summary judgment proceeding will not extend deadlines because findings of fact and conclusions of law "have no place." *Id.* The reason is that a summary judgment cannot be rendered if there are fact issues, and the legal conclusions are contained in the motion and response. *Id.* Other examples where judgments are rendered as a matter of law and requests and conclusions have no purpose and will not extend the deadlines include judgments after directed verdicts, judgments notwithstanding the verdict, dismissals for want of prosecution without an evidentiary hearing, dismissals for want of jurisdiction without an evidentiary hearing, dismissals based on the pleadings or special exceptions, and any judgment rendered without an evidentiary hearing. *Id.* at 443.

On the other hand, in addition to those situations where findings and conclusions are required under Rule 296, the deadline for perfecting an appeal will be extended where there is a reason for the findings and conclusions and the appellate court could properly consider them. *Id.* Examples are judgments after a conventional trial before the court, default judgments on a claim for liquidated damages, judgments rendered as sanctions, and any judgment based, in part, on an evidentiary hearing. *Id.*

F. Motion to Reinstate

A party should file a motion to reinstate where its case has been dismissed for want of prosecution. *See* TEX. R. CIV. P. 165a(3). The motion will extend the appellate deadlines. *See Butts v. Capitol City Nursing Home, Inc.,* 705 S.W.2d 696, 697 (Tex. 1986) (per curiam); TEX. R. CIV. P. 165a.

Rule 165a contains specific requirements for the motion, including that it be verified. *Id.* The court must reinstate the case if a party establishes, after a hearing, that the party or its attorney's failure was not intentional or the result of conscious indifference, but due to an accident or mistake or that the failure has otherwise been reasonably explained. *See* TEX. R. CIV. P. 165a(3).

Recently, the Texas Supreme Court held that Rule 165a does not require a separate hearing to be held before a case is dismissed for want of prosecution. *Alexander v. Lynda's Boutique,* 134 S.W.3d 845, 846 (Tex. 2004). In *Alexander,* a prior court order warned that, if the parties failed to attend a pre-trial scheduling conference on a specific date and at a specific time, the case could be dismissed. *Id.* at 847. The Texas Supreme Court held that the order met the hearing requirement under Rule 165a. *Id.* at 846-48, 851. A separate dismissal hearing was not required under Rule 165a. *Id.* at 846, 848, 851. Also, it did not matter that dismissal was only one of the possible sanctions that could be imposed for the failure to appear. *Id.* at 846, 851.

Rule 165a does not preclude a trial court from setting a pre-trial hearing, giving notice that the failure to attend may result in a dismissal for want of prosecution, and deciding, at the hearing, the case should be dismissed where a party fails to attend. *Id.* at 852. Rule 165a requires only a notice of intent to dismiss and the date, time, and place for the hearing. *Id.*

If the trial court fails to rule on a motion to reinstate, it is overruled by operation of law seventy-five days after the judgment is signed or within such other time as Rule 306a allows. *Id.* TEX. R. CIV. P. 306c. Where a motion to reinstate is filed within thirty days of the dismissal order or the period provided by Rule 306c, regardless of whether an appeal has been perfected, the trial court has plenary power to reinstate the case until thirty days after all timely filed motions are overruled, either by written and signed order or by operation of law, whichever occurs first. TEX. R. CIV. P. 165a(3).

G. Motion For Judgment Nunc Pro Tunc

Once a trial court loses jurisdiction over a judgment, it can correct only clerical errors in the judgment, not judicial ones. *Escobar v. Escobar,* 711 S.W.2d 230, 231 (Tex. 1986). The vehicle for obtaining a correction is through a motion

for judgment nunc pro tunc. *See id.;* TEX. R. CIV. P. 306a(6), 316, 329(b); TEX. R. APP. P. 4.3(b).

A clerical error is one that occurs in the entry of the judgment. *Escobar,* 711 S.W.2d at 231. It is a mistake or omission where the judgment, as entered, does not accurately reflect the judgment that was rendered. *Escobar,* 711 S.W.2d at 231. A clerical error does not result from judicial reasoning or a judicial determination. *Andrews v. Koch,* 702 S.W.2d 584, 585 (Tex. 1986) (per curiam); *see Escobar,* 711 S.W.2d at 231 (judicial error is an error in the rendering of the judgment); *Mathes v. Kelton,* 569 S.W.2d 876, 877 (Tex. 1978) (one example of judicial error is where trial court determines that the terms of a judgment, as rendered, should be changed).

If a court signs a "corrected judgment" or one labeled nunc pro tunc, but it actually rectifies a judicial error, it will be treated as a modified judgment, provided the court still has plenary power. *See Mathes,* 569 S.W.2d at 877-78; *Alford v. Whaley,* 794 S.W.2d 920, 922 (Tex. App.—Houston [1st Dist.] 1990, no writ). The substance of the judgment, rather than the title or form, controls. *Mathes,* 569 S.W.2d at 878 n.3.

Conclusion

Based on the Texas Rules of Civil Procedure and the Texas Rules of Appellate Procedure, a party should assert in the trial court every argument or issue that it believes it may raise on appeal. At least, two goals are accomplished with this approach. The trial court is given the opportunity to correct an error and actually may do so. In addition, a party lessens the chances that the appellate court will find an error has been waived.

Eileen Wilson practices in the areas of civil appellate law and general litigation. She is Board Certified in Civil Appellate Law by the Texas Board of Legal Specialization. In addition to her trial and appellate practice, she taught legal research and writing at the University of Houston Law Center for more than ten years. She is a member of the State Bar of Texas and the Houston Bar Association appellate sections. She is also a fellow of the Houston Bar Foundation. She is a former briefing attorney for the Honorable Jack Smith on the First Court of Appeals in Houston. ★

THE JUDGE DID WHAT?! MANDAMUS – WHEN AND UNDER WHAT CIRCUMSTANCES IS IT AVAILABLE?[1]

BY ERIC WALRAVEN

AT TIMES, LITIGATION IS QUITE SIMILAR to parenting; you must learn to pick your battles. Never is that more evident than when deciding whether to pursue mandamus relief.

The decision of whether you should pursue a mandamus is one that should begin before you attend the hearing that could result in an erroneous ruling. Experienced trial lawyers know when the potential for the judge to get it wrong exists. When these situations present themselves, it is crucial to at least begin planning for the possibility of a mandamus proceeding.

Although you may be furious with a judge's ruling on a matter, pursuing a mandamus is not always the answer. In fact, it seldom is. There are very few instances when a judge has actually abused his or her discretion such that mandamus would be proper, and there are even fewer instances when you have no adequate remedy at law. However, there are times when mandamus is the only answer. It is at these times that it pays to have already planned your strategy so that it can be implemented immediately after the erroneous ruling is issued.

"There are very few instances when a judge has actually abused his or her discretion such that mandamus would be proper, and there are even fewer instances when you have no adequate remedy at law. However, there are times when mandamus is the only answer."

Mandamus relief is available when the respondent abuses its discretion and there is no adequate legal remedy. "A trial court abuses its discretion if `it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law.' "*Id.* citing *Johnson v. Fourth Court of Appeals*, 700 SW.2d 916, 917 (Tex.1985) (orig. proceeding). The court determines whether "the trial court's error is so arbitrary, unreasonable, or based on so gross and prejudicial an error of law as to establish abuse of discretion. A mere error in judgment is not an abuse of discretion." *Johnson,* 700 S W.2d at 918.

When the trial court's decision rests on the resolution of factual issues or matters committed to the court's discretion, "[t]he relator must establish that the trial court could reasonably have reached only one decision." *In re China Oil and Gas Pipeline Bureau*, – 94 S.W.3d 50, 56 (Tex. App.–Houston [14th Dist.] 2002, orig. proceeding) (quoting Walker, 827 SW .2d at 839-40). If an evidentiary hearing has been held and has resolved disputed issues of fact, an appellate court may not substitute its judgment on the facts for the judgment of the trial court. *Dallas Morning News v. Fifth Court of Appeals,* 842 SW2d 655, 660 (Tex. 1992) (orig. proceeding). In other words, do not pursue mandamus if the facts are disputed. *Hooks v. Fourth Court of Appeals*, 808 SW.2d 56, 60 (Tex. 1991) (orig. proceeding); *In re China Oil*, 94 S.W.3d at 56.

On the other hand, the trial court is given little deference in matters involving the determination of legal principles. *Mitchell Energy Corp. v. Ashworth*, 943 SW.2d 436,437 (Tex. 1997) (orig. proceeding); *In re Smith Barney, Inc*., 975 S.W.2d 593, 598-99 (Tex. 1998) (orig. proceeding).

The requirement that a person seeking mandamus relief establish the lack of an adequate appellate remedy is a "fundamental tenet" of mandamus practice. Walker, 827 S.W.2d at 840. As the Supreme Court has repeatedly stated, an appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining mandamus relief. *CSR Ltd. v. Link*, 925 S.W.2d 591, 596 (Tex. 1996); Walker, 827 S.W.2d at 842. The recent trend in Texas jurisprudence held that because mandamus is an extraordinary remedy, it is not used by appellate courts to supervise or correct a trial court's incidental rulings when there is an adequate remedy at law, such as a normal appeal. *See Polaris Inv. Mgmt. Corp. v.*

Abascal, 892 S.W.2d 860, 862 (Tex.1995) (per curiam); *Pope v. Ferguson,* 445 S.W.2d 950, 954 (Tex.1969). However, two new cases were recently decided by the Texas Supreme Court, which muddied the waters regarding when a legal remedy is adequate,[2] *In re AIU Ins. Co.*,— S.W.3d — (Tex.2004) and *In re The Prudential Ins. Co. of America and Four Partners L.L.C.*, — S.W.3d — (Tex.2004). Both decisions were issued on September 3, 2004 and have the potential to drastically alter the landscape of mandamus practice.

In re The Prudential involved a commercial lease agreement that contained a waiver of jury trial in any future lawsuit involving the lease. However, when the tenant and its guarantors sued for rescission and damages, they demanded a jury trial. After the trial court denied the landlord's motion to quash the jury demand, the landlord petitioned for mandamus relief. The court of appeals denied the mandamus and the landlord pursued the matter to the Texas Supreme Court. *Id.* at 1.

The Supreme Court, finding that Texas public policy does not forbid waiver of trial by jury, held the waiver contained in the lease agreement was valid. *Id.* at 14. In doing so, the court analogized the waiver to an agreement to arbitrate. *Id.* According to the court, the trial court clearly abused its discretion by refusing to enforce the jury waiver because "'[a] trial court has no 'discretion' in determining what the law is or applying the law to the facts,' even when the law is unsettled,…." *Id.* at 15.

As for whether *Prudential* showed it had no adequate remedy by appeal, the court made the interesting observation that "[t]he operative word, 'adequate,' has no comprehensive definition; it is simply a proxy for the careful balance of jurisPrudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts." *Id.* at 15. While acknowledging the general principles that appellate courts do not sit to review incidental, interlocutory rulings of the trial court by mandamus and that "an appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ," *Walker,* 827 S.W.2d at 842, the court went on to state that "[a]n appellate remedy is 'adequate' when any benefits to mandamus review are outweighed by the detriments. When the benefits outweigh the detriments, the appellate courts must consider whether the appellate remedy is adequate." *Id.* at 16. Additionally, the court stated that while it "has tried to give more concrete direction for determining the availability of mandamus review, rigid rules are necessarily inconsistent with the flexibility that is the remedy's principal virtue." *Id.* According to the court, "whether an appellate remedy is 'adequate' so as to preclude mandamus review depends heavily on the circumstances presented and is better guided by general principles than by simple rules." *Id.* at 17. The court also noted that "[p]rudent mandamus relief is also preferable to legislative enlargement of interlocutory appeals," because of the fact that interlocutory appeals lie as of right must be decided on the merits while mandamus is a selective procedure. *Id.* at 18. The court then cautioned that appellate courts must remain mindful that the benefits of mandamus review are lost by overuse. *Id.*

Taking all of the factors announced by the court into consideration, it determined that the situation presented by *Prudential* was likely to recur and could not be rectified on appeal. *Id.* at 19. In the court's opinion, "[e]ven if *Prudential* could somehow obtain reversal based on the denial of its contractual right, it would already have lost a part of it by having been subject to the procedure it agreed to waive." *Id.* The court analogized this situation to arbitration to hold that "[o]nly if a contractual waiver of trial by jury is enforced in the trial court can its propriety effectively be reviewed on appeal." *Id.* at 20. According to the majority, "[t]o deny *Prudential* enforcement of the jury waiver by mandamus is to deny it any remedy at all." *Id.* at 22.

The four-justice dissent, presented by Chief Justice Phillips, pointed out that the Supreme Court, as recently as 2001, said that a party establishes its appellate remedy is inadequate by showing that it is in real danger of permanently losing its substantial rights. *Id.* (Phillips, C.J., dissenting). According to the dissent, *Prudential* did not make this showing. The dissent also acknowledged *Prudential*'s appellate remedy would not be as efficient as mandamus, but reminded efficiency is not the test for adequacy.

In In re AIU Ins. Co., the enforceability of a forum-selection clause was at issue. The trial court denied a motion to enforce the clause. *AIU* sought mandamus relief. *In re AIU*, — S.W.3d — (Tex.2004), p.1.

After finding that the trial court abused its discretion by refusing to enforce the clause, the court addressed whether *AIU* had an adequate remedy by appeal. Just as in *The Prudential*, the court analogized this situation to an arbitration agreement and held *AIU* had no adequate remedy by appeal. *Id.* at 9. In doing so, the court reasoned that subjecting a party to trial in a forum other than that agreed upon and requiring an appeal to vindicate the rights granted in a forum-selection clause is clear harassment that will not be tolerated under the standard established in *Walker v. Packer. Id.* at 13. According

to the court, the burden on the party seeking enforcement of the forum-selection clause of participating in a trial and then appealing to vindicate its contractual rights is great while there is no legitimate benefit whatsoever to the party who breached the clause. *Id.* at 13. Thus, the court held no adequate remedy existed and mandamus was proper even while acknowledging this was not the result reached by the United States Supreme Court in a similar case. *Id.* at *7; *see Lauro Lines S.R.L. v. Chasser,* 490 U.S. 495, 501, 109 S.Ct. 1976, 104 L.Ed.2d 548 (1989)(Supreme Court held the denial of a motion to dismiss based on a forum selection clause cannot be reviewed by interlocutory appeal or the collateral order doctrine).

The four-justice dissent again pointed out the test for whether a remedy is adequate does not revolve around whether the remedy is convenient, quick, or cheap. *Id. at* *10. Additionally, the dissent noted that the Texas Supreme Court historically has not specifically enforced contractual rights by mandamus except for the limited circumstance of arbitration agreements that are governed by the Federal Arbitration Act. *Id.*

Only time will tell whether these recent decisions will greatly expand the instances when mandamus relief is granted. In the meantime, it is recommended that you consider whether the situation you are facing is a situation where mandamus has been granted before. If it isn't, then the chances of success are extremely low.[3] Although the discussion above is a good illustration of the fact that many mandamus proceedings will turn on their own unique facts, there are several areas where the courts have consistently held mandamus relief is available[4].

1. Appointment of guardian ad litem – *See In re Forth Worth Children's Hosp.*, 100 S.W.3d 582, 590-91 (Tex.App.—Fort Worth 2003, orig. proceeding)
2. Appointment of master – *See In re Xeller,* 6 S.W.3d 618, 624 (Tex.App.—Houston [14th Dist.] 1999, orig. proceeding)
3. Discovery disputes — if the court of appeals cannot cure the trial court's error or that error impairs a party's ability to present a viable claim or defense. *Volkswagen, A.G. v. Valdez*, 909 S.W.2d 900, 903 (Tex.1995); *Able Sup. Co. v. Moye*, 898 S.W.2d 766, 771-72 (Tex.1995).
4. Disqualification of judge – *See McLeod v. Harris*, 582 S.W.2d 772, 773-75 (Tex.1979)(orig. proceeding)
5. Disqualification of lawyer – *See In re Nitla*, 92 S.W.3d 419, 422-23 (Tex.2002)
6. Denial of a motion for continuance – *See Union Carbide Corp. v. Moye*, 798 S.W.2d 792, 793 (Tex.1990)
7. Orders on motions to compel arbitration – *See In re J.D. Edwards World Solutions Co.*, 87 S.W.3d 546, 552 (Tex.2002)
8. Violation of mandatory venue provisions – *See In re Continental Airlines, Inc.,* 988 S.W.2d 733, 735 (Tex.1998)
9. Violation of procedural requirements, such as enforcement of notice requirements, *see Grigsby v. Coker,* 904 S.W.2d 619, 621 (Tex.1995), enforcement of mandatory hearings, *see Eli Lilly & Co. v. Marshall*, 829 S.W.2d 157, 158 (Tex.1992), to consider and rule on a party's motion, *see City of Galveston v. Gray,* 93 S.W.3d 587, 592-93 (Tex.App.—Houston [14th Dist.] 2002, orig. proceeding), and to proceed to trial and judgment, *see Boswell, O'Toole, Davis & Pickering v. Stewart*, 531 S.W.2d 380, 382 (Tex.App.—Houston [14th Dist.] 1975, orig. proceeding)

"In addition to considering whether the situation you are facing is one in which mandamus relief is often granted, trial lawyers and the parties they represent must also take into consideration the extra-legal issues, such as the costs associated with pursuing a mandamus."

In addition to considering whether the situation you are facing is one in which mandamus relief is often granted, trial lawyers and the parties they represent must also take into consideration the extra-legal issues, such as the costs associated with pursuing a mandamus. In certain instances the costs, which can include attorneys fees associated with preparing the petition and possibly preparing for and attending oral argument, and costs for preparing the record, can be more than the party's entire claim is worth. Other times, the adverse ruling from the trial court could have wreaked such havoc with your party's case that you have no chance to be successful if mandamus relief is not granted. This analysis is necessarily case specific, but it must be done in each case to ensure that the costs of pursuing mandamus relief do not outweigh the benefits to be gained from a successful mandamus.

Just as important a consideration is what effect pursuing a mandamus will have on the trial judge. In the vast majority of mandamus situations, even if you are ultimately successful, you and your client will still be in front of the judge who issued the erroneous ruling. It is a rare circumstance when no

tension is created between you and the judge against whom you seek a mandamus. Again, you must decide whether this is a battle worth fighting.

Ultimately, seeking mandamus relief is a process that must have been contemplated prior to the issuance of the erroneous ruling. Only through thoughtful analysis of your situation, your client's position and needs, and the effect a mandamus will have on your case as a whole, can you determine whether it is indeed time to fight.

Eric Walraven is a member of the Appellate Section of Godwin Gruber, LLP. He is a member of the Appellate Section of the State Bar of Texas, the Bar Association of the Fifth Federal Circuit, and a former member of the Local Bar Coordinating Committee of the Appellate Section of the State Bar of Texas (1998-2000). Mr. Walraven is also a co-author of the Fifth Circuit Update in the Summer issues of The Appellate Advocate. ★

---

[1] This article does not cover the mechanics of preparing and filing a petition for writ of mandamus. Numerous CLE materials, including the SUCCEEDING IN MANDAMUS REVIEW, by Jane M.N. Webre, which was presented at the 18th Annual Advanced Civil Appellate Practice Course, and other publications have more than adequately covered the requirements and procedures involved. *Also, see* Tex.R.App.P. 52.

[2] Considering the magnitude of these recent decisions, they will be discussed fully. As a result, the more traditional bases for mandamus will be limited to a listing toward the end of this article.

[3] If your issue is not one that mandamus relief has been granted on before, your likelihood of success is even lower than average, which is already extremely low. In fiscal year 2002, the Texas Supreme Court disposed of 246 petitions for writ of mandamus. ANNUAL REPORT OF THE TEXAS JUDICIAL SYSTEM, FISCAL YEAR 2002. The court granted only 7 (2.8%) of those petitions. *See Id.* It is clear that the likelihood of success when pursuing mandamus relief is extremely low, and should be seriously considered when deciding whether this is the time to fight.

[4] For a more complete list of areas where mandamus has been granted, please see O'CONNOR'S TEXAS APPEALS § 4.3.

CIVIL APPEALS TO THE COURTS OF APPEALS

BY C. ALFRED MACKENZIE

A GOOD PLACE TO BEGIN a discussion of civil appeals to the courts of appeals would be with the concept of appellate jurisdiction. "Appellate jurisdiction" is the power and authority conferred on a superior court to rehear and determine—to review—causes that have been tried in inferior courts. *Morrow v. Corbin*, 122 Tex. 553, 62 S.W.2d 641, 644 (1933). Judicial action without jurisdiction is void. *Cleveland v. Ward*, 116 Tex. 1, 285 S.W. 1063, 1071 (1926).

Article 5, section 6, of the Texas Constitution provides that the state "shall be divided into courts of appeals districts" with "appellate jurisdiction co-extensive with the limits of their respective districts... under such restrictions and regulations as may be prescribed by law... [p]rovided, that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error." TEX. CONST. art. V, § 6.

Section 22.220 of the Texas Government Code grants to each of the courts of appeals appellate jurisdiction of "all civil cases within its district of which the district courts and county courts have jurisdiction when the amount in controversy or the judgment rendered exceeds $100, exclusive of interest and costs." TEX. GOV'T CODE § 22.220; *see also* TEX. CIV. PRAC. & REM. CODE § 51.012.

The Texas Rules of Appellate Procedure[1] provide for "traditional" appeals from final judgments, accelerated appeals, including interlocutory appeals, and restricted appeals.

I. Appeals from Final Judgments

A. Finality

The general rule, with a few mostly statutory exceptions, is that an appeal may be taken only from a final judgment. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). "A judgment is final for purposes of appeal if it disposes of all pending parties and claims in the record, except as necessary to carry out the decree." *Id.*

Rule 301 of the Texas Rules of Civil Procedure provides, in part, that "[o]nly one final judgment shall be rendered in any cause except where it is otherwise specially provided by law." TEX. R. CIV. P. 301. To be final, a judgment must be definite and certain. *Int'l Sec. Life Ins. Co. v. Spray*, 468 S.W.2d 347, 350 (Tex. 1971). In addition, a judgment generally should not be conditional, alternative, or contingent. *Hill v. Hill*, 404 S.W.2d 641, 643 (Tex. Civ. App.—Houston [1st Dist.] 1966, no writ). A judgment will, however, be final if it definitely settles the rights controverted by the parties, even though further proceedings will be required to carry the judgment into effect. *Ferguson v. Ferguson*, 161 Tex. 184, 338 S.W.2d 945, 947 (1960).

When a judgment, not intrinsically interlocutory in character, is rendered and entered in a case regularly set for a conventional trial on the merits, no order for a separate trial of issues having been entered, it will be presumed for appeal purposes that the trial court intended to, and did, dispose of all parties legally before it and of all issues made by the pleadings between such parties. *N.E. Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893, 897-98 (Tex. 1966). This presumption does not apply to a summary judgment. Rather, all parties and all issues before the trial court must be disposed of before a summary judgment order becomes final and appealable. *See Mafrige v. Ross*, 866 S.W.2d 590, 591 (Tex. 1993). In *Lehmann*, the Supreme Court clarified the longstanding general rule governing summary judgments by holding that "in cases in which only one final and appealable judgment can be rendered, a judgment issued without a conventional trial is final for purposes of appeal *if and only if* either it actually disposes of all claims and parties then before the court, regardless of its language, or it states with unmistakable clarity that it is a final judgment as to all claims and all parties." 39 S.W.3d at 192-93 (emphasis added). In doing so, the court rendered obsolete the traditional "Mother Hubbard" clause (*e.g.*, "All relief not expressly granted is denied."). In its place, the Court in *Lehmann* suggested a statement like, "This judgment finally disposes of all parties and all claims and is appealable." *Id.* at 206.

All interlocutory judgments and orders are merged into the final judgment regardless of whether the prior interlocutory judgments or orders are specifically named within the final judgment. *Campbell v. Kosarek*, 44 S.W.3d 647, 649 n.1 (Tex.

App.—Dallas 2001, pet. denied).

B. Notice of Appeal

"An appeal is perfected when a written notice of appeal is filed with the ***trial court clerk***." TEX. R. APP. P. 25.1 (emphasis added); *Kinnard v. Carnahan*, 25 S.W.3d 266, 268 (Tex. App.—San Antonio 2000, no pet.). The notice of appeal must be filed within 30 days after the judgment is signed, except as otherwise provided by Rule 26.1. TEX. R. APP. P. 26.1. The deadline for filing the notice of appeal is extended to 90 days after the judgment is signed if any party timely files one of the following post-judgment motions or requests:

(1) a motion for new trial;
(2) a motion to modify the judgment;
(3) a motion to reinstate under Texas Rule of Civil Procedure 165a; or
(4) a request for findings of fact and conclusions of law ***if*** findings and conclusions either are ***required*** by the Rules or, if not required, ***could properly be considered*** by the appellate court.

TEX. R. APP. P. 26.1(a) (emphasis added).

Any party who seeks to alter the trial court's judgment or other appealable order must file a notice of appeal. TEX. R. APP. P. 26.1(c). Conversely, a party who does not seek to alter the judgment need not file a notice of appeal. *Ash v. Hack Branch Distrib. Co.*, 54 S.W.3d 401, 409 n.2 (Tex. App.—Waco 2001, pet. denied). If any party timely files a notice of appeal, any other party who seeks to alter the trial court's judgment may file a notice of appeal "within the applicable period stated [in Rule 26.1] or 14 days after the first filed notice of appeal, whichever is later." TEX. R. APP. P. 26.1(d).

Because the filing of a notice of appeal invokes the appellate court's jurisdiction, if a party does not timely perfect the appeal, the appellate court does not acquire jurisdiction, and must dismiss the appeal. *Butts v. Capitol City Nursing Home, Inc.*, 705 S.W.2d 696 (Tex. 1986); TEX. R. APP. P. 25.1(b); *see also* TEX. R. APP. P. 2 (providing that an appellate court may not alter the time for perfecting an appeal in a civil case).

C. Motion to Extend Time

Rule 26.3 expressly authorizes the appellate court to extend the time to file a notice of appeal if, within 15 days after the deadline for filing the notice of appeal, the party:

(a) files in the trial court the notice of appeal; and
(b) files in the appellate court a motion for extension of time that states the facts relied on to reasonably explain the need for an extension.

TEX. R. APP. P. 26.3, 10.5(b).

Notwithstanding the express language of Rule 26.3, requiring both the notice of appeal and a motion for extension of time to be filed within the 15-day period following the deadline, the court of appeals may consider a notice of appeal, tendered within the 15-day time period, as an implied motion for extension of time to file the notice of appeal. *Hone v. Hanafin*, 104 S.W.3d 884, 886 (Tex. 2003). Nevertheless, the appellant must reasonably justify, whether in response to a directive from the court, a motion to dismiss, or otherwise, the need for an extension as required by Rule 10.5(b). *Smith v. Houston Lighting & Power Co.*, 7 S.W.3d 287, 288 (Tex. App.—Houston [1st Dist.] 1999, no pet.); *Kidd v. Paxton*, 1 S.W.3d 309, 310 (Tex. App.—Amarillo 1999, no pet.). A "reasonable explanation" is "any plausible statement of circumstances indicating that failure to file within the [specified] period was not deliberate or intentional, but was the result of inadvertence, mistake or mischance." *Hone v. Hanafin*, 104 S.W.3d 884, 886 (Tex. 2003). Absent a finding that an appellant's conduct was deliberate or intentional, the court of appeals should ordinarily accept the appellant's explanations as reasonable. *Id.* at 887 (citing *Garcia v. Kastner Farms, Inc.*, 774 S.W.2d 668, 670 (Tex. 1989)). Once "the period for granting a motion for extension of time under Rule [26.3] has passed, a party can no longer invoke the appellate court's jurisdiction." *Verburgt v. Dorner*, 959 S.W.2d 615, 617 (Tex. 1997).

D. Preservation of Appellate Complaints

Other than to point out that, in accordance with Rule 33.1, the record must show that (1) the complaint was made to the trial court by timely request, objection, or motion; and (2) the trial court ruled thereon, either expressly or implicitly, or refused to rule and the complaining party objected to the refusal, a discussion of "preservation of error" is beyond the scope of this article. *See* TEX. R. APP. P. 33.1.

E. Record on Appeal

The appellate record consists of the clerk's record and, if necessary to the appeal, the reporter's record. TEX. R. APP. P. 34.1. The required contents of the clerk's record are set out in Rule 34.5, but at any time before the clerk's record is prepared, any party may file with the trial court clerk a written designation specifying additional items to be included in the record. TEX. R. APP. P. 34.5(a), (b). Rule 34.5(c) further provides that, even in the absence of a timely request, the clerk's record may be freely supplemented upon the request

of the trial court, the appellate court, or any party. TEX. R. APP. P. 34.5(c). Rule 34.6 requires the appellant to request the reporter's record in writing and to designate the exhibits and portions of the proceedings to be included. TEX. R. APP. P. 34.6(b)(1). Nevertheless, the appellate court may not refuse to file a reporter's record or a supplemental record because of a failure to timely request it. TEX. R. APP. P. 34.6(b)(3). Under Rule 35, the clerk and reporter are responsible for preparing and timely filing the clerk's record and reporter's record, respectively, ***provided*** the appellant has paid the required fee or "has made satisfactory arrangements" to pay the fee or is entitled to appeal without paying the fee. TEX. R. APP. P. 35.3.

E. Briefs

The various elements of the appellant's brief and the appellee's brief are set out in Rules 38.1 and 38.2, respectively. TEX. R. APP. P. 38.1, 38.2. An appendix, which must include certain "necessary contents" and may include various "optional contents" as required by Rule 38.1(j), must accompany the appellant's brief. TEX. R. APP. P. 38.1(j). The appellant's brief is due 30 days after the later of (1) the date the clerk's record was filed or (2) the date the reporter's record was filed. TEX. R. APP. P. 38.6(a). The appellee's brief is due 30 days after the appellant's brief was filed. TEX. R. APP. P. 38.6(b). A party desiring oral argument must note that request on the front cover of the party's brief. TEX. R. APP. P. 39.7.

II. Accelerated Appeals

Some appeals are "accelerated" pursuant to statute or rule. According to Rule 28.1, an appeal from an interlocutory order, when allowed, will be accelerated. TEX. R. APP. P. 28.1. The discussion herein will be limited to appeals from interlocutory orders under section 51.014 of the Texas Civil Practice and Remedies Code. In an accelerated appeal, the notice of appeal must be filed within 20 days after the judgment is signed. TEX. R. APP. P. 26.1(b). Post-judgment motions do not extend the time for perfecting an accelerated appeal. TEX. R. APP. P. 28.1. The appellate record, which may consist of the original papers forwarded by the trial court or sworn and uncontroverted copies of those papers, must be filed in the appellate court within 10 days after the notice of appeal is filed. TEX. R. APP. P. 28.3, 35.1(b). The appellant's brief is due 20 days after the clerk's record and reporter's record are filed. TEX. R. APP. P. 38.6(a). The appellee's brief is due 20 days after the appellant's brief is filed. TEX. R. APP. P. 38.6(b).

A. Statutory Interlocutory Appeals

Pursuant to section 51.014(a) of the Texas Civil Practice and Remedies Code, a person may appeal from an interlocutory order of a district court, county court at law, or county court that:

(1) appoints a receiver or trustee;
(2) overrules a motion to vacate an order that appoints a receiver or trustee;
(3) certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure;
(4) grants or refuses a temporary injunction or grants or overrules a motion to dissolve a temporary injunction as provided by Chapter 65;
(5) denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state;
(6) denies a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article I, Section 8, of the Texas Constitution, or Chapter 73;
(7) grants or denies the special appearance of a defendant under Rule 120a, Texas Rules of Civil Procedure, except in a suit brought under the Family Code;
(8) grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001;
(9) denies all or part of the relief sought by a motion under Section 74.351(b), except that an appeal may not be taken from an order granting an extension under Section 74.351; or
(10) grants relief sought by a motion under Section 74.351(l).

TEX. CIV. PRAC. & REM. CODE § 51.014(a).

An interlocutory appeal under section 51.014(a), other than an appeal from an order that grants or refuses a temporary injunction or grants or overrules a motion to dissolve a temporary injunction, stays the commencement of a trial in the trial court pending resolution of the appeal. TEX. CIV. PRAC. & REM. CODE § 51.014(b). An interlocutory appeal from an order that certifies or refuses to certify a class, denies a motion for summary judgment that is based on an assertion of official immunity, or grants or denies a plea to the jurisdiction by a governmental unit also stays all other proceedings in the

trial court pending resolution of that appeal. *Id.* A denial of a motion for summary judgment based on an assertion of official immunity, a special appearance of a defendant, or plea to the jurisdiction by a governmental unit is not subject to the automatic stay unless the motion, special appearance, or plea to the jurisdiction is filed and requested for submission or hearing before the trial court not later than the later of:

(1) a date set by the trial court in a scheduling order entered under the Texas Rules of Civil Procedure; or
(2) the 180th day after the date the defendant files:
  (A) the original answer;
  (B) the first other responsive pleading to the plaintiff's petition; or
  (C) if the plaintiff files an amended pleading that alleges a new cause of action against the defendant and the defendant is able to raise a defense to the new cause of action under Subsection (a)(5), (7), or (8), the responsive pleading that raises that defense.

TEX. CIV. PRAC. & REM. CODE § 51.014(c).

B. Permissive Interlocutory Appeals

Since 2001, district courts have been granted the authority to issue "a written order for interlocutory appeal in a civil action not otherwise appealable" if:

(1) the parties agree that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion;
(2) an immediate appeal from the order may materially advance the ultimate termination of the litigation; and
(3) the parties agree to the order.

TEX. CIV. PRAC. & REM. CODE § 51.014(d). A permissive interlocutory appeal does not stay proceedings in the district court unless the parties agree and the district court, the court of appeals, or a judge of the court of appeals orders a stay of the proceedings. *Id.* § 51.014(e). Furthermore, the trial court's certification that an interlocutory order is appealable is not binding on the court of appeals. *See e.g.*, *Diamond Products Intern., Inc. v. Handsel*, 2004 WL 1607689 (Tex. App.—Houston [14 Dist.] 2004, no pet. h.) (holding that to persuade the court of appeals to grant permission to appeal, appellant should include facts and argument addressing the requirements of section 51.014(d)—that the order "involves a controlling question of law as to which there is a substantial ground for difference of opinion" and that "an immediate appeal... may materially advance the ultimate termination of the litigation."); *see also* TEX. CIV. PRAC. & REM. CODE § 51.014(f) (providing that the appellate court "***may permit*** an appeal to be taken.") (emphasis added).

Although section 51.014(f) does not specify the contents of the application, several appellate courts have concluded that the application, or at least the briefs, must inform the appellate court of the reasons the appeal should be permitted. *See Stolte v. County of Guadalupe,* 139 S.W.3d 406, 408-10 (Tex. App.—San Antonio 2004, no pet. h.); *Richardson v. Kays,* 2003 WL 22457054, (Tex. App.—Fort Worth 2003, no pet.) (not designated for publication) (denying application to appeal that did "not mention, discuss, or analyze why the issue... involves a controlling question of law as to which there is a substantial ground for difference of opinion").

Section 51.014(f) also requires the filing of the application "not later than the 10th day after the date an interlocutory order... is entered." TEX. CIV. PRAC. & REM. CODE § 51.014(f). The courts of appeals have differed, however, regarding whether the 10-day period specified by section 51.014(f) is jurisdictional. *See e.g. Stolte v. County of Guadalupe,* 139 S.W.3d 406, 408-10 (Tex. App.—San Antonio 2004, no pet. h.) (holding that, because a motion for extension of time to perfect an appeal is necessarily implied when an appellant acting in good faith files a perfecting instrument beyond the time allowed by the rules, but within the fifteen-day period for filing a motion to extend the filing deadline, a notice of appeal filed nineteen days after the interlocutory order was signed by the trial court was sufficient to invoke the jurisdiction of the appellate court, which in that case granted the appellant an opportunity to file an amended application explaining why the court of appeals should grant permission to appeal); *but see In re D.B.*, 80 S.W.3d 698 (Tex. App.—Dallas 2002, no pet.) (holding that because the deadline for perfecting an appeal from an interlocutory order pursuant to section 51.014(d) is specifically stated in section 51.014(f), the deadline and extension for perfecting an appeal in the rules of appellate procedure do not apply). Until this issue is resolved by the Supreme Court, prudent counsel should file an application addressing the requirements of section 51.014(d) within 10 days of the date the interlocutory order is entered rather than relying on the 20-day period for filing the notice of appeal generally applicable to interlocutory appeals. *See* TEX. R. APP. P. 26.1(b).

III. Restricted Appeals

Pursuant to Rule 30, a party who did not participate—either in person or through counsel—in the hearing that resulted in the judgment complained of, and who did not timely file a postjudgment motion or request for findings of fact and conclusions of law, or a timely notice of appeal, may file a notice of restricted appeal within six months after the judgment is signed. TEX. R. APP. P. 30, 26.1(c); *see also* TEX. CIV. PRAC. & REM. CODE § 51.013 (providing that writ of error, now restricted appeal, may be taken at any time within six months after the date the final judgment is rendered.).

In determining whether the nonparticipation requirement of Rule 30 is met, the question is whether the appellant participated in the "decision-making event" that resulted in the order adjudicating the appellant's rights. *Withem v. Underwood*, 922 S.W.2d 956, 957 (Tex.1996).

An additional requirement for a restricted appeal is that the appellant must demonstrate that the error complained of is apparent from the face of the record. *Campbell v. Fincher,* 72 S.W.3d 723 (Tex. App.—Waco 2002, no pet.). According to the Texas Supreme Court in *DSC Finance Corp. v. Moffitt*, 815 S.W.2d 551 (Tex. 1991) (per curiam), the court of appeals "may consider all of the papers on file in the appeal including the [reporter's record]." Extrinsic evidence, however, cannot be considered in a restricted appeal. *Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004) (holding that an affidavit executed after the restricted appeal reached the court of appeals was extrinsic evidence that could not be considered in determining whether there was error on the face of the record.) As the Supreme Court explained in *General Electric Co. v. Falcon Ridge Apartments, Joint Venture*, 811 S.W.2d 942, 944 (Tex.1991), if extrinsic evidence is necessary, it should be presented in a motion for new trial or a bill of review.

In *Alexander,* the Supreme Court held that the failure of the record to affirmatively show that notice of a pre-trial hearing was sent to counsel or that notice of the order dismissing the case was sent to counsel at a particular address was not error on the face of the record. *Id*., 134 S.W.3d at 849-50. On the other hand, a default judgment will be set aside if the record does not demonstrate strict compliance with the Rules of Civil Procedure governing service of citation. *Discount Rental, Inc. v. Carter,* 2004 WL 1007847 (Tex. App.—Waco 2004, pet. denied) (not designated for publication). No presumptions are entertained in favor of valid issuance, service, and return of citation in a restricted appeal. *Id.*

C. Alfred Mackenzie is an attorney with Haley & Davis, P.C. in Waco, Texas, and is board certified in civil appellate law by the Texas Board of Legal Specialization. From time to time he has also served as an adjunct instructor for the Baylor University School of Law (Appellate Procedure, 2004; Federal Courts, 2000; Legal Research, 1992-1993). Mr. Mackenzie recently completed a three-year term on the State Bar of Texas Appellate Section Council and is currently a member of the Civil Appellate Law Advisory Commission of the Texas Board of Legal Specialization. ★

[1] Unless otherwise specified, references to Rules are to the Texas Rules of Appellate Procedure.

UNSUPPORTED EXPERTS BEWARE:

COASTAL TRANSPORT Allows Parties to Bring an Initial Challenge to Unsupported Expert Opinions After Trial.

BY KURT H. KUHN

IN 1998, THE TEXAS SUPREME COURT in *Maritime Overseas Corp. v. Ellis* held that, to preserve a *Daubert/Robinson* complaint for appeal, a party was required to object either before trial or when the evidence was offered at trial.[1] This year, in *Coastal Transport Co. v. Crown Central Petroleum Corp.*, a unanimous court modified this rule by adopting the position advocated by the *Maritime Overseas* dissent.[2] Now, counsel can use a legal sufficiency challenge to assert for the first time, after trial, that an expert's opinion was unsupported and speculative on its face.

Even before this change, careful practitioners were raising valid challenges to the opposing party's experts pre-trial, at the time the testimony was offered at trial, and in post-trial motions. Repeatedly raising the challenge ensures that: (1) counsel re-evaluates the challenge and makes any modifications necessary to track any changes in the expert's opinion; (2) the trial court considers the merits of the challenge in each context; and (3) there is no potential waiver. *Coastal Transport*, however, provides counsel with a welcome alternative when no prior objection was made. The opinion is worth careful consideration.

A. In *Coastal Transport*, the court holds that if the opinion is conclusory or speculative on its face, an expert's reliability can be challenged for the first time post-trial. The *Coastal Transport* decision seems to have been necessary because defense counsel did not object, either pre-trial or at the time the testimony was offered, to apparent over-reaching or over-simplification by plaintiff's counsel and its expert. To support a claim of gross negligence, the plaintiff attempted to rely on its expert's completely unsupported and unexplained testimony that the elements of the claim were met. This type of opinion testimony is clearly prohibited under *Daubert/Robinson*.

The lawsuit arose out of a 1993 fire that destroyed a bulk gasoline loading facility in Pasadena, Texas, owned by Crown Central. While a Coastal driver was loading a Coastal tanker truck at the facility, the driver put more gasoline in the truck than it could hold. The gasoline tanks on Coastal's trucks were equipped with probes designed to sense when the tank was full and to prevent additional gas from being pumped. The probe malfunctioned and failed to prevent the tank from being overfilled. The gasoline loaded at 500 to 600 gallons per minute, and the overfill resulted in the spill of more than a hundred gallons of gasoline. A nearby truck engine ignited the gasoline vapors from the spill, which triggered an explosion and fire that destroyed the facility and severely burned the driver.[3]

In the lawsuit, Crown Central alleged that Coastal was negligent in failing to train its drivers in proper loading methods and in failing to maintain and equip its trucks in a manner that would prevent overfill. Moreover, it alleged that Coastal was aware of defective probes in its fleet and failed to inspect or replace them. Crown Central argued that Coastal's failure to replace probes it knew to be defective demonstrated that its breach of care was committed in a wanton and willful manner, and that Crown Central was, therefore, entitled to an award of exemplary damages.[4]

After Crown Central completed its case-in-chief, the trial court granted Coastal's motion for directed verdict on the gross negligence claim. Crown Central appealed, and the court of appeals reversed the directed verdict, holding that evidence of gross negligence had been presented by the testimony of Crown Central's trucking-safety expert. The appellate court's holding was based on the following exchange between plaintiff's attorney and its expert:

> Q: When viewed objectively from Coastal's point of view at the time of the September '93 incident, in your opinion, did Coastal's failure to stop using probes that could have [sensor failure] problems, did that involve a high degree of risk, considering the probability and magnitude of the potential harm to others?
>
> A: Yes, it did, very high.

Q: In your opinion, did Coastal have an actual subjective awareness of the risk involved in failing to stop using probes that can have [sensor failure] problems?

A: Yes, again and again.

Q: And in your opinion, did Coastal nevertheless proceed with conscious indifference to the rights, safety, or welfare of others?

A: That's the only conclusion I can draw.

Coastal argued that this testimony amounted to no more than a "bare conclusion" that was "factually unsubstantiated" and therefore constituted no evidence of conscious indifference that would support Crown Central's gross negligence claim. The court of appeals, relying on *Maritime Overseas*, held that Coastal waived its right to make this argument because it did not object to the quoted testimony as unreliable.[5]

A unanimous Texas Supreme Court disagreed, holding that an earlier objection is only necessary when the challenge questions the expert's underlying methodology, technique, or foundational data. The court distinguished this from situations where a challenge is limited to the face of the record—such as when the expert testimony is speculative or conclusory on its face—in which a party is allowed to challenge the legal sufficiency of the evidence even in the absence of any objection to its admissibility. Under *Coastal Transport*, an objection is now only required at or before trial when the challenge would require the court to go beyond the face of the record and evaluate the underlying methodology, technique, or foundational data used by the expert.[6]

"Under *Coastal Transport*, an objection is now only required at or before trial when the challenge would require the court to go beyond the face of the record and evaluate the underlying methodology, technique, or foundational data used by the expert."

B. The *Coastal Transport* holding is really the rule proposed by the *Maritime Overseas* dissent.

At first blush, it might seem as if the two alternatives described in *Coastal Transport*—a "facial challenge" verses a "deeper challenge"—are easily discernable and that the *Coastal Transport* and *Maritime Overseas* opinions fit nicely together. In reality, *Coastal Transport* adopts the very rule urged by the *Maritime Overseas* dissent, and the two opinions can best be reconciled by recognizing that the court modified its prior ruling.[7]

1. The court's attempt to distinguish *Coastal Transport* and *Maritime Overseas* does not hold up to closer scrutiny.

In *Coastal Transport*, the court attempts to distinguish the case from *Maritime Overseas* by relying on how the defendant in the prior case had articulated its argument.[8] *Maritime Overseas* was an appeal from a $12.6 million dollar award (including $8,576,000 in actual damages) to a seaman who claimed to have suffered numerous injuries, including permanent neurotoxicity, after being ordered to clean up diazinon, an insecticide, which was at levels up to 200 times above what is considered safe for human exposure and without any proper protective equipment.[9] There, the petitioner specifically denied making any legal sufficiency claim, and instead argued that under the framework of a factual sufficiency review, the court of appeals "should have examined whether any well-founded scientific methodology supported the jury's actual damage award."[10] This is the language relied upon by the Texas Supreme Court to distinguish the two cases.[11]

The court's reliance on the petitioner's statement of the issue is misplaced. First, the issue in that case was not really a challenge to the expert's methodology, as stated in *Coastal Transport*, but rather whether the opinions were supported by *"any* well-founded scientific methodology."[12] The real focus was not on an underlying method, but on the fact that there was no evidence at all underlying the specific opinion. Second, both the majority and dissent in *Maritime Overseas* agreed that the petitioner's statement was inaccurate.[13] While the petitioner claimed it was only seeking a proper factual sufficiency review, both the majority and dissent recognized that the real complaint was that a review would show that there was "*no evidence* of long term injury from delayed neurotoxicity."[14] As the dissent explained, while the plaintiff was undeniably injured by his exposure to diazinon, the real argument was that there was no scientific evidence to support the conclusion that diazinon causes permanent neurotoxicity, and thus the evidence was insufficient to support the nearly $8.6 million in actual damages.[15]

A review of the evidence at issue makes this point clear. In *Maritime*, all five of the plaintiff's expert witnesses testified that he suffered the long-term effects of neurotoxicity as a result of his exposure to diazinon. These opinions were expressed in varying levels of confidence ranging from "reasonable medical probability" to "without a doubt."[16]

However, as explained in detail by the dissent, there was no evidence to support any of these conclusions.

> Maritime Overseas' challenge to Ellis's scientific evidence is valid. Although Ellis's experts testified that Ellis's exposure to diazinon caused neurotoxicity, there was no basis for their opinions in any scientific literature or experimentation. The experts reviewed all the literature regarding neurotoxicity from exposure to pesticides in general and organophosphates in particular; none was omitted. Nowhere in the literature is there any demonstration that diazinon causes neurotoxicity.
>
> Ellis's position is that diazinon is an organophosphate, some organophosphates cause neurotoxicity (although some do not), and therefore diazinon causes neurotoxicity. The logical fallacy in this syllogism is apparent. The record establishes that no scientific evidence exists for concluding that diazinon is among the organophosphates that causes neurotoxicity or among those that do not. There is simply no way to tell.[17]

The majority never disputed the dissent's explanation of the nature of the challenge or the evidence in the record. In fact, the majority specifically stated that it did "not disagree with the dissent that 'Maritime Overseas' position has always been . . . that no reliable scientific evidence show[ed] that Diazinon can cause long-term neurotoxicity.'"[18]

Instead, without ever discussing the lack of support for the experts' testimony regarding neurotoxicity, the majority's holding was entirely based on the failure to object before trial or at the time the testimony was offered. The rule put forward by the majority was straightforward: "[t]o preserve a complaint that scientific evidence is unreliable and thus, no evidence, a party must object to the evidence before trial or when the evidence is offered."[19] As noted by the dissent, the court did not even attempt to argue that the testimony at issue had any probative value. Instead, the *Maritime Overseas* majority position was that "even if the evidence had no probative value, it must be considered some evidence to support the judgment on appeal if it was not objected to."[20]

2. The only reasonable reading of the *Coastal Transport* decision is that it adopted the position argued by the *Maritime Overseas* dissent.

The *Maritime Overseas* procedural bright line cannot reasonably be aligned with the holding of *Coastal Transport*. Instead, the position recently adopted by the Texas Supreme Court is exactly the position advocated by the *Maritime Overseas* dissent. The dissent explained that, if the probative value of evidence is to be questioned, the issue must ordinarily be raised in the trial court, but that an exception to this rule exists when the evidence at issue is plainly without probative value.[21] In fact, the dissent's summary of its view of the law sounds surprisingly like the *Coastal Transport* holding:

> To summarize, bare conclusions and assertions unsupported by facts of record, expert opinions based on facts merely assumed and not proved, or facts different from those proved, and scientific testimony without any reliable basis, even if admitted without objection, are no evidence to support a finding of fact. An expert's opinion . . . even if admitted without objection, is not probative evidence if the testimony shows that the opinion lacks any substantial basis.[22]

Thus, the dissent's position in *Maritime Overseas*, like the opinion for the court in *Coastal Transport*, is that most reliability challenges need to be made at trial, but claims that an expert's opinion is without support in the record can be made for the first time after trial as a no-evidence challenge. As such, the only fair reading of *Coastal Transport* is that it modified the prior preservation rule articulated in *Maritime Overseas* by adopting the dissent's exception to the standard rule.

The only other possible reading of the language in *Coastal Transport* would result in an absurd rule. Some practitioners may attempt to parse the language of the opinion such that it creates a narrow exception when the objection requires only a review of the actual testimony at trial (as opposed to reviewing all the evidence offered). A review of the court's language demonstrates how such an argument would be constructed. The court wrote that:

> When the testimony is challenged as conclusory or speculative and therefore non-probative on its face, however, there is no need to go beyond the face of the record to test its reliability. We therefore conclude that when a reliability challenge requires the court to evaluate the underlying methodology, technique, or foundational data used by the expert, an objection must be timely made so that the trial court has the opportunity to conduct this analysis. However, when the challenge is restricted to the face of the record—for example, when expert testimony is speculative or conclusory on its face—then a party may challenge the legal sufficiency of the evidence even in the absence of any objection to its admissibility.[23]

It is easy to imagine an argument stating that the court intended this distinction to turn on whether the challenge required the reviewing court to review only the testimony at trial or also the exhibits. The argument would ask, "What else could the court have meant when it said you should not have to review the underlying foundational data used by the expert?" This question may have some initial appeal. The court did not fully describe, and it is not entirely clear, what are the exact distinctions between the two situations.

Regardless, such a narrow reading of the case is not warranted by the language of the opinion, the authority it cites, or general Texas procedure. First, the court did not say that the reviewing court should restrict its review to only the trial transcript—it specifically indicated that the review was of the "face of the record." For purposes of appeal, the "appellate record" consists of the clerk's record and, if necessary to the appeal, the reporter's record.[24] The clerk's record includes any post-judgment motions and any items designated by a party.[25] The reporter's record specifically includes the transcript and any exhibits designated by a party.[26] The Texas Supreme Court, as well as any experienced practitioner, knows the difference between the "transcript" and the "record." If the court had meant to limit the review to the actual spoken testimony appearing in the transcript, it could have easily said so. The opinion cannot be read in a manner that ignores the specific words chosen by the court.

Second, the narrow reading of the case would ignore the legal analysis done by the court itself. In *Coastal Transport*, the court based its decision on several cases that rejected unsupported expert opinions.[27] Most notably, the court relied on the *Havner* opinion, in which the court had ruled that, in conducting a reliability review of an expert, the reviewing court on appeal looks beyond just the words spoken by the expert to the basis underlying the opinion given.[28] If the court was creating a special exception to reliability challenges such that only the testimony could be reviewed, the court's reliance on *Havner* would be completely inconsistent.

Third, the narrow reading of the case would run contrary to what we know to be true about legal sufficiency review. In conducting a legal sufficiency review, the court is required to "look at ***all*** the evidence."[29] This only makes sense. As the Texas Supreme Court explained in *Havner,* prohibiting a court from looking at the underlying data and reducing a legal sufficiency review to consideration of an expert's spoken words at trial would reduce the review to "a meaningless exercise."[30]

So what did the court mean when it said that an objection filed after trial cannot go beyond the face of the record? It seems more consistent to read this language to mean that, if the trial court is to consider a full-blown *Daubert/Robinson* hearing, including the movant's filing of evidence to attack the non-movant's experts and their materials, that type of challenge should be done before trial or at the time the testimony is offered. After the trial is over, the objection should be based on what evidence (testimonial and otherwise) was offered at trial.

This more expansive reading of *Coastal Transport* is consistent with the still limited case law that has considered it. For instance, the Beaumont Court of Appeals was asked to reverse a summary judgment because the affidavit supporting it was undeniably conclusory. While citing *Coastal Transport* and acknowledging the conclusory nature of the affidavit, the court went beyond the face of the affidavit, and upheld the judgment because the documents attached to it clearly provided a sufficient basis for the opinion.[31] Obviously, a narrower reading of *Coastal Transport* would have required reversal without any consideration of the evidence attached to the affidavit.

C. By allowing unsupported expert testimony to be first challenged after trial on legal sufficiency grounds, *Coastal Transport* creates the most efficient and equitable rule.

The *Coastal Transport* rule is the right one. By requiring expert challenges that would make the trial court consider significant hearings and proof to be brought before trial or at the time the testimony is offered, the rule draws a line after which time the parties cannot continue to reopen the matter for additional testimony. But, by allowing parties to challenge evidence that is speculative or unsupported even after trial, the court properly applies the equities and ensures public confidence in our system by requiring verdicts to be supported by credible evidence.

1. Judgments cannot be allowed to stand when they are based on evidence that is unsupported on the face of the record.

Even the most qualified expert cannot testify based on "because I said so." The Fifth Circuit and the Texas Supreme Court have both rejected the notion that an expert can testify based upon little more than his credentials and a subjective opinion.[32] As the Fifth Circuit explained:

> As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and

> should be left for the jury's consideration. In some cases, however, the source upon which an expert's opinion relies is of such little weight that the jury should not be permitted to receive that opinion. Expert opinion testimony falls into this category when that testimony would not actually assist the jury in arriving at an intelligent and sound verdict. If an opinion is fundamentally unsupported, then it offers no expert assistance to the jury. Furthermore, its lack of reliable support may render it more prejudicial than probative, making it inadmissible under Fed. R. Evid. 403.[33]

Not only does conjecture fail to satisfy the requirement of general acceptance of the expert's position, it actually serves to demonstrate general acceptance of the contrary position.[34] "Moreover, mere assurances by an expert as to the accuracy of his own methods or results, in the absence of other credible supporting evidence, is insufficient."[35]

Allowing such testimony would make a farce out of expert testimony in our courts. The rules do not allow plaintiffs to bolster their own version of the facts by the mere subjective opinion of an "expert." Where more than one possibility exists, an expert cannot, without any support other than the claims of his client, simply choose the explanation most advantageous to his client.[36] If this practice were allowed, then the expert's testimony would be nothing more than a party's testimony "dressed up and sanctified as the opinion of an expert."[37]

In *Gammill v. Jack Williams Chevrolet, Inc.,* the Texas Supreme Court rejected unsupported expert testimony, explaining that where the evidence was equally consistent with the plaintiff both wearing or not wearing the seat belt, the expert "has offered nothing to suggest that what he believes could have happened actually did happen. His opinions are little more than 'subjective belief or unsupported speculation.'"[38]

2. The party offering an expert should bear the risk that the opinion is unsupported.

It is clear that a driving force behind the majority's decision in *Maritime Overseas* was concern that allowing an objection to be brought after trial might be unfair to the non-movant.[39] As the dissent recognized, the court was swayed with the notion that "parties should not be 'ambushed.'"[40] While understandable, this concern is unwarranted, particularly under the system adopted by *Coastal Transport.*

Procedural rules should try to prevent unfair surprise from deciding cases, and the *Coastal Transport* rule passes this test. First, all parties should be on notice that all of their evidence will be reviewed to determine whether it is legally sufficient. Preventing the courts from undertaking a substantive review of expert testimony only works to undermine legal sufficiency review and threaten to turn it into a meaningless exercise.[41] It is hard to imagine why it should matter whether an unsupported opinion comes from an expert or a layman—it is still no evidence.

Second, particularly in the area of expert opinions, all parties are already proceeding under a heightened awareness of the need to offer sufficient testimony. A unanimous United States Supreme Court has recognized that parties proffering experts are well aware of the need to put forward their best evidence. It explained:

> Since *Daubert*, moreover, parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet. It is implausible to suggest, post-*Daubert*, that parties will initially present less than their best expert evidence in the expectation of a second chance should their first try fail.[42]

The same fairness argument that concerned the *Maritime Overseas* court could be made in response to any legal sufficiency challenge. Told after trial that its evidence was legally insufficient, any party could go back to trial and at least attempt to offer some additional or alternative evidence to support its position. However, an appellate court should ordinarily render judgment after sustaining a complaint as to the legal sufficiency of the evidence.[43] It would be inconsistent to create a different rule for those cases involving unsupported expert testimony, when this is the very situation in which the proffering party has had the most warning.

Moreover, the *Coastal Transport* rule seems to minimize the risks of surprise. By limiting post-trial challenges to the face of the record, the movant is protected from the introduction of surprise evidence. Given the level of pre-trial discovery in civil cases, a litigant has the tools it needs to fully understand any potential challenges to its experts by the time the trial arrives.

Third, focusing on the potential unfairness to the expert's proponent ignores potential unfairness to the other side. There is always a risk that the testimony at trial will be different than the parties anticipated. Experts may attempt to offer new opinions for the first time at trial, radically change their opinion at trial, or fail to fully explain their theories at trial. Faced with such a situation, opposing counsel

should immediately object to these tactics and obtain a well-deserved order striking such testimony from the record along with an instruction to disregard. The realities of trial tell us that it is impossible for counsel and the trial court to always timely catch changes in the proffered opinions at the moment they are offered. By allowing counsel and the trial court a limited opportunity to review the testimony after trial and detect unsupported or speculative opinions, the *Coastal Transport* rule promotes fairness, rather than undermines it.

D. *Coastal Transport* leaves one glaring question unanswered: "Does *any* objection need to be made in the trial court?"

One question noticeably left unanswered by the *Coastal Transport* opinion is "Can a party raise a legal sufficiency challenge for the first time on appeal?" To be fair, this question was not presented in the facts before the court, as the trial court had granted a directed verdict based on the legal sufficiency argument.[44] Nevertheless, it seems noteworthy that the court's opinion discusses in depth whether the objection must be made "at trial," but never indicates the final deadline by when the objection must be made.

At submission of this article, only one court had written on this question. In *City of Dallas v. Redbird Dev. Corp.*, the Dallas Court of Appeals rejected an argument that *Coastal Transport* allows a legal sufficiency challenge based on unsupported testimony to be raised for the first time on appeal.[45] From the court's view, *Coastal Transport* does not change long-standing procedural rules as to the preservation of legal sufficiency challenges for appeal.[46]

This position certainly has significant appeal. If the Texas Supreme Court had meant to take such a dramatic step, it seems likely that the court would have done so more directly. Also, those claims that can be raised for the first time on appeal are traditionally restricted to lack of jurisdiction or other fundamental errors.[47] Clearly, a lack of sufficient evidence is not the same type of fundamental error that exists when a court acts without jurisdiction. Moreover, allowing a legal sufficiency challenge to be raised for the first time on appeal would greatly increase the burden on appellate courts. In theory, it would provide a possible basis for every litigant to attempt to seek review in the Texas Supreme Court.

However, the alternative argument is not without merit. Most notably, disallowing a legal sufficiency argument on appeal may mean that the reviewing court is forced to accept an absurd position for purposes of the case. Certainly, a driving concern behind allowing such a challenge is to prevent such a result. The *Maritime Overseas* dissent certainly considered this point when relying on colorful examples of unreliable scientific evidence provided by the *Robinson* court:

> [E]ven an expert with a degree should not be able to testify that the world is flat, that the moon is made of green cheese, or that the Earth is the center of the solar system. If for some reason such testimony were admitted in a trial without objection, would a reviewing court be obliged to accept it as some evidence? The answer is no.[48]

But if no legal sufficiency challenge was mounted at all in the trial court, would the Texas Supreme Court be willing to agree, for purposes of the appeal, that the moon is made of green cheese? While these examples might enter the realm of fantasy, it seems safe to assume that an appellate court would not relish affirming a case that is based on testimony that was plainly and indisputably false.

Further, there is at least one situation in which a defendant can raise legal sufficiency for the first time on appeal. Even without filing a response, in a traditional motion for summary judgment, the non-movant can argue on appeal that the summary judgment proof was insufficient as a matter of law.[49] While summary judgment is obviously a different creature than a full trial, and the result of reversal of a summary judgment is likely remand and not a rendition, the reviewing court is in no better or worse position to judge the merits of unsupported or speculative testimony.

In the end, it is clear that *Coastal Transport* did not answer the question of when the argument must be made. It is reasonable to expect that the issue will continue to be raised until the answer is clarified.

Conclusion

Upon close examination, it is clear that the *Coastal Transport* opinion adopted the dissent's position from *Maritime Overseas.* The shift in the court's position is muddied, however, by its failure to openly recognize the change. The position is all the more confusing given that the unanimous opinion was issued less than four months after the court, without dissent, had reiterated the bright line rule from the *Maritime Overseas* majority.[50]

Nevertheless, the new rule adopted by the court is the correct one. While a party should not have to face the

surprise of new evidence attacking an expert's opinion for the first time after trial, it cannot reasonably be surprised if its expert's opinion is attacked after trial because it was unsupported or speculative. The party offering an expert is in the best position to ensure that unsupported opinions are not presented, and it is fair to presume that a party will put forward its best possible expert testimony.

While trial counsel should continue to press valid challenges before trial, when the testimony is offered, and post-trial, counsel should now also review each case post-trial in light of *Coastal Overseas* and determine whether to raise any additional challenges against unsupported opinion testimony.

Kurt H. Kuhn has extensive litigation experience at both the trial and appellate level. He has successfully won reversals in numerous cases before the United States Fifth Circuit Court of Appeals, the Texas Supreme Court, and other Texas appellate courts, and is Board Certified in Civil Appellate Law by the Texas Board of Legal Specialization. In his trial practice, Mr. Kuhn has served as attorney-in-charge for a variety of civil disputes, and has worked on cases in each of the federal districts in Texas, as well as numerous Texas district and county courts. Mr. Kuhn is a partner at Brown McCarroll, L.L.P., in Austin, Texas.★

[1] *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 409 (Tex. 1998).
[2] *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 233 (Tex. 2004).
[3] *Id.* at 230.
[4] *Id.*
[5] *Id.* at 230-32.
[6] *Id.* at 233.
[7] *Maritime* was decided by a 5-2 vote, with one concurrence and one justice not sitting. It is interesting to note that, by the time the *Coastal Transport* case was decided, only two justices who sat on the prior case remained on the court, Chief Justice Phillips and Justice Hecht, the two dissenting votes in *Maritime.*
[8] *Id.*
[9] *Maritime Overseas Corp.*, 971 S.W.2d at 404.
[10] *Id.* at 405.
[11] *Coastal Transp. Co.*, 136 S.W.3d at 233.
[12] *Maritime Overseas Corp.*, 971 S.W.2d at 405 (emphasis added).
[13] *Id.* at 405, 415-16.
[14] *Id.* (emphasis in original).
[15] *Id.*
[16] *Id.* at 407.
[17] *Id.* at 426.
[18] *Id.* at 411.
[19] *Id.* at 409.
[20] *Id.* at 424.
[21] *Id.* at 423, 425.
[22] *Id.* at 421.
[23] *Coastal Transp. Co.*, 136 S.W.3d at 232.
[24] TEX. R. APP. P. 34.1.
[25] TEX. R. APP. P. 34.5(a)(6), (13).
[26] TEX. R. APP. P. 34.6(a).
[27] *Coastal Transp. Co.*, 136 S.W.3d at 232.
[28] *Merrell Dow Pharm. v. Havner*, 953 S.W.2d 706, 711-12 (Tex. 1997).
[29] *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002) (emphasis added).
[30] *Havner*, 953 S.W.2d at 712.
[31] *Beeler v. Fuqua*, No. 09-03-344-CV, 2004 Tex. App. LEXIS 7747, at *9-10 (Tex. App.—Beaumont Aug. 26, 2004, no pet. h.).
[32] *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 421-22 (5th Cir. 1987); *Havner*, 953 S.W.2d at 712.
[33] *Viterbo*, 826 F.2d at 422 (citations omitted).
[34] *Black v. Food Lion, Inc.*, 171 F.3d 308, 313 (5th Cir. 1999).
[35] *Castellow v. Chevron USA*, 97 F.Supp.2d 780, 792 (S.D. Tex. 2000).
[36] *Viterbo*, 826 F.2d at 424; *see also, Oglesby v. General Motors Corp.*, 190 F.3d 244, 251 (4th Cir. 1999).
[37] *See Viterbo*, 826 F.2d at 424.
[38] 972 S.W.2d 713, 727-28 (Tex. 1998).
[39] *Maritime Overseas Corp.*, 971 S.W.2d at 411.
[40] *Id.* at 425.
[41] *Havner*, 953 S.W.2d at 712.
[42] *Weisgram v. Marley Co.*, 582 U.S. 440, 455 (2000) (holding that court of appeals court reverse and render when holding that necessary expert testimony was improperly admitted).
[43] *Horrocks v. Texas Dep't of Transp.*, 852 S.W.2d 498, 499 (Tex. 1993).
[44] *Coastal Transp. Co.*, 136 S.W.3d at 230.
[45] *City of Dallas v. Redbird Dev. Corp.*, No. 05-03-01155-CV, 2004 Tex. App. LEXIS 7119, *20-23 (Tex. App.—Dallas Aug. 9, 2004, no pet. h.).
[46] *Id.* at *22.
[47] *In re J.B.W.*, 99 S.W.3d 218, 225 n. 35 (Tex. App.—Fort Worth 2003, pet. denied).
[48] *Maritime Overseas Corp.*, 971 S.W.2d at 420 (quoting *Havner*).
[49] *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000).
[50] *Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245, 251-52 (Tex. 2004). In *Kerr-McGee*, the court was faced with the situation of an expert who admitted on cross-examination that he had no factual basis to support his opinion. *Id* at 249-250, 253. After reiterating the *Maritime Overseas* majority bright line rule as the law, the court held that opposing counsel's objection and motion to strike the testimony, made immediately after cross-examination, was sufficient. *Id.* at 251-52. Since the issue in *Kerr-McGee* would have been resolved by the holding in *Coastal Overseas*, it is curious that the court did not simply release the opinions together, articulating a more coherent approach.

ERROR PRESERVATION ISSUES FOR *DAUBERT/ROBINSON* CHALLENGES TO EXPERT WITNESSES UNDER TEXAS RULES OF EVIDENCE 103

BY ROGER W. HUGHES

ERROR PRESERVATION under Texas Rule of Evidence 103(a)[1] is, first and foremost, a problem of preparation and analysis. Unless counsel has thoroughly analyzed the evidence before trial, it may be difficult to see when objectionable evidence is being offered and what objections to make. Expert testimony adds several layers to the usual problems. Texas Rules of Evidence of 702 and 703 provide a number of grounds to challenge questionable opinions.

Texas Rule 103(a) permits counsel to rely on "definitive" pretrial or "out-of-the-jury's-presence" evidentiary rulings to preserve error. Though this may speed up trial and prevent annoying the court (and jury) with repetitive objections, it presents new problems. Reliance solely on pretrial rulings may be short-sighted. If the proponent uses the evidence for unforeseen purposes, counsel may have to object as the witness testifies. Counsel must be alert enough to spot when the expert seeks to offer previously undisclosed opinions. Also, identifying when a pretrial ruling is "definitive" can be slippery. Finally, many courts now set pretrial deadlines and hold pre-trial hearings on *Daubert/Robinson*[2] challenges under Texas Rule of Evidence 104(a). Counsel may be limited at trial (and on appeal) to the objections or proffers made in the pretrial *Daubert/Robinson* challenge.

This article will not examine which objections one can or should make to any expert's opinions. Rather, if focuses on when and how to make those objections. In the author's experience, error preservation is often the greater problem; it certainly has become more so as trial lawyers and judges press to resolve these objections before the expert testifies. The article first looks at the "old way," objecting as the expert testifies. This is still an important skill to master because judges may not wish to resolve objections pretrial and experts often give new opinions at trial. The article then surveys the new means to object and preserve error about expert opinions via pretrial motions, motions out of the jury's presence, motions to strike, and post-verdict.

I. General Rules to Preserve Error under Rule 103(a)

A. Making the Objection Timely

Rule 103(a) does not define "timely." *Beale v. Ditmore*, 867 S.W.2d 791, 795 (Tex. App.–El Paso 1993, writ denied). Ordinarily, to be "timely" the objection must be interposed at such a time in the proceedings as to enable the trial court to cure the alleged error. Beale, 867 S.W.2d at 795; McDonald & Carlson, Texas Civil Practice ' 21:4 (2003). Whether an objection is "timely" is left to the sound discretion of the trial judge. Beale, 867 S.W.2d at 795; McDonald & Carlson, section 21:4. The general rule is that the objection must be lodged when the evidence is "offered"—that is, when the exhibit is offered or before the witnesses answers the question. Goode, Wellborn, & Sharlot, Courtroom Handbook on Texas Evidence p. 258 (2003)("Goode"); *Montes v. Lazzara Shipyard*, 657 S.W.2d 886, 889 (Tex. App.–Corpus Christi 1983, no writ).

When the evidence is "offered" may be difficult to pin down. See e.g. Fort Worth Hotel Ltd. v. Enserch Corp., 977 S.W.2d 746, 756 (Tex. App.–Fort Worth 1998, no pet.) (defendant mentioned evidence in opening statement, but plaintiff did not object until actual expert testimony was offered; held, objection was timely); Beavers v. Northrop Worldwide Aircraft Serv., Inc., 821 S.W.2d 669, 673-74 (Tex. App.–Amarillo 1992, writ denied) (one expert testified without objection that he relied on second expert's report; opposing counsel objected to second report when it was offered; held, objection timely); Montes, 657 S.W.2d at 889 (defendant read list of convictions to jury, but no objection until entire list was read; held, objection untimely).

1. Just how quick do I have to be?

Normally, an objection to oral testimony must precede the answer. *Celotex Corp. v. Tate,* 797 S.W.2d 197, 205 (Tex. App.–Corpus Christi 1990, no writ). A post-answer objection is acceptable if (1) the witness answers too fast, (2) the witness gives an objectionable answer to a non-objectionable

question, or (3) the defect did not appear until subsequent questions. Goode, p. 258; *Johnson v. State,* 878 S.W.2d 164, 167 (Tex. Crim. App. 1994); *Beale,* 867 S.W.2d at 794. In the latter two cases, the objection may not have to immediately follow the answer. *Beale*, 867 S.W.2d at 795. The objection must be accompanied by a motion to strike; the motion must be made timely. *Mack v. State,* 872 S.W.2d 36, 38 (Tex. App.–Fort Worth 1994, no writ); *Beale,* 867 S.W.2d at 794. The motion to strike should be urged as soon as it is apparent the expert has given an inadmissible opinion. *City of Glenn Heights v. Sheffield Dev. Co.,* 61 S.W.3d 634, 659 (Tex. App.–Waco 2001), *aff'd in part, rev'd in part*, 140 S.W.3d 660 (Tex. 2004).

The rule gets fuzzy when the objection is that expert testimony is unreliable. In *Martime Overseas Corp. v. Ellis,* 971 S.W.2d 402, 409 (Tex. 1998), the Supreme Court held that a complaint that expert testimony was unreliable and thus, no evidence, had to be made before trial or when the evidence was offered. If the "unreliability" objection requires the trial court to evaluate the underlying methodology, technique, or foundational data the objection must be timely so the trial court can perform its "gatekeeper" function. *Coastal Transport Co., Inc. v. Crown Central Petroleum Corp.,* 136 S.W.3d 227, 233 (Tex. 2004). In *Kerr- McGee Corp. v. Helton,* 133 S.W.3d 245, 252 (Tex. 2004), the Supreme Court held that Texas Rule of Evidence 705(a) may permit a party to object and move to strike after cross-examining the expert. The Court held that opposing counsel was not required to first voir dire the expert out of the jury's presence under Texas Rule of Evidence 705(b). *Id.* at 252. Because Rule 705(a) permits the opponent to elicit supporting data on cross examination, a party who first learns on cross-examination that the expert is unreliable may object after the cross-examination. *Id.* It not clear whether this preserves the evidentiary ruling or only the "no evidence" point. The plaintiff then argued that Kerr-McGee waived its point by failing to object to the same expert's report when it was later offered. *Id.*. Without ruling whether this waived any evidentiary objection, the Supreme Court held that it did not waive Kerr-McGee's "no evidence" challenge to the testimony. *Id.* If the expert's oral testimony was "no evidence," then the written report fared no better. *Id.* An objection to the oral testimony preserved a "no evidence" challenge to the written version. *Id.*

2. Do I have to object immediately if this will "underline" the bad evidence for the jury?

Every trial lawyer has faced the decision whether to object immediately or delay a question or two and then approach the court. The fear is that objection will call the jury's attention to inadmissible evidence if the objection is erroneously denied. Sometimes, counsel fears that even a good objection will offend some jurors. Some slight delay may be permissible. Compare Beale, 867 S.W.2d at 795 with *Rosewood Property Co. v. Hardy,* 1995 WL 479656, *13 (Tex. App.–Dallas 1995, no writ) (unpublished). In Beale, the plaintiff gave a non-responsive answer that referred to defendant's liability insurance. 867 S.W.2d at 793. Defense counsel asked another unrelated question and then approach the bench to ask for a mistrial out of the hearing of the jury. *Id.* The El Paso Court of Appeals held this objection was "timely". *Id.* at 795. Defense counsel's decision to wait one more question and then approach the bench was considered a responsible action. *Id.* Appellate court should not be "wholly insensitive" to the conflicting needs of counsel to present the best case possible while preserving error. However, the court determined that the error, though preserved, was harmless. Id. at 796. There was a dissent on the issue of timeliness. *Id.*

However, in Rosewood Property, the Dallas court in an unpublished decision held that waiting 25 questions was too long before approaching the bench. 1995 WL 479656 at *13. The Dallas court assumed, without deciding, that some slight delay might be tolerable, but waiting 25 questions was held to be not "timely" and to be waiver.

Federal courts have indicated that a deliberately late objection may preserve error. *See Virgin Islands,* 987 F.2d at 184; *Helminski v. Ayerst Labs.,* 766 F.2d 208, 211 (6th Cir. 1985), *cert. denied,* 474 U.S. 981 (1985); *Hutchinson v. Groskin,* 927 F.2d 212, 725 (2nd Cir. 1991). Some courts have noted that delay might be excused if the objection had been raised before trial and the party had a special reason not to object when it was offered. *Judd v. Rodman,* 105 F.3d 1339, 1342 (11th Cir. 1997); *Reyes v. Mo. Pac. RR,* 589 F.2d 791, 793 (5th Cir. 1979). The problem is that invoking this exception concedes the delay was "tactical" and hands the opponent a waiver argument. *Jenkins v. General Motors Corp.,* 446 F.2d 377, 382 (5th Cir. 1971), cert. denied, 405 U.S. 922 (1972)

3. Is it safe to rely on running objections?

The general rule is that each time the objectionable material is offered, counsel must object; failure to object the second or third time it was offered waived the objection. 75 AM. JUR. 2D Trial § 413 (1991). Texas permits the "running objection" as an exception to the contemporaneous objection rule. Goode, pp. 258-59. First, the objection must be specific; it will preserve error only as to similar or connected questions. Ethington v. State, 819 S.W.2d 854, 858-59 (Tex. Crim. App. 1991); *Atkinson Gas Co. v. Albrecht*, 878 S.W.2d 235, 242-43 (Tex. App.–Corpus Christi 1994, writ denied). To preserve

error, the objection cannot be too broad as to subject matter or cover too many witnesses. In re A.P., 42 S.W.3d 248, 260 (Tex. App.–Waco 2001, no pet.). To evaluate specificity, the court considers on a case-by-case basis the proximity of the original objection to the subsequent testimony, the similarity of subsequent testimony, whether it was elicited from the same or different witnesses, how the objection was granted, and any other circumstances showing why the objection should not have been re-urged. *Correa v. General Motors Corp.*, 948 S.W.2d 515, 518 (Tex. App.–Corpus Christi 1997, no writ).

Second, a running objection ordinarily applies only to that witness; counsel must get a specific ruling to have the objection apply to similar testimony from other witnesses. Ford v. State, 919 S.W.2d 107, 113 (Tex. Crim. App. 1996); *Huckaby v. A.G. Perry & Son, Inc.*, 20 S.W.3d 194, 203 (Tex. App.–Texarkana 2000, pet. denied).

4. If the other attorney objected, do I have to make the same objection?

In a trial involving multiple defendants, a party must make its own objections to the evidence if it wishes to preserve error for appeal. Celotex Corp., 797 S.W.2d at 201. The court may permit or require that one party's objections inure to other parties' benefit. *Owens-Corning Fiberglass Corp. v. Malone*, 916 S.W.2d 551, 556-57 (Tex. App.–Houston [1st Dist.] 1996), aff'd, 972 S.W.2d 35 (Tex. 1998).

5. If I am really late, is it worthwhile to try anyway?

A truly late objection has some value because the court can still take remedial action. It is possible that the court may act on a belated objection and grant a motion to strike. *See e.g. Lubbock County v. Strube,* 953 S.W.2d 847, 855 (Tex. App.–Austin 1997, writ denied) (trial judge held *Daubert* hearing on expert's methodology after late objection). Also, this may preserve a "no evidence" objection, even if it does not preserve an objection to admissibility. *Kerr-McGee,* 133 S.W.3d at 252.

6. If the judge is going to let the inadmissible evidence in, may I bring it up first to "remove the sting"?

The extent to which counsel can bring up adverse evidence first to "remove the sting" is controversial. *See, e.g.* Charles Wright & Kenneth Graham, FEDERAL PRACTICE & PROCEDURE: EVIDENCE, § 5037.1, pp. 95-97 (Supp. 2003). Counsel often feels that, once the court has ruled adversely on a motion in limine, the harmful evidence must be blunted. So far, Texas appears to follow the rule that a party cannot object to evidence that it has offered. *Villareal v. State,* 384 S.W.2d 891, 892 (Tex. Crim. App. 1964); 35 TEX. JUR.3D *Evidence* § 23, p. 53 (2002). However, once a valid objection is overruled, the objecting party can offer evidence to explain or rebut the objectionable evidence without waiving the objection. *Scurlock Oil Co. v. Smithwick,* 724 S.W.2d 1, 4 (Tex. 1986); *Beavers,* 821 S.W.2d at 674. It remains to be seen whether a party that loses a pre-trial ruling under Rule 103(a) waives the objection if that party then offers the evidence at trial.

Federal courts have adopted an "invited error" rule that poses a risk to counsel who chooses to bring up the harmful evidence first. *Ohler v. United States*, 529 U.S. 753, 757-58 (2000). In *Ohler,* the defendant lost a motion in limine on whether his prior conviction would be admissible to impeach him. When he took the stand to testify, he testified on direct as to the circumstances concerning the prior conviction. The Supreme Court noted that Federal Rule 103(a) does not address "invited error;" it is silent concerning the effect of introducing evidence on *direct exam* that would otherwise be objectionable. *Id.* at 756. The defendant's decision to testify about the conviction on direct was just one of those tough choices a defendant must make at trial. *Id.* at 757-58. The government may choose not to use the conviction rather than inject error. *Id.* at 758.

Justice Souter's dissent noted that the rationale for invited error was that the party "freely" chose to use the evidence. *Id.* at 762. According to Justice Souter, if the defendant had clearly lost the motion in limine on that point, he should have the right to mitigate the damage and avoid the appearance of deceit. *Id.* at 762-64. Already, two federal courts have applied *Ohler* in civil cases. *Coursen v. A.H. Robins Co., Inc.*, 764 F.2d 1329, 1340 (9th Cir. 1985) (in Dalkon Shield products liability case, plaintiff who lost motion in limine on admissibility of husband's prior sexual history waived error when husband testified about it on direct); *Ludwig v. Norfolk Southern Rwy., Co.*, 50 Fed. App. 743, 751 (6th Cir. 2002)(unpublished) (*Ohler* applied to plaintiff's pre-emptive use of settlement documents).

Unpublished Texas decisions appear to apply *Ohler* to criminal cases. *See Turk v. State*, 2002 WL 1174551, *1 (Tex. App.–Texarkana 2002, pet. denied)[unpublished]; *Thompson v. State*, 2001 WL 1002415, *2 (Tex. App.-Corpus Christi 2001, no pet.)[unpublished].

B. Specificity

1. How specific do I have to be?

A general objection does not preserve error. *Seymore v. Gillespie*, 608 S.W.2d 897, 898 (Tex. 1980) (general objection to "foundation" without specifying the exact inadequacy did not preserve error); *Scott v. Scruggs*, 836 S.W.2d 278, 280 (Tex.

App.–Texarkana 1992, writ denied) (objection as to "form" without more did not preserve error). The general rule is that the objection must be sufficiently specific to unable the trial court to understand the precise nature of the error alleged and afford the opposing party a chance to cure. *Beale*, 867 S.W.2d at 795; *Garay v. T.E.I.A.*, 700 S.W.2d 657, 659 (Tex. App.–Corpus Christi 1985, no writ). T exas Rule of Appellate Procedure 31.1(a)(1)(A) imposes the further requirement that the record show that the objecting party made a complaint "with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context." Objections to testimony or exhibits as a whole are insufficient to preserve error. *Bushell v. Dean,* 803 S.W.2d 711, 712 (Tex. 1991) (objection to expert's entire "profile" opinions on sexual harasser was inadequate); *Richards,* 35 S.W.3d at 250 (objection that legal malpractice expert could not testify that defendant violated any disciplinary rules failed to identify any specific opinion). One must identify specific statements as objectionable to preserve error. *Columbia Rio Grande Reg. Hosp. v. Stover,* 17 S.W.3d 387, 396 (Tex. App.–Corpus Christi 2000, no pet.). A motion to strike must identify the specific testimony and each reason it is inadmissible. *Top Value Entr., Inc. v. Carlson Marketing Group, Inc.,* 703 S.W.2d 806, 811 (Tex. App–El Paso 1986, no writ). Challenging an opinion on one ground waives other grounds not mentioned. *Kroger Co. v. Betancourt,* 996 S.W.2d 353, 361 (Tex. App.–Houston [14th Dist.] 1999, pet. denied).

2. Can't I rely on the context to tell the trial judge what I meant?

Relying on context to supply the grounds is not advisable. Relying solely on context to supply the grounds for the objection is reliable only when accepting the waiver argument would require the appellate court to assume the trial judge has no familiarity with the applicable law. *See e.g., Blair v. United States,* 401 F.2d 387, 891 (D.C. Cir. 1968) (held that objection to accused's pretrial statement because he "was not advised of his rights" sufficiently raised a *Miranda* objection; counsel may assume objection stating essence of contention will receive court's attention); *Campbell v. Coleman Co., Inc.,* 786 F.2d 892, 896 (8th Cir. 1986) (objection that testimony was inadmissible hearsay under Rule 804 and that declarant's deposition was available, held sufficient to raise objection that declarant was not unavailable).

C. Making the Proffer When Evidence is Excluded

Rule 103(a)(2) requires that the offering party make the substance of the excluded evidence known to the court, unless substance is apparent from the context. Most courts of appeal have added the gloss that the offering party state all the reasons for admission and make the proffer before or shortly after the ruling to exclude.

1. Do I have to state the grounds that make the excluded evidence admissible?

To preserve error for excluding evidence, the party offering the evidence must specify the purpose for which it offers the evidence and give the reason it is admissible. *In re C.Q.T.M.*, 25 S.W.3d 730, 737 (Tex. App.–Waco 2000, pet. denied); *Richards v. Comm'n for Lawyer Discipline,* 35 S.W.3d 243, 252 (Tex. App.–Houston [14th Dist.] 2000, no pet.). Failure to give a reason for admission waives any error. *Vandever v. Goette,* 678 S.W.2d 630, 635 (Tex. App.–Houston [14th Dist.] 1984, writ ref'd n.r.e.). The offering party is limited to grounds for admissibility urged in the trial court. *In re C.Q.T.M.,* 25 S.W.3d at 738.

2. What is the format for a proffer?

The purpose of a proffer is to enable the appellate court to determine if the exclusion was harmful and to permit the trial judge to reconsider the ruling. Goode, p. 260; *Ludlow v. DeBerry,* 959 S.W.2d 265, 270 (Tex. App.–Houston [14th Dist.] 1997, no writ). It is sufficient if it apprises the court of the substance of the testimony and may be presented in a concise form. *Ludlow,* 959 S.W.2d at 270. However, an offer of proof may be excused where (1) the trial judge makes it clear the proffer would be futile, and (2) the relevance of the excluded evidence was obvious. *Echols v. Wells*, 510 S.W.2d 916, 919 (Tex. 1974); *Lewis v. Lewis*, 853 S.W.2d 850, 852 (Tex. App.–Houston [14th Dist.] 1993, no writ).

Texas Rule of Evidence 103(b) states that offer shall be made out of the jury's presence; if the court requires it or a party requests it, the party must offer in question and answer form. See *Gibson v. Ellis*, 126 S.W.3d 324, 333 (Tex. App.–Dallas 2004, no pet.) (party has no absolute right to make offer by Q&A). Texas courts are divided on whether the requirement applies to questions on cross-examination. Goode, p. 261; *Compare T.E.I.A. v. Garza,* 557 S.W.2d 843, 847 (Tex. App.–Corpus Christi 1977, writ ref'd n.r.e.) (failure to make proffer waives objection), *with Ledisco Fin. Serv., Inc. v. Viracola,* 533 S.W.2d 951, 958 (Tex. Civ. App.–Texarkana 1976, no writ).

The excluded evidence must be in the record. When the excluded evidence is in the clerk's file and was brought to the court's attention during the objections, it is not necessary to formally offer it for inclusion in the reporter's record. *Texas Health Entr., Inc. v. Texas Dep't of Human Serv.,* 949 S.W.2d 313, 314 (Tex. 1997); *Turner v. Peril,* 50 S.W.3d 742, 745 (Tex. App.–Dallas 2001, pet. denied).

3. When do I have to make the proffer?
Texas Rule of Evidence 103(b) requires the party to make its proffer "as soon as practicable" but before the charge is read to the jury. *Fletcher v. Minn. Mining & Mfg. Co.,* 57 S.W.3d 602, 607 (Tex. App.–Houston [1st Dist.] 2001, pet. denied) (proffer of excluded testimony came too late when offered before charge read). It cannot be done for the first time on appeal. *Richards,* 35 S.W.3d at 251-52.

4. When can I rely on context to show the substance of the excluded testimony?
Context may supply the proffer if the counsel's objections and the trial judge's statements show that the judge grasped the substance and the grounds for admission. *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 174 (1988). Justice Brennan, writing for the majority, stated that the nature of the excluded testimony was abundantly apparent from the questions asked on cross-examination. 488 U.S. at 174. The district court's statements showed that it understood the grounds and in fact cut the offering counsel off. *Id*.

Chief Justice Rehnquist's dissent agreed that the issue was whether the district court fairly understood the proffer, both as to the excluded testimony and the grounds which the evidence was being admitted. *Id.* at 178. However, he stressed the need to clearly inform the district court as to the grounds. *Id.* at 177.

II. Texas Rule 103(a): Problems in Preserving Challenges to Admissibility and "No Evidence" Points
A. The Problem
The Texas bench and bar have searched for means to properly preserve error on expert opinions without the necessity of objecting every time the expert speaks. Proper error preservation broke up the testimony and risked alienating the jury. To understand how the new procedures to preserve error on expert testimony may work, one must understand the old problems.

First, a ruling on a motion in limine preserves nothing; the party must also object when the evidence is offered during trial. *Norfolk Southern Ry. Co. v. Bailey*, 92 S.W.3d 577, 583 (Tex. App.–Austin 2002, no pet.). Second, a party must object each time the same evidence is offered; failing to object to one offer waives the objection. *Celotex Corp.*, 797 S.W.2d at 201.

Third, the courts have held that a Rule 702 objection to admitting expert testimony as "unreliable," and a "no evidence" point based on the same argument involve the same substantive guidelines. *Merrill Dow Pharm. Inc. v. Havner,* 953 S.W.2d 706, 712 (Tex. 1997), *cert. denied*, 523 U.S. 1119 (1998); *Exxon Corp. v. Makofski,* 116 S.W.3d 176, 182 (Tex. App.–Houston [14th Dist.] 2003, pet. filed); Judge Harvey Brown, *Procedural Issues Under Daubert,* 36 HOUS. L. REV. 1133, 1155 (1999)("Brown"). At the same time, they involve different substantive and error preservation issues. Brown, pp. 1149-52. An evidentiary challenge may require the appellate court review the pretrial and trial record on expert challenges. *Piro v. Sarofim,* 80 S.W.3d 717, 720 (Tex. App.–Houston [1st Dist.] 2002, no pet.). Brown, pp. 1151-52. A "no evidence" point requires the appellate court consider only the evidence presented to the fact finder during trial. *Makofsky,* 116 S.W.3d at 181. In deciding an evidentiary objection, the trial court is not bound by the rules of evidence. TEX. R. EVID. 104(a); Brown, p. 1149. In ruling on a "no evidence" point, the appellate court is bound by the rules of evidence. *Havner,* 953 S.W.2d at 711; *Cecil v. Smith*, 804 S.W.2d 509, 510 n. 2 (Tex. 1991).

Fourth, the Texas Supreme Court has held that a "no evidence" challenge based on the unreliability of expert testimony must be urged before or during trial or it is waived. *Kerr-McGee,* 133 S.W.3d at 252; *Guadalupe-Blanco River Auth. v. Kraft,* 77 S.W.3d 805, 807 (Tex. 2002); *General Motors Corp. v. Sanchez,* 997 S.W.2d 584, 590-91 (Tex. 1999); *Maritime Overseas,* 971 S.W.2d at 409. The same rule applies when the "reliability" objection requires the trial court evaluate the expert's methodology, technique, or foundational data. *Coastal Transp.,* 136 S.W.3d at 233.

If the "unreliable" objection is that the opinion is speculative and therefore non-probative on its face, the appellant can assert a "no evidence" objection on appeal with any objection to admissibility. *Id.* It appears that this is an extension of a general rule that "bare conclusions" do not become probative evidence simply because there is no evidentiary objection. *Id.* The Amarillo court of appeals held that a "no evidence" point based on the witness's utter lack of qualification to give an opinion did not require a contemporaneous evidentiary objection. *See Pilgrim's Pride Corp. v. Smoak*, 134 S.W.3d 880, 890 n.1 (Tex. App.–Amarillo 2004, pet. denied) (witness admitted he had no expertise in accident reconstruction).

There are two reasons for the distinction. First, if the objection goes to methodology, technique, or foundational date, there is a fear the proponent may get "ambushed," that is, the lack of an objection may induce the proponent to not offer evidence that could moot the objection. *Kerr-McGee,* 133 S.W.3d at 252. Second, it ensures a full record to allow the trial court to make an informed decision. *Coastal Transp,* 136 S.W.3d at 233.

B. The Procedures For Preserving Error Without Repetitive Objections

First, the opponent can file a motion to exclude evidence pretrial. Under Texas Rule of Civil Procedure 166 and Texas Rule of Evidence 104(b), the trial court has authority to rule on the admissibility of evidence before trial. *Owens-Corning,* 916 S.W.2d at 557; *Huckaby,* 20 S.W.3d at 203-4; *Park v. Larison,* 28 S.W.3d 106, 111 (Tex. App.–Texarkana 2000, no pet.). A definitive ruling on a motion to exclude can preserve the objections without re-urging them when the evidence is offered at trial. *Huckaby,* 20 S.W.3d at 203-4. However, there is a possibility that the trial court can require that all objections be made pretrial, resulting in waiver of other objections that are first made at trial. *Park,* 28 S.W.3d at 111-12. The court may construe a "motion in limine" to be a motion to exclude evidence that will preserve error. *Brookshire Bros., Inc. v. Smith*, 2004 WL 104776, *2 n.3 (Tex. App.–Houston [1st Dist.] 2004, no pet. h.).

Use of a motion to exclude does not foreclose urging other objections at trial. *Id.* In one case, the objections were made at the expert's deposition and were ruled upon at trial as the deposition was read to the jury; this preserved error. *Brookshire Bros., Inc.*, 2004 WL 104776 at *2-3. One court of appeals has suggested that the party should renew the objections at trial if the trial testimony shows new or more extensive reasons why the objections were valid. *Piro,* 80 S.W.3d at 720. Also, Rule 103(a)(2) has no provision that the pretrial proffer will preserve error. If the evidence is excluded pretrial, the proponent may need to tender the excluded testimony again at trial. Brown, p. 1146.

Second, Texas Rules of Evidence 103(a) and 705(b) would permit a party to object at the end of the witness's voir dire and preserve an evidentiary objection without further objection. *Kraft*, 77 S.W.3d at 807.

Third, a motion to strike at the end of cross-examination could preserve both a Rule 702 objection and a "no evidence" objection. *See Kerr-McGee,* 133 S.W.3d at 252. However, the Supreme Court was careful to note that (1) the defendant in *Kerr-McGee* did not voir dire the expert, and (2) the basis for the objection did not become apparent until after cross-examination. *Id.* at 249-50, 252.

Finally, a "no evidence" point in a motion for judgment notwithstanding the verdict or for new trial can preserve an argument that the expert's opinion is so conclusory or speculative that it has no probative value. *Coastal Transp.,* 136 S.W.3d at 233. This is limited to challenges that do not require evaluation of the expert's methodology, technique, or foundational data. *Id.*

The motion to strike should be used as a last-ditch effort, rather than as a deliberate tactic. Had the defendant in *Kerr-McGee* voir dired the expert, delaying the objection until after cross-examination might have resulted in waiver. The party offering the expert could argue that the basis became apparent in discovery or voir dire; it remains to be seen whether this will trigger a duty to object pretrial or when the opinion is offered. Apparently, Helton did not argue that the motion to strike should have been made as soon as the expert conceded his problem instead of at the end of cross-examination. That might have defeated the evidentiary point, though it might not have defeated a "no evidence" argument. It is risky to skip voir dire and then move to strike at the end of cross-examination.

Nonetheless, the new methods have certain pitfalls. First, if the evidence is admitted, the opponent must get a clear ruling that it need object no further. Second, the trial court can hold the party to the objections made pretrial or outside the jury's presence. The proponent of an excluded expert may find itself limited by the reasons it urged for admissibility pretrial as well as to the affidavits, depositions, etc., it used to make its proffer. Third, the opponent must remain vigilant during the expert's testimony to object to new opinions, new uses of opinions, or violations of the earlier rulings. Fourth, objections may have to be renewed at the close of testimony if new reasons appear to support the earlier objections. Fifth, the proponent should pay close attention to motions to strike; effective cross-examination may have exposed weaknesses that need to be addressed to avoid a "no evidence" objection.

IV. Special Problems About Expert Opinions in Public and Business Records

How to attack expert opinions contained in public and business records lately has received more attention. See Harvey Brown, *Daubert Objections to Public Records: Who Bears the Burden of Proof?* 39 HOUS. L. REV. 413, 432- 33 (2002) ("Brown"); Richard Orsinger & Kimberly Harris, *Special Problems Admitting Business Records Containing Expert Evidence,* STATE BAR OF TEXAS 4TH ANNUAL ADVANCED EXPERT WITNESS COURSE (Dallas 2004). This problem represents a crossroads for courts and litigators. Public and business records are economical means to present information to the court; they can also be a "Trojan horse" to smuggle into court opinions that could not get past a valid *Daubert* challenge.

1. Public Records

The Texas rules provide a hearsay exception for public records

"unless the source of information or other circumstances indicate lack of trustworthiness." Tex. R. EVID. 803(8). It appears then that the *Daubert* challenge must be a "trustworthiness" challenge under Rule 803(8). Brown, p. 428-29; *Beech Aircraft,* 488 U.S. at 162; *Derosiers v. Flight Internat'l of Florida, Inc.,* 156 F.3d 952, 961 (9th Cir. 1998), *cert. dism'd*, 525 U.S. 1062 (1998); *Cole v. State,* 839 S.W.2d 798, 804 (Tex. Crim. App. 1990). "Trustworthiness" appears to be similar to the inquiry into "reliability" and the expert's qualifications under Rule 702 and *Daubert/Robinson. Derosiers,* 156 F.3d at 962; *Pilgrim's Pride Corp.,* 134 S.W.3d at 892-93 n.2. It also includes (1) the timeliness of the investigation, (2) the investigator's skill and experience, (3) whether an evidentiary hearing was held, and (4) possible bias when the report is prepared with a view towards litigation. Michael Graham, FEDERAL PRACTICE & PROCEDURE: EVIDENCE § 7049, pp. 494-500 (2000); *Pilgrim's Pride,* 134 S.W.3d at 892-93 n. 2 citing the "dvisory Committee's Notes on Federal Rule Evidence 803(8), 28 U.S.C. App. p. 275.

Proof that the opinions and findings contained in a public record meet *Daubert/Robinson* standards is not an absolute prerequisite to their admission. See Wright, § 7049, pp. 504-510; *McRae v. Echols,* 8 S.W.3d 797, 799-800 (Tex. App.–Waco 2000, pet. denied); *Pilgrim's Pride,* 134 S.W.3d at 892-93. Proof of trustworthiness may be shown or disproved by the record itself. *Compare Cowan v. State,* 840 S.W.2d 435 (Tex. Crim. App. 1992) and *Wright v. Lewis,* 777 S.W.2d 520, 524 (Tex. App.–Corpus Christi 1989, writ denied). The court may consider the investigator's qualifications, but the burden is on the party opposing admission to provide evidence showing untrustworthiness, not on the party offering the report. *See McRae,* 8 S.W.3d at 800; Brown, pp. 432- 33. Therefore, the opponent of a public record containing questionable expert opinions is best advised to offer evidence impeaching the expert's qualification or the investigation.

2. Business Records

The first issue is whether the report was "prepared in the ordinary course of business." Reports of retained experts prepared for litigation do not meet this requirement, even if the retained expert normally prepares a report when hired. *Certain Underwriters at Lloyds v. Sinkovich,* 232 F.3d 200, 205 (4th Cir. 2000); *State v. Hardy,* 71 S.W.3d 535, 537-38 (Tex. App.–Amarillo 2002, no pet.); *Freeman v. Amer. Motorists Ins. Co.,* 53 S.W.3d 710, 714-15 (Tex. App.–Houston [1st Dist.] 2001, no pet.).

Second, opinions in business records still must meet "reliability" standards. *Loper v. Andrews,* 404 S.W.2d 300, 305 (Tex. 1966); *Gutierrez v. Excel Corp.,* 106 F.3d 683, 689 (5th Cir. 1997). Thus the proponent of the business record must show that the expert's conclusions are reliable. *See e.g., Burroughs Wellcome Co. v. Crye,* 907 S.W.2d 497, 500 (Tex. 1995); *Gutierrez,* 106 F.3d at 688-90; *Fowler v. Carrollton Public Libr.,* 799 F.2d 976, 983 (5th Cir. 1986). Sometimes this may be self-evident. *Compare*, *Loper,* 404 S.W.2d at 305 (speculation self-evident) and *March v. Victoria Lloyds Ins. Co.*, 773 S.W.2d 785, 789 (Tex. App.–Fort Worth 1989, writ denied) (blood alcohol report admissible without further expert explanation because interpretation was unnecessary). Sometimes the author's live testimony provides the basis for support or the challenge. *See e.g., Kerr-McGee Corp.* 133 S.W.3d at 252, 255-56. Sometimes the impeaching information can come from other experts. *See, e.g., Burroughs Wellcome Co.,* 907 S.W.2d at 499-500.

However, one must be aware of statutes that make some records *prima facie* admissible or "self-authenticating." See for example TEX. CIV. PRAC. & REM. CODE ANN. '18.001 (Vernon's 1997) (affidavit of billing records custodian can authenticate costs of repairs, treatment, etc.). One court has already held that a non-expert who could not testify live concerning the reasonableness of the charges nevertheless may sign an affidavit under section 18.001. *Castillo v. American Garment Finishers Corp*., 965 S.W.2d 646, 654 (Tex. App.–El Paso 1998, no writ). The El Paso court literally held that a non-expert can sign the affidavit which becomes *prima facie* evidence, even though the affiant would have to be excluded on *Daubert/Robinson* grounds if asked to testify live at trial. *Id.* Perhaps this result has been tolerated for two reasons. First, a section 18.001 affidavit is merely "some evidence;" it is not conclusive evidence and may be impeached at trial. *Slone v. Molandes*, 32 S.W.3d 745, 752 (Tex. App.–Beaumont 2000, n pet.). Second, a section 18.001 affidavit does not establish that defendant's wrongful conduct caused the injury. *Sloan v. Molandes*, 32 S.W.3d 745, 752 (Tex. App.–Beaumont 2000, no pet.); *Beanchamp v. Hambrick*, 901 S.W.2d 747, 748-49 (Tex. App.–Eastland 1995, no writ). Therefore, a section 18.001 affidavit may not help plaintiff avoid *Daubert/Robinson* issues on causation.

3. Objections to Inadmissible Evidence supporting the Expert's Opinion.

Another recurring problem is the admission/exclusion of the expert's supporting data or documents. The facts, data, or documents underlying the expert's opinions may be contained in information that is inadmissible, even when the opinion itself may be admissible. In some cases, a major reason to use the expert is the potential to put otherwise inadmissible evidence before the fact finder.

The expert may testify about an opinion without disclosing the otherwise inadmissible foundation; Texas Rule of Evidence 705(a) requires that, on cross-examination, the expert be required to disclose his underlying facts or data. *Kerr-McGee Corp.,* 133 S.W.3d at 252. It is entirely appropriate to probe such data in order to impeach the expert. *Morris v. State,* 123 S.W.3d 425, 428-29 (Tex. App.–San Antonio 2003, pet. ref'd).

The trial court may exclude inadmissible facts or data if there is a danger of unfair prejudice that will outweigh their value to explain the expert's opinion. TEX. R. EVID. 705(d). This is essentially a discretionary balancing test, akin to Texas Rule of Evidence 403. *Morris,* 123 S.W.3d at 427. The prevailing view is that Texas Rules of Evidence 703 and 705 permit the expert to relate on direct examination the reasonably reliable facts and data relied upon to form the opinion, subject to an objection under Texas Rule of Evidence 403 that the probative value of such data is outweighed by the risk of undue prejudice. *Stam v. Mack,* 984 S.W.2d 747, 750 (Tex. App.—Texarkana 1998, no pet.); *Sosa ex rel. Grant v. Koshy,* 961 S.W.2d 420, 426-27 (Tex. App.—Houston [1st Dist.] 1997, pet. denied).

The trial court may exclude the supporting data or facts if the testimony is more prejudicial than probative; the decision is addressed to the trial court's sound discretion. *Stam,* 984 S.W.2d at 750. If the facts or data are disclosed, the opposing party may ask for a limiting instruction. TEX. R. EVID. 705(d). The failure to specifically object on Rule 705(d) grounds or request the limiting instruction waives the objection. *Morris,* 123 S.W.3d at 427.

For example, the Texas Court of Criminal Appeals has held that a DPS lab expert may not testify as to the lab test results for testing done by a different DPS chemist because such a report is hearsay. *Aguilar v. State,* 887 S.W.2d 27, 29 (Tex. Crim. App. 1994) (plurality); *Cole v. State,* 839 S.W.2d 798, 806 (Tex. Crim. App. 1990). However, it recently held that under Rule 705, a DPS lab expert can give his opinion that the substance was cocaine based upon his review another DPS chemist's testing, provided the testifying expert does not state the report's contents. *Martinez v. State,* 22 S.W.3d 504, 508 (Tex. Crim. App. 2000) (en banc).

Therefore, the careful advocate must now scrutinize the supporting data and documents and then object to them separately from the opinion, before the expert testifies. Counsel's objection should first specify the ground or rule of evidence that makes the underlying data inadmissible, e.g., hearsay, unfair prejudice, etc. The objection should then assert that any probative value the underlying data has to explain the expert's opinion is outweighed by the danger of unfair prejudice, confusion, or other improper purpose.

Mr. Hughes, of Adams & Graham, L.L.P., in Harlingen, leads the firm's appellate division. His practice focuses on defense of personal injury claims, professional malpractice cases, commercial disputes and federal civil rights litigation. He is board certified in civil appellate law and is a member of the American Academy of Appellate Lawyers and the Texas Association of Defense Counsel Amicus Curiae Committee. He graduated from the University of Texas School of Law in 1977.★

---

[1] Texas Rule of Evidence 103(a) provides:

> **(a) Effect of Erroneous Ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground, if the specific ground was not apparent from the context. When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating the objections.
>
> (2) *Offer of Proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer, or was apparent from the context within which questions were asked.

[2] Referring to *Daubert v. Merrell Dow Pham., Inc.*, 509 U.S. 579 (1995); *E.I. Du Pont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 713 (Tex. 1998).

THE APPELLATE CLOCK

BY TOM COWART

THIS ARTICLE IS INTENDED TO GIVE A QUICK GUIDE TO APPELLATE PRACTICE IN TEXAS STATE COURT, primarily focusing on time tables. To provide a quick reference for the time requirements governing an appeal in Texas, here, with discussion to follow, is a chart that lays out the relevant time periods:

EVENT		TYPE OF APPEAL		
	Final Judgment - No Motion for New Trial	Final Judgment - Post-Judgment Motion for Filed	"By right" appeal of interlocutory order	Discretionary interlocutory appeal
Date Order Signed	Day 0	Day 0	Day 0	Day 0
Post Judgment Motion due	Not Filed	Day 30	Not applicable	Not applicable
Notice of Appeal due	Day 30	Day 90	Day 20	Day 10 - Application due
Motion to Extend time to File Notice of Appeal due	Day 45	Day 105	Day 35	Unclear whether applicable
Request for Reporter's Record due	Day 30	Day 90	Day 20	Under Rule, by time perfected
Designation of Clerk's Record Due	Before prepared	Before prepared	Before prepared	Under Rule, before prepared
Clerk's Record due	Day 60	Day 120	Notice of Appeal + 10 days	Under Rule, Notice of Appeal + 10 days
Reporter's Record due	Day 60	Day 120	Notice of Appeal + 10 days	Under Rule, Notice of Appeal + 10 days
Appellant's Brief due	Date record complete + 30 Days	Date record complete + 30 Days	Date record complete + 20 Days	Date record complete + 20 Days
Appellee's Brief due	30 days after Appellant's brief filed	30 days after Appellant's brief filed	20 days after Appellant's brief filed	20 days after Appellant's brief filed

EVENT		TYPE OF APPEAL		
At issue	Date Appellee's Brief filed	Date Appellee's Brief filed	Date Appellee's Brief filed	Date Appellee's Brief filed
Reply Brief due	20 days after Appellees' Brief filed	20 days after Appellees' Brief filed	20 days after Appellees' Brief filed	20 days after Appellees' Brief filed
Submission	On 21 days notice	On 21 days notice	On 21 days notice	On 21 days notice
Opinion issues	At Court's discretion	At Court's discretion	At Court's discretion	At Court's discretion
Motion for Rehearing due	15 days after Opinion issued	15 days after Opinion issued	15 days after Opinion issued	15 days after Opinion issued
Motion to Extend Time to File Motion for Rehearing due	15 days after Motion for Rehearing due	15 days after Motion for Rehearing due	15 days after Motion for Rehearing due	15 days after Motion for Rehearing due
Petition for Review due	45 days after Opinion or order on timely Motion for Rehearing	45 days after Opinion or order on timely Motion for Rehearing	If permitted, 45 days after Opinion or order on timely Motion for Rehearing	If permitted, 45 days after Opinion or order on timely Motion for Rehearing

The critical questions for the appellate process in Texas

The initial critical question is whether the order the party is unhappy with is one that is subject to appeal. This primarily involves determining whether the order is "final" or one of the limited "interlocutory orders" subject to an immediate appeal under Texas law. If so, the next cannot-be-missed issue is the appellate deadlines that govern the effort to have the order reviewed. After the appeal is successfully docketed with the Court of Appeals, the rest of the process is a simple carrying out of the rules of appellate procedure.

Appellate jurisdiction–"final judgments," specifically identified "interlocutory orders," and appeal by unanimous agreement

The first question an attorney must be prepared to answer whenever the appellate remedy is considered is whether the order is even subject to appeal. Texas Courts of Appeals are given appellate jurisdiction over "final judgments" and certain "interlocutory orders." The key, then, is recognizing when the order in hand is a "final judgment," and when it is an "interlocutory order" that can be taken up on appeal.

"Final" judgments

As a general rule, "final judgments" are orders by the trial court that resolve all claims by all parties in the suit. Under the Supreme Court's current view, finality is determined with reference to either the intention of the court rendering the judgment or the actual state of the record of the suit.[1] So, if the trial court intended the judgment to be final and intentionally included language that indicates that it is final, the order is final and appealable. On the other hand, even if the trial court did not necessarily intend for the judgment to be final, if it actually disposed of all remaining claims and parties, it is final in fact and appealable.

Identified interlocutory orders

An interlocutory order is any order that is not final. This means that the vast majority of orders rendered by a trial court during a suit are interlocutory. And as a general rule, these types of orders are not subject to being appealed as a matter of right. But there are exceptions, explicitly specified by the legislature in section 51.014 of the Texas Civil Practice and Remedies Code[2] and scattered through out other statutes.[3] If

an interlocutory appeal is authorized by statute, a party has a right to bring such an appeal.

A "four yeses" appeal

Finally, there is a discretionary category of interlocutory appeals. This new procedure (added in 2001) applies to interlocutory orders that would otherwise by unappealable, but which all parties and courts agree should be immediately subject to an appeal.[4] Thus, in the two party case, to take such an order up on appeal requires all four interested entities–the plaintiff, the defendant, the trial court, and the court of appeals–to agree that the order should be appealed.

The second critical issue–timing

After determining that the order may be taken up on appeal, the second and equally important issue is the timing of taking the steps to bring the order before the court of appeals. This issue is critical because the court of appeals cannot exercise jurisdiction over an order if its jurisdiction is not properly invoked. Thus, blowing a deadline in perfecting an appeal is the kiss of death for the attempt to obtain relief from an adverse order.

Appeals from final judgments–30 days

There are two points that must be emphasized regarding the deadlines for perfecting appeals from a final judgment. First, all of the deadlines run from the signing of the judgment.[5] Secondly, generally something has to happen within 30 days of the date that the judgment is signed to preserve appellate rights. That something can either be the filing of a proper post judgment motion or the filing of a notice of appeal. One or the other must be filed within 30 days of the judgment or the right to file an appeal may be lost (subject to the exceptions discussed below).

Thus, there are two possible deadlines for filing a notice of appeal from a final judgment. The first deadline applies when there is no deadline-extending post-judgment motion or request for findings of facts/conclusion of law. In that instance, the notice of appeal is due 30 days after the judgment is signed.[6]

The second deadline applies when a post-judgment motion that requests a change in the judgment is filed. The "requests a change in the judgment" caveat is important–if the post-judgment motion does not seek to alter the judgment, it is not effective to extend the appellate deadlines.[7] If such a motion is filed, the deadline to file the notice of appeal is extended to 90 days after the judgment is signed, as it is if findings of fact/conclusions of law are appropriate and are requested.[8]

"By right" appeals of interlocutory orders–20 days

Interlocutory orders are subject to a different set of time lines than those appeals after a case has concluded. And to complicate matters, the two different types of interlocutory appeals–by right under a specific statute and by permission–have different deadlines.

In appellate parlance, an appeal involving an interlocutory order is an "accelerated appeal."[9] As the name suggests, the time lines are compressed for such an appeal. Again, there are two important points that lawyers considering an appeal from an interlocutory order specifically authorized by a statute must recall. First, just like the appeal from a final judgment, the deadline runs from the signing of the order.[10] Secondly, unlike the final judgment appeal, a post-order filing does not change the deadline for filing a notice of appeal.[11] The notice of appeal is due 20 days after the order is signed and that time period is not automatically expanded when the party asks the trial court to reconsider its ruling or requests findings of fact/conclusions of law (subject to the exceptions discussed below).[12]

Permissive interlocutory appeals–10 days

The second category of interlocutory appeals, those not specified in a statute but taken with the consent of all parties and courts, are also considered "accelerated" by the Rules of Appellate Procedure, but are subject to different requirements. The statute itself sets out the requirements for taking this kind of an appeal up to the Court of Appeals: the appellant must file an "application" within ten days after the order granting permission to appeal is "entered."[13] The questions that flow from this simple language are plentiful. What event triggers the beginning of the countdown–when the order is signed or when it is filed stamped or when it is noted on the docket?[14] Must a notice of appeal under Rule 25 also be filed? If so, should it be filed within 10 days under the statute or within 20 days under the Rules? Can the 10 day deadline line be extended? The current answer to many of these questions is different, depending on in which appellate district the trial court lies.[15] The point here is to realize that the 10 day deadline is established by the statute and whenever a discretionary appeal is considered, that deadline must be taken into account.

More time–extensions, "no notice," and subsequent notices of appeal

There are, of course, times when an appellate deadline is not met. The question then is whether there is some avenue for rescuing the attempt to take an appeal. There are three primary means attorneys should look to for curing this problem.

The first and most generally available method is the liberal provisions for an extension of time for appealing contained in the Rules of Appellate Procedure.[16] Almost every deadline in the Rules is subject to an extension if a proper request is made. There are two requirements for a proper request–it must be made within 15 days of the expiration of the deadline and it must show "good cause" for why the deadline was missed.[17] In the case of a notice of appeal, the notice itself must be filed within 15 days of the deadline, but if it is, the Court of Appeals is to presume that the appellant intended to also file a motion for an extension of time and to invite the appellant to state the "good cause" for missing the deadline.[18] And the "good cause" requirement is very forgiving–even negligence amounting to malpractice is a sufficient reason to justify the request for an extension of time.[19] Thus, if the deadline to file a notice of appeal has run, but less than 15 days have passed since the deadline, in most cases the appeal can still be taken provided that no time is lost in filing the notice of appeal.

"... if the deadline to file a notice of appeal has run, but less than 15 days have passed since the deadline, in most cases the appeal can still be taken provided that no time is lost in filing the notice of appeal."

The next two avenues for obtaining additional time to file a notice of appeal are significantly less likely to be available merely because the facts justifying them are rarely present. The first, the "no notice of the judgment" extension, applies when a party has not been given proper notice or acquired actual knowledge that an order has been signed within 20 days of its signature.[20] If so, then the party can move the trial court to establish the date on which the party received notice or acquired actual knowledge and that date serves as the start point for the running of the appellate deadlines.

The last generally applicable extension requires a prior notice of appeal. If one party files a notice of appeal, another party is allowed to file a subsequent notice of appeal within 14 days of the first notice.[21] This exception is important because every party that seeks a change in the judgment must file a notice of appeal.[22] Thus, if a party is "OK" with a judgment, but has complaints it would present if the other side were to take an appeal, it can wait to see if the judgment is going to be taken up before deciding to raise its own complaints.

The fourth non-appeal route to the Court of Appeals: Original proceedings

There is a fourth route to the Court of Appeals, one that is outside of the "appellate process" because it is not an "appeal," but is a proceeding that is begun in the Court of Appeals. These original proceedings include petitions for a writ of mandamus, for a writ of prohibition, and for a writ of habeas corpus. These proceedings are not governed by strict time tables, but are subject to equitable considerations regarding when they are filed.[23]

Prosecuting the appeal–time and technical requirements

Identifying appealable judgments and orders and timely perfecting the appeal from those orders are practically the only issues that are necessary to avoid a summary disposition of an appeal. Virtually every other requirement of Texas appellate practice can be relaxed by the Court of Appeals and there must be a warning of the deficiency and an opportunity to cure before a failure to comply with the requirement can have case determinative effects.

The record

After perfection (i.e., timely filing the notice of appeal), the next issue is the proper designation and filing of the record. The record comes in two parts–the Clerk's Record, which used to be referred to as the "Transcript" and contains the pleadings, motions, and other documents filed with the clerk, and the "Reporter's Record," which used to called the "Statement of Facts" and consists of the court reporter's transcription of the relevant proceedings held in the litigation.[24] The requirements for these two parts of the record are different. The Rules provide for the contents of the Clerk's Record and the parties do not need to take any action at all if they are content with having only those items presented to the Court of Appeals. If, on the other hand, the parties need items not included in the default contents, a written designation of those additional items must be filed with the trial court's clerk "[a]t any time before the clerk's record is prepared[.]"[25] The Reporter's Record, on the other hand, is not prepared by default. Rather, if a Reporter's Record is required, the party must make a written request for its preparation "[a]t or before the time for perfecting the appeal[.]"[26] Neither of these request deadlines are binding because the Rules specifically forbid the Court of Appeals from refusing to file a record due to a failure to timely request it.[27] And as more good news in connection with the Record, a party's only duty regarding the record is to request and pay for it, the burden of ensuring that it is prepared and filed is on the courts.[28]

The "docketing statement"

An appellant is required to file a "docketing statement" when

the appeal is perfected.[29] This form provides the Court of Appeals with basic information concerning the case, primarily of an administrative nature. Almost all of the Courts of Appeals (all but El Paso) have copies of their docketing statement forms available for downloading from their websites (which can be accessed through the Texas Judicial Server at http://www.courts.state.tx.us/appcourt.asp).

Motions practice

Motions requesting relief during the course of an appellate proceeding are presented to the Court of Appeals in writing.[30] The Rules provide specific formatting requirements for motions and also outline the required contents. One specific requirement is that all motions presented in civil cases must contain a certificate of conference verifying that the movant has conferred with the other parties regarding the relief sought in the motion and whether the relief is opposed by those other parties. The Rules also contain very detailed requirements for certificates of service for all pleadings filed with the Court of Appeals.[31] Generally, unless unopposed or for more time to file a brief, motions are held for 10 days after filing before being presented to the Court of Appeals for a ruling.[32]

Briefing the appeal

The parties' positions are presented to the Court of Appeals through briefs and, if properly requested, oral arguments. Of the two, the brief is the much more important presentation. Briefs are governed by expressly stated requirements both as to form–double spaced, 8-1/**2** by 11 inch paper, one inch margins, 13 point proportionally spaced or 10 cpi non proportionally spaced type, with covers, if any, that are not plastic, red, black or dark blue containing specific information, stapled or bound so that it will lie flat, no longer than 50 pages for the substance of the principle brief and 25 pages for the substance of a reply brief[33]–and the sections of the contents–Identity of Parties and Counsel, Table of Contents, Index of Authorities, Statement of the Case, Issues Presented, Statement of Facts, Summary of the Argument, Argument, and Prayer.[34] Examples of briefs filed in the Texas Supreme Court, which generally have the same technical requirements as those filed in the Courts of Appeals, can be found at the Supreme Court's website (http://www.supreme.courts.state.tx.us/ebriefs/).

Briefs are due based on the date that the record is completed, that is, the date on which the last of the Clerk's Record or the Reporter's Record is filed. In an appeal from a final judgment, the appellant's brief is due 30 days after the Record is complete.[35] In an accelerated appeal (i.e., one involving an interlocutory order[36]) the Appellant's brief is due within 20 days of the completion of the record. The appellee's brief is due within 30 days of the filing of the appellant's brief. The appellant's reply brief is due 20 days after the appellee's brief is filed. All of these deadlines can be modified by the Court.

Oral argument

After the parties' principle briefs are filed the appeal is considered to be "at issue" by the Court of Appeals and subject to being set for "submission" or presentation to the court for resolution. Generally, a party that has properly requested oral argument (by noting the request on the cover of its brief) has a right to present arguments to the court, but that right is subject to the court's discretion to decide that argument would not be useful in a particular case.[37] Submission to the court either with or without argument requires 21 days notice to the parties of the date for submission.[38]

Decision by the Court

Obviously, the timing of the decision by the Court of Appeals is entirely within the discretion of the court. Statistics showing the average time for each of the courts can be found in the Office of Court Administration's annual report (available at the OCA website: http://www.courts.state.tx.us/publicinfo/annual_reports.asp).

Motions for Rehearing

The final stage in the intermediate court of appeals is the decision whether to seek rehearing of an adverse decision. Under the current rules, the motion for rehearing is not a necessary predicate to seeking review by the Supreme Court,[39] but given the rate of review by that Court, any serious problem with the opinion should be presented to the Court of Appeals. The motion is limited to 15 pages in length and is governed by the form requirements for every motion under the appellate rules.[40] It is due within 15 days of the opinion, but that time can be extended upon a proper motion filed within 15 days of the expiration of the deadline.[41] The prevailing party is not required to file a reply because the Court of Appeals is prohibited from granting the motion unless a reply has been filed or requested.[42]

Appealing to the Supreme Court

Generally, the losing party in the Court of Appeals has the opportunity to request that the Supreme Court review the decision (the right to request Supreme Court review is limited with respect to accelerated/interlocutory appeals[43]). The vehicle for this request is a Petition for Review, a procedure introduced into Texas practice by the 1997 amendments to the Rules of Appellate Procedure. The most significant technical change is the page limitation: A Petition for Review is

limited to 15 pages for its substantive discussion of the issues presented.[44] This limitation was intended to (and appears to have had) the effect of focusing the Petition for Review on the reasons why the Supreme Court should review the decision rather than the specific complaints about the merits of the Court of Appeals' decision. It is due within 45 days of either the opinion of the Court of Appeals or the ruling on the last timely filed motion for rehearing.[45] Significantly, there is no provision in the rules for an expansion of the time for filing based on a ruling on a motion to extend time to file a motion for rehearing, which means that a Petition for Review could be due before a party knows whether the Court of Appeals will allow it to file a motion for rehearing under a request for an extension of time. Just as with the motion for rehearing in the intermediate court of appeals, the opposing party need not file a reply unless one is requested because the Court is not supposed to grant a Petition for Review unless a reply has been filed or requested.[46] If the Court decides to accept the appeal, it usually requires the parties to file Briefs on the Merits which are full briefs presenting the parties' positions.[47] The Court may, and often does, request Briefs on the Merits before deciding whether to accept a case for review.[48]

Conclusion

The appellate time line in Texas is really not very complicated, once the Rules are consulted. There are very few "sudden death" provisions in our Rules. Where such deadlines do apply, though, it is mandatory that all involved keep a close watch for the events that begin the running of the clock. Knowing that they are out there will, hopefully, prevent the loss of valuable appellate rights by the litigants in our courts.

Tom Cowart is responsible for the appellate docket in the Law Offices of Windle Turley, P.C. Mr. Cowart is Board Certified in Civil Appellate Law by the Texas Board of Legal Specialization. He is a member of the American Trial Lawyers Association, the Dallas Bar Association, and the College of the State Bar of Texas. Mr. Cowart serves as an editorial board member for The Advocate. ★

---

[1] *Lehmann v. Har-Con Corp.*, 39 S.W.2d 191, 192-93 (Tex. 2001).
[2] TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a) (Vernon Supp. 2004).
[3] *E.g.*, TEX. CIV. PRAC. & REM CODE ANN. § 15.003(a) (Vernon Supp. 2004) (venue in a multi-plaintiff case); TEX. CIV. PRAC. & REM. CODE ANN. ' 171.098(a) (Vernon Supp. Phamp. 2004) (orders denying arbitration).
[4] TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d) (Vernon Supp. 2004).
[5] TEX. R. APP. P. 26.1 & (a); TEX. R. CIV. P. 329b(a).
[6] TEX. R. APP. P. 26.1.
[7] *Lane Bank Equipment Co. v. Smith Southern Equipment, Inc.*, 10 S.W.3d 308, 313-14 (Tex. 2000).
[8] TEX. R. APP. P. 26.1(a).
[9] TEX. R. APP. P. 28.1.
[10] TEX. R. APP. P. 26.1(b).
[11] TEX. R. APP. P. 28.1.
[12] TEX. R. APP. P. 26.1(b); 28.1.
[13] TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(f).
[14] *See Burrell v. Cornelius*, 570 S.W.2d 382, 384 (Tex. 1978) ("entered" does not mean "signed").
[15] *E.g., Compare Stolte v. County of Guadalupe*, 139 S.W.3d 406, 408 (Tex. App.–San Antonio 2004, no pet.) *with In re D.B.*, 80 S.W.3d 698, 701 (Tex. App.–Dallas 2002, no pet.).
[16] TEX. R. APP. P. 26.3.
[17] TEX. R. APP. P. 26.3; *Hone v. Hanafin*, 104 S.W.3d 884 (Tex. 2003).
[18] *Verburgt v. Dorner*, 959 S.W.2d 615, 616 (Tex. 1997).
[19] *Hone v. Hanafin*, 104 S.W.3d 884 (Tex. 2003); *Garcia v. Kastner Farms*, 774 S.W.2d 668 (Tex. 1989).
[20] TEX. R. APP. P. 4.2 (trial court orders), 4.5 (appellate court orders).
[21] TEX. R. APP. P. 26.1(d).
[22] TEX. R. APP. P. 25.1(c).
[23] *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993).
[24] TEX. R. APP. P. 34, 34.5(a), 34.6(a).
[25] TEX. R. APP. P. 34.5(b).
[26] TEX. R. APP. P. 34.6(b).
[27] TEX. R. APP. P. 34.5(b)(4), 34.6(b)(3)
[28] TEX. R. APP. P. 35.3(c).
[29] TEX. R. APP. P. 32.1.
[30] TEX. R. APP. P. 10.1.
[31] TEX. R. APP. P. 9.5(e).
[32] TEX. R. APP. P. 10.3.
[33] TEX. R. APP. P. 9.4; 38.4.
[34] TEX. R. APP. P. 38.1, 38.2.
[35] See generally TEX. R. APP. P. 38.6 for all deadlines for briefs.
[36] TEX. R. APP. P. 28.1.
[37] TEX. R. APP. P. 39.7, 39.8.
[38] TEX. R. APP. P. 39.9.
[39] TEX. R. APP. P. 49.9
[40] TEX. R. APP. P. 49.10
[41] TEX. R. APP. P. 49.1, 49.8.
[42] TEX. R. APP. P. 49.2.
[43] TEX. GOV'T CODE ANN. § 22.225(b)(3) (Vernon 2004).
[44] TEX. R. APP. P. 53.6.
[45] TEX. R. APP. P. 53.7(a).
[46] TEX. R. APP. P. 53.3.
[47] TEX. R. APP. P. 55.2, 55.3.
[48] TEX. R. APP. P. 55.1.