

**PRESERVATION OF ERROR:
PRETRIAL AND TRIAL
(State & Federal)**

Presented by

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CHAPTER 11



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- Co-Author and Speaker, *The New Rules on Appeals: Interlocutory Appeals and Stays, Conflicts Jurisdiction, Appeal Bonds, and Interest Rates*, Law Practice After HB4: What Every Practitioner Needs to Know, University of Texas School of Law, August 2003
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PRESERVATION OF ERROR: PRETRIAL AND TRIAL (State & Federal)

I. INTRODUCTION¹

Although preservation requirements often sound simple enough in theory, in practice they can be difficult for even the most able trial lawyer. For one thing, the rules can be very technical. For another, even if the lawyer correctly preserves a complaint at one step of the trial process (for example, by pleading a specific affirmative defense), the complaint can still be waived at another step along the way (for example, by failing to tender a properly worded jury question).

Moreover, tactical considerations often weigh against rigorous compliance with preservation requirements. For example, once the trial court has determined that it is going to admit certain evidence you believe should be excluded, do you object each and every time the evidence is offered or discussed? If preservation were a trial lawyer's only concern, the answer, quite obviously, would be yes. From the appellate lawyer's standpoint, once is never enough, and you can't get too much of a good thing.

Nonetheless, preservation is not (and should not be) the trial lawyer's only concern. Among other things, the trial lawyer must also be concerned with the judge's and the jury's reactions to repeated objections. Is he just drawing unwanted attention to the evidence, increasing its importance in the eyes of the jury? Is he irritating a judge she needs to go his way on more crucial issues? Trying to balance these competing interests is difficult under the best of circumstances; in the heat of trial, when a lawyer has so many issues competing for his attention, it can be impossible.

So, what do you do? The suggestion here is that you *know* what it takes to preserve a specific complaint, and to the extent possible, plan your strategy well in advance of trial. Some points may not be worth preserving. Some points will be. Deciding which points fall into which category requires thought and analysis. To make the best decision, the trial lawyer needs to be well informed about the case (its facts, its proof, its problems, and the applicable law)

¹ This paper is based on works authored for prior seminars by Richard P. Hogan and Jennifer Bruch Hogan of Hogan & Hogan, L.L.P. in Houston, Texas. Their willingness to share their materials for use in this program is greatly appreciated. I also thank Tim Shelhamer and Deborah Wallace for their valuable assistance.

and preservation requirements. This paper focuses on the preservation rules most frequently encountered in state court practice and highlights related federal court issues when appropriate.

II. GENERAL PRESERVATION REQUIREMENTS

A. Basic Rule

“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 therefor, and obtain a ruling.” *Wal-Mart Stores, Inc. v. McKenzie*, 997 S.W.2d 278, 280 (Tex. 1999). Preservation requirements exist because: “(1) fairness to all parties requires a litigant to advance complaints at a time when there is opportunity to respond or cure them; (2) reversing a case for error not raised in a timely fashion permits the losing party to second guess its tactical decisions after they do not produce the desired results; and (3) judicial economy requires that issues be raised first in the trial court in order to spare the parties and the public the expense of a potentially unnecessary appeal.” *Chappell Hill Bank v. Lane Equip. Co.*, 38 S.W.3d 237, 247 (Tex. App.—Texarkana 2001, pet. denied); *Cross Marine, Inc. v. Lee*, 905 S.W.2d 22, 25 (Tex. App.—Corpus Christi 1995, writ denied).

The general preservation requirements are found in the appellate rules. As adopted in 1997 by the supreme court and the court of criminal appeals, the rules provide:

33.1 Preservation; How Shown.

(a) *In general.* As a prerequisite to presenting a complaint for appellate review, the record must show that:

(1) the complaint was made to the trial court by a timely request, objection, or motion that:

(A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and

(B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure; and

(2) the trial court:

(A) ruled on the request, objection, or motion, either expressly or implicitly; or

(B) refused to rule on the request, objection or motion, and the complaining party objected to the refusal.

TEX. R. APP. P. 33.1 (repealing former TEX. R. APP. P. 52 effective September 1, 1997).

Generally, then, to preserve *any* complaint for appellate review, a party must specifically request that the trial court take some action *and* obtain a ruling on the request. If the trial court refuses to rule, the complaining party must object to the refusal to rule. TEX. R. APP. P. 33.1(a).

Rule 33.1(a) provides only the general requirements necessary to preserve a complaint for appellate review. It does not purport to address the individual requirements necessary to preserve any specific complaint. Do not be misled. Rule 33.1(a) is neither all inclusive nor exclusive of other preservation requirements. The rule specifically requires that your complaint must comply “with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure.” TEX. R. APP. P. 33.1(a)(1)(B). All complaints are not treated equally—and they cannot be preserved the same way. Nonetheless, rule 33.1(a) should be considered as providing the minimum requirements for preserving any error.

B. The Request, Objection, or Motion Must Appear in the Record

In Texas state court, the appellate record consists of the reporter’s record and the clerk’s record. TEX. R. APP. P. 34.1. The clerk’s record contains the written pleadings, motions, orders, and other papers in the trial court’s file, as designated by the parties to an appeal. TEX. R. APP. P. 34.5(a). The reporter’s record is the court reporter’s transcription of the oral proceedings occurring in the trial court, including evidence, arguments of counsel, rulings by the court, and the spoken, reported trial proceedings. The “reporter’s record consists of the court reporter’s transcription of so much of the proceedings, and any of the exhibits, that the parties to the appeal designate.” TEX. R. APP. P. 34.6(a)(1).

In reviewing appellate complaints, the court of appeals is confined to the appellate record. It cannot consider matters that do not appear in the record. *See, e.g., Nelson v. Neal*, 787 S.W.2d 343, 346 (Tex. 1990); *Sabine Offshore Service, Inc. v. City of Port Arthur*,

595 S.W.2d 840, 841 (Tex. 1979); *Perry v. Kroger Stores*, 741 S.W.2d 533, 534 (Tex. App.—Dallas 1987, no writ); *Clark v. Dedina*, 658 S.W.2d 293, 297 (Tex. App.—Houston [1st Dist.] 1983, writ dismissed).

Consequently, the specific appellate complaint must have been raised in a written request, objection, or motion included in the clerk’s record or in an oral request, objection, or motion transcribed by the court reporter and included in the reporter’s record. Certain trial court requests must be made in writing (such as a motion to transfer venue) while others are almost always made orally (such as an objection to the admission of certain testimony). In either case, however, the trial lawyer must make certain the objection, request, or motion is a part of the appellate record. Oral requests or complaints that are not transcribed by the court reporter preserve nothing for review on appeal. An appellate court cannot consider documents attached as exhibits or appendices to the briefs, if those materials are not a part of the appellate record. *Mitchison v. Houston I.S.D.*, 803 S.W.2d 769, 771 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

Rule 33.1 further requires that a request, objection, or motion must be “timely” and stated “with sufficient specificity to make the trial court aware of the complaint.” “Sufficient specificity” is not a precisely defined concept, but common sense should be an adequate guide. “[T]imeliness” is another matter. Very often, timeliness is determined by strict legal rules applying to individualized complaints.

C. The Court’s Ruling Must Appear in the Record

The trial court’s ruling must likewise appear in the record to preserve a complaint for appellate review. But Rule 33.1(c) states that “a signed separate order” is not required “to preserve a complaint for appeal,” and Rule 33.1(a)(2)(A) says that even an “implicit” ruling on the record is sufficient. A number of appellate courts have examined implicit rulings since Rule 33.1 was adopted. *See, e.g. Gutierrez v. State*, 36 S.W.3d 509, 511 (Tex. Crim. App. 2001); *Krishnan v. Ramirez*, 42 S.W.3d 205, 220 n3 (Tex. App.—Corpus Christi 2001, pet. denied) (recognizing that “in general” the new rule has loosened the once mandatory requirement that an express ruling is necessary to preserve a complaint for appeal); *see also Hardman v. Dault*, 2 S.W.3d 378, 381 (Tex. App.—San Antonio 1999, no pet.); *Frazier v. Yu*, 987 S.W.2d 607, 610 (Tex. App.—Fort Worth 1999, pet. denied); *Blum v.*

Julian, 977 S.W.2d 819, 823 (Tex. App.—Fort Worth 1998, no pet.).

Krishnan takes the new rule about as far as it can go. In a case involving a stillborn fetus, the appellee's lawyer struck a sensitive note in closing:

So, all of the mental anguish that has been testified about here, is mental anguish that she suffered as a result of the loss of the fetus as a part of her body. Because the courts have held that until the baby is born alive, it is not an individual.

42 S.W.3d at 221. After the appellant objected, the trial court said, "You may proceed." *Id.* at 220 n.3. Although the trial court made no express ruling—and did not even acknowledge that an objection was lodged—the appeals court held that error was preserved. "It is apparent the trial court was aware of appellant's objection and appellee's response to the objection. By telling appellee to proceed following this exchange, the trial court implicitly overruled appellant's objection. Thus, the issue was preserved for our review." *Id.*

Some courts have followed the same basic approach in summary judgment appeals, holding that objections to affidavit evidence preserved error without an express ruling or a written order. For example, another Corpus Christi opinion recently held that Rule 33.1 changes the requirement for a written order to complain about the trial court's evidentiary rulings. The court relied on the reporter's record of the summary judgment hearing:

Because we approve of the *Frazier* Court's reasoning and its comparative analysis of rule 33.1(a) with former rule 52(a), we adopt its conclusions with respect to ruling on objections to evidence under the new rule. Accordingly, this Court concludes no written order overruling Columbia's objections was necessary to preserve error, if the record indicates the trial court ruled on Columbia's objections, either expressly or implicitly.

Columbia Rio Grande Regional Hosp. v. Stover, 17 S.W.3d 387, 395-396 (Tex. App.—Corpus Christi 2000, no pet.); *see also Zuniga v. San Benito Consol. Indep. Sch. Dist.*, 2004 Tex. App. LEXIS 6839 at **6-7 (Tex. App.—Corpus Christi Jul. 29, 2004, no pet. h.).

Other appellate courts have continued to enforce the need for written orders in summary judgment cases. *See, e.g., Chapman Children's Trust v. Porter &*

Hedges, L.L.P., 32 S.W.3d 429, 435 (Tex. App.—Houston [14th Dist.] 2000, writ denied). In *Chapman*, appellants had tried to obtain a ruling on summary judgment affidavit objections, but failed to secure a ruling before summary judgment was granted:

Moreover, we find that the Trusts failed to preserve error on their objections to the form of the affidavits filed by Porter & Hedges. It is well settled that a party must obtain a ruling on an objection as to defects of an affidavit's form or else the objection is waived. *See McConnell v. Southside I.S.D.*, 858 S.W.2d 337, 343 n.7 (Tex. 1993); *Green v. Indus. Specialty Contractors, Inc.*, 1 S.W.3d 126, 130 (Tex. App.—Houston [1st Dist.] 1999, no pet.). Here, the Trusts concede that, despite repeated efforts to do so, they were unable to obtain a written ruling on their formal objections from the trial court. After the summary judgment was granted, the Trusts scheduled a hearing on their objections. At that March 2, 1998 hearing, the trial court refused to rule on the objections, and so the Trusts lodged an objection to the court's refusal to rule. We find that by failing to obtain a ruling or a refusal to rule on the hearsay objections until after summary judgment was granted, the Trusts did not preserve error. *See TEX. R. APP. P. 33.1(a); see also Dolcefino*, 19 S.W.3d 906, 926 (emphasizing that it remains "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").

Id.

Presumably, when the right case is presented, the appellate courts will enforce the rule as written. If that happens, formal signed orders would not be necessary to raise a complaint that is otherwise preserved properly. Regardless of what Rule 33.1 says, however, it will always be much safer to obtain a signed, written order granting or denying the requested relief (except for rulings made on the record during trial). That way, you will never have to rely on the court reporter to accurately transcribe the ruling. Moreover, with a signed order in hand, you don't have to wait for the reporter's record to be completed to evaluate the preservation of your appellate complaints.

D. Federal Court

Although the Federal Rules of Appellate Procedure do not include an equivalent to Texas Rule of Appellate Procedure 33.1, the general preservation rules in federal court are very similar to those in state court.

A federal court of appeals generally will not consider an issue that was not raised in the trial court. *See, e.g. Whitehead v. Food Max of Miss., Inc.*, 332 F.3d 796, 807 (5th Cir. 2003). *Vogel v. Verreman*, 276 F.3d 729, 733 (5th Cir. 2002). “A party must have raised an argument ‘to such a degree that the trial court may rule on it.’” *Vogel*, 276 F.3d at 733 (quoting *In re Fairchild Aircraft Corp.*, 6 F.3d 1119, 1128 (5th Cir. 1993)). Moreover, as in state court, federal court of appeals will not consider matters that do not appear in the record. *See Roberts v. Wal-Mart Stores, Inc.*, 7 F.3d 1256, 1259 (5th Cir. 1993) (“We can only review the record and do not take evidence to supplement or contradict it.”); *Great Plains Equip., Inc. v. Koch Gathering Systems, Inc.*, 45 F.3d 962, 965 (5th Cir. 1995).

The Fifth Circuit has no agreed “bright-line rule” for determining whether an issue was properly raised in the trial court. *New York Life Ins. Co. v. Brown*, 84 F.3d 137, 142 n.4 (5th Cir. 1996). But, if a litigant desires to preserve an argument for appeal, the litigant must pose and not merely intimate the argument during the proceedings before the district court.” *F.D.I.C. v. Mijalis*, 15 F.3d 1314, 1327 (5th Cir. 1994); *see also Vela v. City of Houston*, 276 F.3d 659, 678-79 (5th Cir. 2001). At a minimum, a party “must raise his argument to such a degree that the district court may rule on it.” *Harris County, Tex. v. Car Max Auto Superstores, Inc.*, 177 F.3d 306, 326 (5th Cir. 1999). Likewise, the objection must be timely, that is contemporaneous with the alleged error. *E.g. Chrysler Credit Corp. v. Whitney Nat’l Bank*, 51 F.3d 553, 556 n.1 (5th Cir. 1995); *Murray v. Orr*, 200 F.3d 291, 305 (5th Cir. 2000).

Formal bills of exception are not required to preserve error. *See* FED. R. CIV. P. 46. Federal Rule of Appellate Procedure 10(c) provides the mechanism for supplementing the record when proceedings were not recorded or when a transcript is unavailable.

III. PLEADING REQUIREMENTS

Specific preservation rules apply to certain trial court pleadings. Generally, we think of pleadings as the plaintiff’s petition and the defendant’s answer, but

those are by no means the only pleadings a party may file. In fact, if the first pleading a defendant files is its original answer, that defendant has already waived certain complaints it might want to raise on appeal—specifically, a challenge to the court’s exercise of personal jurisdiction over the defendant or a challenge to the venue.

A. Special Appearance

A challenge to the trial court’s exercise of jurisdiction over the person or property of the defendant is properly raised by filing a sworn special appearance. *See* TEX. R. CIV. P. 120a. The special appearance *must* be filed before an answer on any other plea or motion. *Id.* Moreover, any other answer, plea, or motion must be made subject to the special appearance; and the special appearance must be ruled upon before any other plea or motion. *See, e.g., Liberty Enterprises v. Moore Transp. Co.*, 690 S.W.2d 570, 571-72 (Tex. 1985) (by filing a motion to set aside a default judgment and agreeing to the entry of an order granting the motion, the defendant waived its special appearance). A special appearance under Rule 120a can be waived even by challenging the service of process. Although a non-resident defendant, like any other defendant, may move to quash the citation for defects in the process, his only relief is additional time to answer rather than dismissal of the cause. A curable defect in service of process does not affect a non-resident defendant’s amenability to service of process. *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 202 (Tex. 1985).

Special appearances, like many other interlocutory orders of the trial courts, are now appealable by statute before a final judgment is rendered. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7); *Daimler-Benz Aktiengesellschaft v. Olson*, 21 S.W.3d 707, 713 (Tex. App.—Austin 2000, writ dismissed w.o.j.). Because these interlocutory rulings can be appealed, preservation requirements have become more imperative and immediate.

B. Motion to Transfer Venue

An objection to improper venue (other than a motion to transfer because an impartial trial cannot be had in the county of suit) must be made by written motion filed before any other answer, plea, or motion. TEX. R. CIV. P. 86. As with the special appearance, any other answer, plea, or motion should be made expressly subject to the motion to transfer venue; and the motion to transfer should be ruled upon before any

other plea or motion. *See, e.g., Grozier v. L-B Sprinkler & Plumbing Repair*, 744 S.W.2d 306, 309-11 (Tex. App.—Fort Worth 1988, writ denied) (defendant’s actions in submitting and obtaining rulings on his motion to allow attorney to withdraw and his motion for a new trial waived his motion to transfer venue).

Additionally, the movant has the duty to request a setting for the hearing on the motion to transfer venue. *See* TEX. R. CIV. P. 87; *Grozier v. L-B Sprinkler & Plumbing Repair*, 744 S.W.2d at 309-10 (defendant waived his right to complain of the trial court’s failure to grant his uncontested motion to transfer venue by failing to obtain a hearing and ruling on his motion). *But see Accent Energy Corp. v. Gillman*, 824 S.W.2d 274, 276-77 (Tex. App.—Amarillo 1992, writ denied) (despite a delay of nearly three years in securing a hearing, the defendants did not waive their motion to transfer venue in light of the plaintiffs’ repeated amendments to their pleadings and the plaintiffs’ request for a continuance of at least one scheduled venue hearing).

Two cases emphasize that choice of venue belongs to plaintiffs, so long as suit is filed in a permissible county. Only if a plaintiff fails to meet the burden to show venue *is* permissible in the county of suit may the trial judge transfer 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.” *Wilson v. Texas Parks & Wildlife Dep’t*, 886 S.W.2d 259, 260 (Tex. 1994). On appellate review of a trial court’s venue ruling, the test is legal sufficiency of the evidence, and the record is reviewed “in the light most favorable to the trial court’s ruling.” *Ruiz v. Conoco*, 868 S.W.2d 752, 757-58 (Tex. 1993).

C. Petitions and Answers

1. Each independent ground of recovery must be pleaded

As a general rule, a party’s pleadings are liberally construed. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896-97 (Tex. 2000). Nonetheless, every independent ground of recovery must be specifically pleaded. *See* TEX. R. CIV. P. 47; TEX. R. CIV. P. 301 (“The judgment of the court shall conform to the pleadings . . .”). For example, alter ego and each of the other bases for disregarding the corporate fiction is an independent ground of recovery that must be specifically pleaded or it is waived. *See Mapco Inc. v. Carter*, 817 S.W.2d 686, 688 (Tex. 1991); *Castleberry*

v. Branscum, 721 S.W.2d 270, 272, 275 n.5 (Tex. 1986). Quantum meruit is a separate theory of recovery that must be specifically pleaded. *See Centex Corp. v. Dalton*, 840 S.W.2d 952, 959 (Tex. 1992). Likewise, a request for prejudgment interest must be specifically pleaded. *Benavidez v. Isles Constr. Co.*, 726 S.W.2d 23, 25 (Tex. 1987).

2. Matters of avoidance and affirmative defenses must be specifically pleaded

Unlike many jurisdictions, Texas permits a party to answer by way of a general denial. *See* TEX. R. CIV. P. 92. The affect of a general denial is to put in issue those matters pleaded by the adverse party. *Id.* A general denial is not sufficient, however, to raise (or preserve) affirmative defenses or certain defenses that must be verified. *See* TEX. R. CIV. P. 92, 93, 94.

Texas Rule of Civil Procedure 93 lists those pleas that must be verified. They include the following:

- a plea that the plaintiff or the defendant lacks the legal capacity to sue or be sued;
- a plea that the plaintiff is not entitled to recover in the capacity in which he sues;
- a plea that the defendant is not liable in the capacity in which he has been sued;
- a plea that there is another suit pending between the parties;
- a plea that there is a defect of parties;
- a denial of partnership, incorporation, or doing business under an assumed name;
- a denial of the execution of a written instrument upon which any pleading is founded;
- a denial of the genuineness of an endorsement or assignment of a written instrument upon which suit is brought;
- a plea that a written instrument upon which a suit is founded is without consideration;
- a denial of an account;
- a plea that a contract sued upon is usurious;
- a plea that notice and proof of loss or claim for damage has not been given as alleged; and
- certain matters in a worker’s compensation case.

TEX. R. CIV. P. 93. The supreme court “[has] not hesitated in previous cases to hold that parties who do not follow rule 93’s mandate waive any right to complain about the matter on appeal.” *Nootsie, Ltd. v. Williamson Cty. Appr. Dist.*, 925 S.W.2d 659, 662 (Tex. 1996) (construing Rule 93(1) requirement for verified denials).

In addition to those defenses that must be verified, Rule 94 requires that any matter constituting an avoidance or affirmative defense must be specifically pleaded. Those matters include accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, and waiver. TEX. R. CIV. P. 94. Additionally, immunity, including a claim of governmental immunity, is an affirmative defense that must be pleaded or it is waived. *Davis v. City of San Antonio*, 752 S.W.2d 518, 519-20 (Tex. 1988). In most circumstances, federal preemption is an affirmative defense that must be specifically pleaded. *Gorman v. Life Ins. Co. of N. Am.*, 811 S.W.2d 542, 546 (Tex. 1990). The discovery rule, and any other matter in avoidance of the statute of limitations, is an affirmative defense that must be specifically pleaded. *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 518 (Tex. 1988). Likewise, any matter seeking to avoid enforcement of a contract—such as lack of conspicuousness, failure to meet the express negligence test, failure of essential purpose, and unconscionability—must be specifically pleaded. *See, e.g., Forest Lane Porsche Audi Assocs. v. G&K Services, Inc.*, 717 S.W.2d 470, 474 (Tex. App.—Fort Worth 1986, no writ); *Delta Eng’g Corp. v. Warren Petroleum, Inc.*, 668 S.W.2d 770, 773 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.); *Henderson v. Ford Motor Co.*, 547 S.W.2d 663, 669 (Tex. Civ. App.—Amarillo 1977, no writ); *Copeland Well Service v. Shell Oil*, 528 S.W.2d 317, 319-21 (Tex. Civ. App.—Tyler 1975, writ dismissed).

3. Pleadings must be amended timely

Parties may amend their pleadings, without obtaining leave of court, anytime more than seven days before trial, unless the court has set an earlier date pursuant to Rule 166. TEX. R. CIV. P. 163, 166. The cut-off date is seven days before the date the case is set for trial, not the date trial actually begins. *See J-IV Investments v. David Lynn Mach., Inc.*, 784 S.W.2d 106, 108 (Tex. App.—Dallas 1990, no writ). “In

computing any period of time prescribed or allowed by [the Texas Rules of Civil Procedure], . . . the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included.” *Sosa v. Central Power & Light Co.*, 909 S.W.2d 893, 895 (Tex. 1995). Therefore, for a pleading filed under Rule 63, “the day on which the . . . amendment [is filed] is not counted but the seventh day after it was filed is counted,” and the last day counted may be the day of the hearing. *Id.* An amendment must be permitted when it is offered post-trial in an effort to conform the pleadings to the jury’s verdict on damages. *Greenhalgh v. Service Lloyd’s Ins. Co.*, 787 S.W. 2d 938, 940 (Tex. 1990). No discretion exists for a trial court to refuse an 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” *Chapin & Chapin, Inc. v. Texas Sand & Gravel Co.*, 844 S.W.2d 664, 665 (Tex. 1992).

Given these pleading requirements, the trial lawyer should review the latest amended pleadings of all parties at least two weeks before the date a case is set for trial. Think about the evidence and legal arguments you expect to offer. Think about the jury questions and instructions you intend to request. Think about the judgment you want to obtain. Every theory of recovery, every avoidance, every argument, every jury question, and all the relief you seek should be supported by your pleadings. If it isn’t, or you aren’t sure, amend more than seven days before the case is set.

D. Federal Court

1. Objections regarding personal jurisdiction, improper venue, and service of process

Much as in state court, a party in federal court must raise a complaint regarding lack of personal jurisdiction, improper venue, and/or insufficiency of process in its *first* responsive pleading—that is, in the party’s original answer or in a pre-answer motion filed in accordance with Federal Rule of Civil Procedure 12(g). *See* FED. R. CIV. P. 12(h); *McCurdy v. Am. of Plastic Surgery*, 157 F.3d 191, 194-195 (5th Cir. 1998); *Golden v. Cox Furniture Mfg. Co.*, 683 F.2d 115, 118 (5th Cir. 1982). Failure to raise these complaints by answer or pre-answer motion waives the complaint. *Id.*

2. The plaintiff's complaint

Federal Rule of Civil Procedure Rule 8(a) provides that a complaint must contain: (1) “a short and plain statement” of the court’s jurisdiction; (2) “a short and plain statement of the claim” and (3) “demand for judgment for the relief the pleader seeks.” These requirements “do not require an inordinate amount of detail or precision.” *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 434 (5th Cir. 2000). Generally, then, the complaint need only provide “the defendant fair notice of the Plaintiff’s claim and the grounds upon which the plaintiff relies.” *Id.* It “need not specify in exact detail every possible theory of recovery.” *Thrift v. Estate of Hubbard*, 44 F.3d 348, 356 (5th Cir. 1995). Nonetheless, “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” FED. R. CIV. P. 9(b). Likewise, a claim for special damages must be specifically stated. *Id.* 9(g).

Even if not pleaded, a cause of action or issue or defense included in the pretrial order is available for trial and preserved for review. *See Thrift v. Estate of Hubbard*, 44 F.3d at 355-56. “It is a well-settled rule that a joint pretrial order signed by both parties supersedes all pleadings and governs the issues and evidence to be presented at trial.” *Branch-Hines v. Hebert*, 939 F.2d 1311, 1319 (5th Cir. 1991).

3. The defendant's answer

Rule 8(b) of the Federal Rules of Civil Procedure requires that a defendant “state in short and plain terms the party’s defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies.” A general denial is not permitted except in the limited circumstance that the pleader “intend[s] to controvert all [the plaintiff’s] averments, including averments of the grounds upon which the court’s jurisdiction depends.” FED. R. CIV. P. 8(b).

Rule 8(c) requires that certain listed defenses as well as “any other matter constituting an avoidance or affirmative defense “be specifically pleaded. FED. R. CIV. P. 8(c); *Oden v. Oktibbeha County, Miss.*, 246 F.3d 458, 467 (5th Cir. 2001). In most circumstances, failure to plead an affirmative defense in a responsive pleading waives that defense. *See Oden*, 246 F.3d at 467. *But see Giles v. General Elec. Co.*, 245 F.3d 474, 491-92 (5th Cir. 2001) (defensive issue included as a contested issue of law in pretrial order was not waived even though the issue had not been pleaded in party’s answer).

4. Amendments

A party may amend a pleading at any time before a responsive pleading has been served. FED. R. CIV. P. 15(a); *Willis v. Collins*, 989 F.2d 187, 189 (5th Cir. 1993). Once a responsive pleading has been filed, however, the decision whether to allow an amendment is within the trial court’s discretion. FED. R. CIV. P. 15(a); *Parish v. Frazier*, 195 F.3d 761, 763 (5th Cir. 1999); *Lone Star Ladies Inv. Club v. Schlotzsky’s Inc.*, 238 F.3d 363, 367 (5th Cir. 2001). A party will not be given multiple chances to add new theories of recovery or defense. *See id.*; *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139-40 (5th Cir. 1993).

IV. JURY DEMANDS AND PAYMENT OF THE JURY FEE

A. State Court

Not every case should be tried to a jury, but this tactical decision should not be dictated by a party’s failure to timely and properly demand a jury trial. A proper jury demand requires *both* a written request and the payment of a fee. TEX. R. CIV. P. 216; *see also Forscan Corp. v. Dresser Indus., Inc.*, 789 S.W.2d 389, 392 (Tex. App.–Houston [14th Dist.] 1990, writ dismissed) (party’s payment of the jury fee accompanied by a transmittal letter enclosing “our firm check in the amount of \$10.00 which represents the jury fee for the above referenced cause” did not comply with the requirement that a written *request* for a jury be made; consequently, the party waived its right to a jury trial).

The written request for a jury trial must be filed and the fee paid “a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than thirty days in advance.” TEX. R. CIV. P. 216(1). When the written request is filed and the fee paid more than 30 days before the case is set for trial, there is a presumption that the jury demand was made within a reasonable time. *Halsell v. Dehoyos*, 810 S.W.2d 371, 371 (Tex. 1991). The adverse party may rebut this presumption only by showing that the granting of a jury trial would cause it injury, disrupt the court’s docket, or impede the ordinary handling of the court’s business. *Id.*

Even when a party does not timely pay the jury fee, courts have held that a trial court should accord the right to jury trial if it can be done without interfering with the court’s docket, delaying the trial, or injuring the opposing party. *See Dawson v. Jarvis*, 627 S.W.2d 444, 446-47 (Tex. App.–Houston [1st Dist.] 1981, writ

ref'd n.r.e.); *Childs v. Reunion Bank*, 587 S.W.2d 466, 471 (Tex. Civ. App.–Dallas 1979, writ ref'd n.r.e.); *Erback v. Donald*, 170 S.W.2d 289, 294 (Tex. Civ. App.–Fort Worth 1943, writ ref'd w.o.m.). When a trial is designed to be tried piecemeal, in start-and-stop fashion, and the court crafts the proceedings to make the jury fee late, the trial court may be subject to mandamus for refusing to allow a jury trial, despite late payment of the jury fee. *See General Motors Corp. v. Gayle*, 951 S.W. 2d 469, 477 (Tex. 1997).

Texas Rule of Civil Procedure 245 requires that the parties receive at least 45 days notice of a first trial setting. Immediately upon learning that a case has been set for trial, the trial counsel should obtain a file-stamped copy of the jury request and a copy of the paid jury fee receipt. If either of these documents cannot be located in the file, file a written request and/or pay the required fee more than 30 days before the date the case is set.

B. Federal Court

In federal court, a party usually must file a demand for a jury trial not later than 10 days after the filing of the responsive pleading to the complaint. *See* FED. R. CIV. P. 38(b); 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2320 (1995). The failure to file and serve the demand as required by the rule “constitutes a waiver by the party of trial by jury.” FED. R. CIV. P. 38(d).

V. DISQUALIFICATION AND RECUSAL OF JUDGES

A. State Court

Although treated similarly in the Texas Rules of Civil Procedure, disqualification and recusal are not synonymous terms. The exclusive grounds for disqualification are expressly set out in the Texas Constitution. *See* TEX. CONST. art. V, § 11. As established by the Constitution, a judge is disqualified from sitting in a case when: (1) the judge is interested in the outcome of the case; (2) the judge is related to a party in the case by affinity or consanguinity within the third degree; or (3) the judge has acted as a counsel in the case. *Id.*; *see also* TEX. R. CIV. P. 18b(1). If a judge is disqualified under the constitution, he has no jurisdiction in the case, and any judgment the court renders is void, without effect, and subject to collateral attack. *See Buckholts Indep. School Dist. v. Glaser*,

632 S.W.2d 146, 148 (Tex. 1982); *Fry v. Tucker*, 202 S.W.2d 218, 220 (Tex. 1947).

The grounds for recusal are enumerated in Texas Rule of Civil Procedure 18b(2). In part, that rule requires that a trial judge “shall” recuse himself in any proceeding in which his impartiality might reasonably be questioned, he has a personal bias or prejudice concerning the subject matter or a party, or he has personal knowledge of disputed evidentiary facts concerning the case. TEX. R. CIV. P. 18b(2). Recusal is *not* jurisdictional. A recusal motion must be filed “[a]t least ten days before the date set for trial or other hearing . . .” and must be verified. TEX. R. CIV. P. 18a(a). A party waives its right to complain of a trial judge’s refusal to recuse himself by failing to raise the issue by a timely, proper motion. *See, e.g., Watkins v. Pearson*, 795 S.W.2d 257, 260 (Tex. App.–Houston [14th Dist.] 1990, writ denied); *Coven v. Heatley*, 715 S.W.2d 739, 742 (Tex. App.–Corpus Christi 1986, writ ref'd n.r.e.). Nonetheless, “[w]here the movant in a motion to recuse does not receive 10 days notice of the hearing on the matter from which he seeks to recuse the judge, the 10-day requirement of rule 18a(a) cannot apply.” *Metzger v. Sebeck*, 892 S.W.2d 20, 49 (Tex. App.–Houston [1st Dist.] 1994, writ denied).

B. Federal Court

There is no constitutional basis for disqualification in the federal courts, and the federal courts therefore do not recognize the distinction between disqualification and recusal that state courts do. Two federal statutes address disqualification and recusal, 28 U.S.C. § 144 and 28 U.S.C. § 455, and they have separate requirements.

Under 28 U.S.C. § 144, a district court judge is to recuse himself if a party “makes and files a timely and sufficient affidavit that the judge . . . has a personal bias or prejudice either against him or in favor of any adverse party.” To be timely, the affidavit must be filed not less than 10 days before the beginning of the term at which the proceeding is to be heard, or good cause must be shown for the late filing. 28 U.S.C. § 144; *Patterson v. Mobile Oil Corp.*, 335 F.3d 476, 483 (5th Cir. 2003). To be sufficient, the affidavit must: (1) state material facts with particularity; (2) state facts that, if true, would convince a reasonable person that a bias exists; and (3) state facts that show the bias is personal, not judicial, in nature. *Patterson*, 335 F.3d at 483. An affidavit that is not based on personal knowledge is insufficient. *Henderson v. Dep’t of Public Safety & Corrections*, 901 F.2d 1288, 1296 (5th

Cir. 1990). Moreover, the affidavit must be accompanied by a certificate of counsel of record that is made in good faith. 28 U.S.C. § 144. “A party may file only one such affidavit in any case.” *Id.*

Disqualification is also addressed in 28 U.S.C. § 455. That section provides that a judge shall disqualify himself:

- in any proceeding in which his impartiality might reasonably be questioned (28 U.S.C. § 455(a));
- when he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding (28 U.S.C. § 455(b)(1));
- when, in private practice, he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it (28 U.S.C. § 455(b)(2));
- when he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy (28 U.S.C. § 455(b)(3));
- he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding (28 U.S.C. § 455(b)(4));
- he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person;
 - (i) is a party to the proceeding, or an officer, director, or trustee of a party;
 - (ii) is acting as a lawyer in the proceeding;
 - (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or
 - (iv) is to the judge’s knowledge likely to be a material witness in the proceeding (28 U.S.C. § 455(b)(5)).

The parties may waive the judge’s disqualification under 28 U.S.C. § 455(b). *See* 28 U.S.C. § 455(e).

VI. DISCOVERY COMPLAINTS

A. State Court

It is beyond the scope of this paper to address all of the pitfalls and preservation traps inherent in propounding and responding to discovery requests. As a general rule, discovery complaints—other than complaints relating to the imposition of sanctions—find their way into an appeal as complaints regarding the admission or exclusion of evidence. Preservation of these complaints is discussed below.

A few preservation issues specific to discovery bear brief mention. If you find yourself in a discovery or sanctions battle, be certain to have the trial court hearing recorded by the court reporter. Should you find yourself on the losing end of such a battle and want to mandamus or appeal, you must have a record of the hearing—otherwise, the appellate court will presume that evidence presented at the hearing supported the trial court’s order. *See, e.g., Walker v. Packer*, 827 S.W.2d 833, 837 & n.3 (Tex. 1992) (“Since an evidentiary hearing was held, the Walkers had the burden of providing us . . . a statement of facts from the hearing”); *Meuth v. Hartgrove*, 811 S.W.2d 626, 627 (Tex. App.—Austin 1990, no writ) (“In the absence of a record of the evidentiary hearings, this court presumes that the omitted proof supports the order . . .”); *McFarland v. Szakalun*, 809 S.W.2d 760, 764 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (“When the record is incomplete, we must assume that the portion omitted supports the correctness of the trial court’s judgment”).

One additional note concerns the exclusion of witnesses who were not timely identified in response to an appropriate interrogatory requesting the identity of all persons with knowledge of relevant facts. If a party fails to identify a witness more than 30 days before trial, the witness cannot be called to testify. *See, e.g., Sharp v. Broadway Nat’l Bank*, 784 S.W.2d 669, 670-71 (Tex. 1990); *Gee v. Liberty Mut. Ins. Co.*, 765 S.W.2d 394, 395 n.2 (Tex. 1989). The sanction is automatic. *Id.* The only exception to this rule exists when the party offering the witness demonstrates, *on the record*, good cause for allowing the testimony and the trial judge finds, *on the record*, that good cause exists. *Gee*, 765 S.W.2d at 395-96. The new discovery rules carry through this punishment, unless the proponent of the evidence offered can prove either:

(1) that there was good cause for the failure to timely make, amend, or supplement the discovery response; or (2) that the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties. TEX. R. CIV. P. 193.6(a). The burden of establishing that one of these exceptions applies rests on the party seeking to introduce the evidence or call the un-revealed witness. TEX. R. CIV. P. 193.6(b). If the party seeking to introduce such evidence cannot meet that burden, the trial court is given the express right to grant a continuance.

B. Federal Court

In federal court, as in state court, a proper record is essential for appeal. Thus, to complain about a discovery ruling, a party must present a sufficient record of the ruling and objections. See Part I.D. above. The federal rules regarding discovery disclosures, supplementation, and sanctions are found in Federal Rules of Civil Procedure 26-37.

VII. EVIDENTIARY MATTERS

Evidentiary errors come in two basic varieties: improperly excluded evidence and improperly admitted evidence. The steps necessary to preserve error in each circumstance are somewhat different, although certain requirements are the same in either case.

A. Motions in Limine Generally

In state court, a ruling on a motion in limine preserves nothing. A party cannot predicate its complaint on appeal (concerning the admission or the exclusion of evidence) on a motion in limine. *E.g.*, *Methodist Hosps. of Dallas v. Corporate Communicators, Inc.*, 806 S.W.2d 879, 883 (Tex. App.—Dallas 1991, no writ). If a motion in limine is denied, the party opposing introduction of the evidence must still object when the evidence is offered. *E.g.*, *Metro Aviation, Inc. v. Bristow Offshore Helicopters, Inc.*, 740 S.W.2d 873, 855 (Tex. App.—Beaumont 1987, no writ). If a motion in limine is granted, the party seeking to introduce the evidence must still offer the evidence on the record. *E.g.*, *Commercial Ins. Co. v. Lane*, 480 S.W.2d 781, 783-84 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.). When a party seeks to introduce evidence despite an adverse ruling on a motion in limine, the party opposing the evidence must still object. *E.g.*, *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 637 (Tex. 1986).

Courts seem more than willing to give the trial judge a second chance, even to the point of requiring a trial lawyer to repeat arguments that were not successful before. *United Parcel Service, Inc. v. Tasdemiroglu*, 25 S.W.3d 914, 916-17 (Tex. App.—Houston [14th Dist.] 2000, writ denied). Consequently, a smart lawyer would be wise to repeatedly object or re-urge the offer of excluded evidence.

B. Motions in Limine and *Daubert/Robinson* Challenges

In *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 409 (Tex. 1998), the supreme court held: “To 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.” (emphasis added). But as Justice Hecht noted in dissent, “[h]ow one objects to evidence before trial is not entirely clear.” *Id.* at 402 (Hecht, J., dissenting). In *Huckaby v. A.G. Perry & Son, Inc.*, 20 S.W.3d 194, 203-05 (Tex. App.—Texarkana 2000, pet. denied), the court distinguished “between a motion in limine and a pretrial ruling on admissibility,” and concluded that while motions in limine preserve nothing for appeal, the plaintiff’s pretrial motion “to exclude evidence” was a sufficient means of preserving their complaint regarding the admission of certain expert testimony. This distinction has been recognized by other courts, but not always with a finding that the specific complaint was preserved. *E.g.*, *Norfolk Southern Ry. Co. v. Bailey*, 92 S.W.3d 577, 583 (Tex. App.—Austin, 2002, no pet.).

The moral of the story is that practitioners should be careful. Do not raise *Daubert/Robinson* challenges in a document labeled a motion in limine, and do not use motion in limine language—*i.e.*, requesting that your opponent approach the bench before attempting to introduce the evidence—when challenging an expert. Obtain a written ruling expressly granting or denying your pretrial motion to exclude, and then raise your challenge again when the witness is called to testify.

C. Erroneous Admission of Evidence

To complain about the improper admission of evidence, Texas Rule of Evidence 103(a)(1) specifically requires “a timely objection or motion to strike . . . stating the specific ground of objection, if the specific ground was not apparent from the context.” The failure to object waives any complaint regarding the improper admission of evidence. See *Crumpton v.*

Stevens, 936 S.W.2d 473, 478 (Tex. App.—Fort Worth 1996, no pet.); *Dalworth Trucking Co. v. Bulen*, 924 S.W.2d 728, 736 (Tex. App.—Texarkana 1996, no pet.); *Wilfin, Inc. v. Williams*, 615 S.W.2d 242, 244 (Tex. App.—Dallas 1981, writ ref'd n.r.e.); *Samora v. Romero*, 581 S.W.2d 742, 747 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

1. The objection must be made by the complaining party

Generally, a party must make its own objection to the admission of evidence in order to preserve a complaint for appeal. See *Celotex Corp. v. Tate*, 797 S.W.2d 197, 201 (Tex. App.—Corpus Christi 1990, no writ). A party cannot rely upon an objection made by another party, even if that party is on the same side of the suit. *Id.* An exception to this rule exists, however, when the parties expressly agree, and the trial court expressly accepts, that an objection by one party will preserve error for all the parties on that side of the suit. *Id.*

2. The objection must be specific

To preserve error, the complaining party must state the specific grounds for objecting to the offered evidence. TEX. R. EVID. 103(a)(1); *Dalworth Trucking Co.*, 924 S.W.2d at 736; *United Cab Co. v. Mason*, 775 S.W.2d 783, 785 (Tex. App.—Houston [1st Dist.] 1989, writ denied). A specific objection is “one which enables the trial court to understand the precise grounds so as to make an informed ruling, affording the offering party an opportunity to remedy the defect, if possible.” *McKinney v. National Union Fire Ins. Co.*, 772 S.W.2d 72, 74 (Tex. 1989). The objection should both identify the objectionable part of the question or answer and identify the rule the court would violate by admitting the evidence. *Haney v. Purcell Co.*, 796 S.W.2d 782, 789 (Tex. App.—Houston [1st Dist.] 1990, writ denied).

When the offered evidence is admissible for a limited purpose, it is particularly important that any objection be specifically directed at the objectionable portion of the evidence. If the objectionable portion of the evidence is separable from the unobjectionable, an objection to the evidence in its entirety is properly overruled. See *Cherokee Water Co. v. Gregg Cty. Appraisal Dist.*, 773 S.W.2d 949, 959 (Tex. App.—Tyler 1989), *aff'd*, 801 S.W.2d 872 (Tex. 1990); see also *Speir v. Webster*, 616 S.W.2d 617, 619 (Tex. 1981). This requirement of specific objections can be especially tricky when summaries of voluminous

records are offered. See *Uniroyal Goodrich Tire Co. v. Martinez*, 928 S.W.2d 64, 74 (Tex. App.—San Antonio 1995), *aff'd*, 977 S.W.2d 328 (Tex. 1998) (trial court did not abuse its discretion in admitting time line prepared by witness to illustrate the sequence of events to which he had already testified). Although such charts and graphs are generally admissible, if small parts of the chart or summary contain inadmissible evidence, the objecting party must point out the objectionable aspect. The objecting party must also ask the trial court to instruct the jury to consider the evidence only for the proper or limited purpose. TEX. R. EVID. 105.

3. The objection must be timely—not too early, not too late

Not only must the objection be specific, it must be made timely. To be timely, the objection must be made at the time the evidence is offered, not after it has been introduced. *Boyer v. Scruggs*, 806 S.W.2d 941, 946 (Tex. App.—Corpus Christi 1991, no writ). But the objection must not be made too early, either. For example, in *Bushnell v. Dean*, 803 S.W.2d 711 (Tex. 1991), the plaintiff’s expert “indicated that he was going to give a working definition of sexual harassment, including general things that are true about a person who harasses.” At that point, the defendant’s counsel objected:

I am objecting to the testimony of this expert witness as a whole to the extent that it goes to questions of profile of someone who harasses. . . I think it is likely to create a great deal of prejudice and to confuse the jury and issues that they actually have to decide in this case, and that involves a mixture of law and fact.

Id. at 712. The trial court responded that it was concerned the witness’s testimony might at some point cross the line into impermissible character evidence, and instructed the defense attorney to reurge his objection at that point in time. *Id.* The defendant’s attorney never made any further objection, and the supreme court held that any complaint regarding the evidence that ultimately came in had been waived. *Id.*

As to the timing of an objection, counsel must also remember that the admission of similar evidence without objection, either before or after an objection is made, waives any error concerning the admission of improper evidence. See *Port Terminal R.R. Ass’n v. Richardson*, 808 S.W.2d 501, 510 (Tex. App.—Houston [14th Dist.] 1991, writ denied); *Celotex Corp. v. Tate*,

797 S.W.2d 197, 201 (Tex. App.–Corpus Christi 1990, no writ).

4. Running objections

There are two lines of authority regarding the need to renew objections. *See City of Fort Worth v. Holland*, 748 S.W.2d 112, 113-14 (Tex. App.–Fort Worth 1988, writ denied) (recognizing two lines of authority). One line of cases holds that “[w]here a party makes a proper objection to the introduction of testimony and is overruled, he is entitled to assume that the judge will make the same ruling as to the other offers of similar testimony, and he is not required to repeat the objection.” *Burnett/Smallwood & Co. v. Helton Oil Co.*, 577 S.W.2d 291, 295 (Tex. Civ. App.–Amarillo 1978, no writ); *Crispi v. Emmott*, 337 S.W.2d 314, 318 (Tex. Civ. App.–Houston 1960, no writ). Courts have analyzed several factors in determining the extent to which a running objection may preserve error: (1) the nature and similarity of the subsequent testimony to the prior testimony, (2) the proximity of the objection to the subsequent testimony, (3) whether the subsequent testimony is from a different witness, (4) whether a running objection was requested and granted, and (5) any other circumstances which might suggest why the objections should not have to be reurged. *In re A.P.*, 42 S.W.3d 248, 261 (Tex. App.–Waco 2001, no pet.); *Correa v. General Motors Corp.*, 948 S.W.2d 515, 518-19 (Tex. App.–Corpus Christi 1997, no writ); *Holland*, 748 S.W.2d at 113.

Another line of authority has concluded “[a]lthough an objection to evidence is made and overruled, it must be repeated if similar evidence is subsequently sought to be introduced, or the objection will be waived . . . or the trial court’s [error will be] . . . deemed harmless.” *Badger v. Symon*, 661 S.W.2d 163, 165 (Tex. App.–Houston [1st Dist.] 1983, writ ref’d n.r.e.); *City of Houston v. Riggins*, 568 S.W.2d 188, 190 (Tex. Civ. App.–Tyler 1978, writ ref’d n.r.e.); *Kelso v. Wheeler*, 310 S.W.2d 148, 150 (Tex. Civ. App.–Houston [1st Dist.] 1958, no writ). “The general rule is that error in the admission of testimony is deemed harmless if the objecting party subsequently permits the same or similar evidence to be introduced without objection.” *Norfolk v. Bailey*, 92 S.W.3d 577, 583 (Tex. App.–Austin 2002, no pet.) (citing *Richardson v. Green*, 677 S.W.2d 497, 501 (Tex. 1984)).

The two lines of authority do not appear reconcilable. From a technical standpoint, renewing objections would be the more prudent course for trial

counsel. That tactic, however, ignores crucial, practical concerns about alienating the trial judge and the jurors by constantly objecting. Unfortunately, no clear answer emerges from these competing considerations.

5. Obtain a ruling

No matter how good the objection, to preserve any complaint for appeal, counsel must obtain a ruling on the objection. *Sanchez v. Brownsville Sports Ctr.*, 51 S.W.3d 643, 661-62 (Tex. App.–Corpus Christi 2001, no pet.); *Perez v. Baker Packers*, 694 S.W.2d 138, 141 (Tex. App.–Houston [14th Dist.] 1985, writ ref’d n.r.e.). As noted in the discussion of implied rulings, a separate, specific objection will preserve error if the trial court refuses to rule. *See* TEX. R. APP. P. 33.1(a)(2)(B).

D. Erroneous Exclusion of Evidence

While a proper objection will preserve a complaint regarding the admission of improper evidence, Texas Rule of Evidence 103(a)(2) provides that a ruling excluding evidence cannot be reversible error in the absence of an offer of proof. Without an offer of proof that informs the trial judge of the substance, purpose, and relevance of the excluded evidence, any complaint regarding the improper exclusion of evidence is waived. *See Fletcher v. Minnesota Mining & Manufacturing Co.*, 57 S.W.3d 602, 608-09 (Tex. App.–Houston [1st Dist.] 2001, pet. denied); *Olson v. Harris County*, 807 S.W.2d 594, 597 (Tex. App.–Houston [1st Dist.] 1990, writ denied).

The offer of proof need not be in question and answer form. TEX. R. EVID. 103(b); *see* TEX. R. APP. P. 33.2(a) (“No particular form of words is required in a bill of exception.”). Instead, the offering party must make the “substance of the evidence . . . known to the court by offer,” unless it was apparent from the context in which the questions were asked. TEX. R. APP. P. 103(a)(2). The offering party need only ensure that the trial court is fully aware of the substance of the evidence sought to be admitted. *See Jones v. Kinder*, 807 S.W.2d 868, 871 (Tex. App.–Amarillo 1991, no writ). “The court may, or at the request of a party shall, direct the making of an offer of proof in question and answer form.” TEX. R. EVID. 103(b).

An offer of proof should state the names of witnesses and identify writings with particularity, state with specificity the testimony to be given by the witnesses and the content of the writings, and state the relevance of the evidence. When a party objects to this

narrative format, however, the trial court “shall” direct that the offer be made in question and answer form (a bill of exception). TEX. R. EVID. 103(b).

Courts have considered error in the exclusion of a witness when the substance of the witness’s testimony was apparent from the context. One court has examined a complaint that an expert was excluded impermissibly, because the import of the expert’s testimony was apparent from the motion to strike hearing. *See Akin v. Santa Clara Land Co.*, 34 S.W.3d 334, 339 (Tex. App.—San Antonio 2000, pet. denied).

However, most courts still recite the tried-and-true rules on error preservation in the exclusion of evidence:

To preserve the error of a trial judge in excluding evidence, a party must do certain things. The party must: (1) attempt during the evidentiary portion of the trial to introduce the evidence, *Estate of Veale v. Teledyne Industries, Inc.*, 899 S.W.2d 239, 242 (Tex. App.—Houston [14th Dist.] 1995, writ denied); (2) if an objection is lodged, specify the purpose for which it is offered and give the trial judge reasons why the evidence is admissible, *Id.*; (3) obtain a ruling from the court, *Id.*; and (4) if the judge rules the evidence inadmissible, make a record, through a bill of exceptions [formal or informal], of the precise evidence the party desires admitted. *Id.* *See also Spivey v. James*, 1 S.W.3d 380, 385 (Tex. App.—Texarkana 1999, pet. denied).

Richards v. Comm’n for Lawyer Discipline, 35 S.W.3d 243, 252 (Tex. App.—Houston [14th Dist.] 2000, no pet.). The careful practitioner will follow the traditional rules.

An offer of proof need not be made precisely at the time the trial court refuses to admit evidence, but the offer *must* be made during the evidentiary portion of the trial, and “before the court’s charge is read to the jury.” TEX. R. EVID. 103(b); *Lakeway Land Co. v. Kizer*, 796 S.W.2d 820, 827 (Tex. App.—Austin 1990, writ denied); *Rawhide Oil & Gas, Inc. v. Maxus Exploration Co.*, 766 S.W.2d 264, 275 (Tex. App.—Amarillo 1988, writ denied). The trial court has no discretion to deny the offering party an opportunity to make an offer of proof concerning excluded evidence. *Ledisco Fin. Serv., Inc. v. Viracola*, 533 S.W.2d 951, 959 (Tex. Civ. App.—Texarkana 1976, no writ).

Of course, before an offer of proof becomes necessary, the trial court must first have refused to admit certain evidence. The trial court’s ruling excluding the evidence must be reflected in the record. *See O’Shea v. Coronado Transmission Co.*, 656 S.W.2d 557, 564 (Tex. App.—Corpus Christi 1983, writ ref’d n.r.e.); *Jones v. Kinder*, 807 S.W.2d 868, 871 (Tex. App.—Amarillo 1991, no writ).

1. Formal bills of exception

If the reporter’s record does not contain the offer of proof or the trial court’s ruling, the issue may be preserved for appeal by filing a formal bill of exception. *See Fletcher*, 57 S.W.3d at 608-09. There is no form for a formal bill. *See* TEX. R. APP. P. 33.2(a). The rules establish the following requirements:

- The formal bill must state the party’s objection and the trial court’s ruling. Those matters must be stated “with sufficient specificity to make the trial court aware of the complaint.” TEX. R. APP. P. 33.2(a).
- The formal bill must be filed within 30 days after the filing party’s notice of appeal is filed. TEX. R. APP. P. 33.2(e)(1).
- The trial court is required to submit the formal bill to the adverse party, and if it is agreed to, the trial judge must sign it and file it with the clerk. TEX. R. APP. P. 33.2(c)(2).
- If the parties disagree, but the trial court judge finds the formal bill correct anyway, he must sign the bill and file it with the clerk; otherwise, if he finds it incorrect, the judge should suggest corrections as he deems necessary, and if the proponent agrees, the trial judge shall sign it and file it with the clerk. TEX. R. APP. P. 33.2(c)(2)(B).
- If the proponent disagrees with the trial judge’s bill, he may file a “bystander’s bill.” The proponent must obtain the signatures of three respectable bystanders who “observed the matter to which the bill is addressed,” and file the “bystanders bill” with the clerk. This bill may then be controverted by opposing affidavits filed within 10 days after the filing of the bystanders bill. If both are filed, the “truth” is determined on appeal from the affidavits. TEX. R. APP. P. 33.2(c)(3).

E. Federal Court

Evidentiary matters often are said to be committed to the discretion of the trial court. On appeal, this means that evidence decisions, in general, are reviewed only for an abuse of discretion. “Time and again [federal appellate courts] have stated that the admission of evidence is within the sound discretion of the district court. Absent proof of abuse an appellate court will not disturb a district court’s evidentiary rulings.” 1 STEVEN ALAN CHILDRESS AND MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 4.02 (2d ed. 1992).

1. Motions in limine

The Federal Rules of Evidence seem to encourage trial courts to decide admissibility questions outside the jury’s hearing. “In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means” FED. R. EVID. 103(c). Despite this encouragement, motions in limine are not favored as an error-preservation tool. If a motion in limine is denied, the party who made the motion usually must renew it at trial. *Petty v. Ideco*, 761 F.2d 1146, 1150 (5th Cir. 1985).

In contrast to Texas practice, however, the Federal Rules of Evidence now make certain objections unnecessary at trial if a pretrial “definitive” ruling is obtained. The relevant rule provides:

Rule 103. Rulings on Evidence

(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 of objection, if the specific ground was not apparent from the context; or

(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.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not

renew an objection or offer of proof to preserve a claim of error for appeal.

FED. R. EVID. 103 (last sentence added effective December 1, 2000). When ambiguity exists about a ruling, the ruling is not “definitive,” and it would preserve nothing. *See C.P. Interests, Inc. v. California Pools, Inc.* 238 F.3d 690, 699 (5th Cir. 2001). If circumstances change from the pretrial “definitive” ruling, then a renewed objection would be required.

2. Timing and specificity

Any party objecting to evidence must make an objection on the record that is specific; the particular ground complained of must be stated. *Goulah v. Ford Motor Co.*, 118 F.3d 1478, 1483 (11th Cir. 1997); General objections will not preserve error about specific complaints. *See United States v. Berry*, 977 F.2d 915, 918 (5th Cir. 1992). As to timing, the objection must be made at the time the evidence is admitted. *Pregeant v. Pan Am World Airways, Inc.*, 762 F.2d 1245, 1248 (5th Cir. 1985). A running objection is precarious in federal court. When someone does not renew objections, and the trial court’s ruling is less than definitive, *see* FED. R. EVID. 103(a)(2), and the unmade objections can be waived. *United States v. Merida*, 985 F.2d 198, 201 (5th Cir. 1993).

3. Offers of proof

The Federal Rules of Evidence require an offer of proof to preserve a complaint about the erroneous exclusion of evidence. FED. R. EVID. 103(a)(2). This rule requires “that to preserve an argument that evidence was wrongly excluded, the proponent must make known the substance of the evidence sought to be admitted . . . unless it ‘was apparent from the context within which the questions were asked.’” *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 174 (1988). Also, the party offering the evidence should note all the grounds for which the evidence is admissible. *See Reese v. Mercury Marine*, 793 F.2d 1416, 1421 (5th Cir. 1986).

4. Obtain a ruling

Even with a decisive advance ruling under Rule 103, if a party nonetheless tries to put on evidence that has been excluded, there must be an objection to preserve error. *U.S. Aviation Underwriters, Inc. v. Olympia Wings, Inc.*, 896 F.2d 949, 956 (5th Cir. 1990). The new Rule 103 language, added in 2000, may suggest a different result for truly “definitive

rulings.” Still, the best and least assailable practice would be to obtain a ruling from the trial court each time inadmissible evidence is discussed.

VIII. TRIAL PROCEEDINGS

As discussed earlier, an appellate court cannot review complaints that do not appear in the record. Because you cannot always know in advance what problems are going to occur during trial, it is extremely important to make a record of everything—and that includes voir dire, opening, and closing arguments.

Even if no error occurs during these portions of the trial, your opposing counsel’s voir dire and arguments can often be used to demonstrate the harm caused by the trial court’s erroneous ruling on another matter. For example, if you complain about the trial court’s admission of some evidence, you could certainly use your opposing counsel’s repeated references to that evidence in her arguments as proof that the evidence was critical to his case and that admission of the evidence probably caused the rendition of an improper judgment. TEX. R. APP. P. 44.1(a)(1). You will only have the opportunity to make such a showing if you have had your opponent’s arguments recorded. Preserve that opportunity.

A. Voir Dire and Jury Selection

1. Challenges for cause

During voir dire examination, if a panel member admits to any bias or prejudice, then he or she is disqualified—period. *See Shepherd v. Ledford*, 962 S.W.2d 28, 34 (Tex. 1998). Any attempts to rehabilitate that panel member will be disregarded as impermissible. *See State v. Dick*, 69 S.W.3d 612, 620 (Tex. App.—Tyler 2001, no writ); *W.D.A. v. State*, 835 S.W.2d 227, 229 (Tex. App.—Waco 1992, no writ); *Sullemon v. U.S. Fidelity & Guar. Co.*, 734 S.W.2d 10, 14 (Tex. App.—Dallas 1987, no writ); *Gum v. Schaefer*, 683 S.W.2d 803, 807 (Tex. App.—Corpus Christi 1984, no writ); *Carpenter v. Wyatt Constr. Co.*, 501 S.W.2d 748, 750 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref’d n.r.e.). One of the possible grounds used to disqualify a prospective juror may be the juror’s refusal to award a given large amount of damages, such as damages over a million dollars, no matter what the evidence. *Cavnar v. Quality Control Parking*, 678 S.W.2d 548, 555-56 (Tex. App.—Houston [14th Dist.] 1984), *modified on other grounds*, 696 S.W.2d 549 (Tex. 1985).

Establishing that a juror is biased or prejudiced and challenging that juror for cause is *not* sufficient to preserve error for appeal. If the trial court overrules a challenge for cause, the complaining party waives any error unless—before the jury is seated—the complaining party: (1) exhausts its peremptory challenges; and (2) identifies, by name or number, the specific jurors who remain on the panel who are objectionable and who would otherwise be struck by the party. *See Hallett v. Houston N.W. Med. Center*, 689 S.W.2d 888, 889-90 (Tex. 1985); *Sullemon*, 734 S.W.2d at 12.

2. Apportionment of peremptory challenges

Generally, the litigants on each side of a case (plaintiffs and defendants) are to receive an equal number of peremptory strikes. The only exception to this rule exists when multiple litigants on the same side are “antagonistic” to one another with respect to an issue of fact the jury will decide. *See Garcia v. Central Power & Light Co.*, 704 S.W.2d 734, 736 (Tex. 1986). If any party wishes to complain about the trial court’s allocation of peremptory strikes, that party must object to the court’s apportionment of strikes *before* the strikes are made, but *after* voir dire has been concluded. *See Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 5 (Tex. 1986); *Tex. Commerce Bank v. Lecco Constructors, Inc.*, No. 13-91-423-CV (Tex. App.—Corpus Christi June 30, 1993, no writ) (“Any pre-voir dire objection to the suggestion by the trial court of how it intends to allocate strikes would be premature . . .”).

B. Motions for Directed Verdict

A motion for directed verdict can be oral or written, and it may be made at the close of the plaintiff’s case or at the close of all evidence. Some older cases hold that a written ruling is required to complain on appeal about the trial court’s denial of the motion. *See, e.g., Steed v. Bost*, 602 S.W.2d 385 (Tex. Civ. App.—Austin 1980, no writ). *But see Sipco Serv. Marine, Inc. v. Wyatt Field Serv. Co.*, 857 S.W.2d 602 (Tex. App.—Houston [1st Dist.] 1993, no writ) (Cohen, J., concurring) (criticizing cases requiring written ruling as prerequisite for complaint that trial court erroneously overruled motion for directed verdict and concluding that oral ruling reflected in reporter’s record should be sufficient to preserve error).

These cases probably will not survive under the new appellate rules. As Rule 33.1(c) states, “[n]either

a formal exception to a trial court ruling or order nor a signed, separate order is required to preserve a complaint for appeal.” TEX. R. APP. P. 33.1 (c). Until these cases are overruled, however, careful lawyers will still want to get signed orders.

C. Closing Arguments

To preserve a complaint concerning improper jury argument, a party should: (1) timely object to the improper argument; (2) ask for an instruction that the jury should disregard the argument; and (3) move for a mistrial. *See, e.g., Armellini Express Lines v. Ansley*, 605 S.W.2d 297, 305 (Tex. Civ. App.—Corpus Christi 1980, writ ref’d n.r.e.). However, recent cases have considered complaints of error that fell short of these requirements. *Krishnan v. Ramirez*, 42 S.W.3d 205, 220 n.3 (Tex. App.—Corpus Christi 2001, pet. denied) (recognizing that “in general” the new rule has loosened the once mandatory rule that an express ruling is required to preserve a complaint for appeal). As discussed earlier in the paper, the *Krishnan* court said that the trial court’s statement in closing argument that “You may proceed” was enough. *Id.* “It is apparent the trial court was aware of appellant’s objection and appellee’s response to the objection. By telling appellee to proceed following this exchange, the trial court implicitly overruled appellant’s objection. Thus, the issue was preserved for our review.” *Id.*

D. Jury Charges

The jury is charged with deciding the factual disputes necessary to form the basis of a judgment. *Tarter v. Metropolitan Sav. & Loan Ass’n*, 744 S.W.2d 926, 928 (Tex. 1988). Under Rules 277 and 278 only questions, instructions, and definitions are to be submitted to the jury. Rule 278 restricts submission to questions raised by written pleadings and the evidence. However, all controlling fact issues must be submitted to the jury by way of questions or instructions in the charge. A litigant is entitled to have controlling questions submitted to the jury. *See Triplex Communications, Inc. v. Riley*, 900 S.W.2d 716, 718 (Tex. 1995). A controlling question is one that determines the outcome of the case. *See* 4 MCDONALD & CARLSON, TEXAS CIVIL PRACTICE § 22:14 (1992).

Judgments must conform to the pleadings, proof, and verdict. TEX. R. CIV. P. 301. The jury’s answers to the questions in the court’s charge are the verdict. As such, complaints concerning the charge find their way into most appeals from judgments based on adverse jury findings. In Texas, the court’s charge to

the jury is controlled by Rules 271 through 279 of the Rules of Civil Procedure. In conjunction with Rules 33.1, 33.2, and 44.1 of the Rules of Appellate Procedure, these rules also form the basis for attacking the charge on appeal.

Properly preserving error in the jury charge is likely the most difficult and complicated preservation task a lawyer faces. As the supreme court has acknowledged: “The rules governing charge procedures are difficult enough; the case law applying them has made compliance a labyrinth daunting to the most experienced trial lawyer.” *State Dep’t of Highways & Public Transp. v. Payne*, 838 S.W.2d 235, 240 (Tex. 1992).

1. Broad form questions

Under former practice, issues were submitted to the jury “distinctly and separately.” Since 1988, however, the rules have provided that “broad form questions” shall be submitted “whenever feasible.” TEX. R. CIV. P. 277. The potential friction between the rule’s use of the mandatory term “shall” and the qualifying phrase “whenever feasible” was promptly considered by the supreme court.

a. Feasibility

In *Texas Department of Human Resources v. E.B.*, 802 S.W.2d 647 (Tex. 1990), the supreme court stated that “whenever feasible” means “in any or every instance in which it is capable of being accomplished.” *Id.* at 649. Thus, the rule unequivocally requires the trial court to submit broad form questions “unless extraordinary circumstances exist.” *Id.* In *E.B.*, the court provided no guidance for exactly what “extraordinary circumstances” would justify *not* using broad form submissions in a jury charge.

However, in a later case, the supreme court indicated that “it may not be feasible to submit a single broad form liability question that incorporates wholly separate theories of liability.” *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 390 (Tex. 2000). Thus, 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.” *Id.* at 388. Although the rule says broad form is clearly the preferred method of submission, “when the trial court is unsure whether it should submit a particular theory of liability, separating liability theories best serves the policy of

judicial economy underlying Rule 277 by avoiding the need for a new trial when the basis for liability cannot be determined.” *Id.*; see also *Westgate, Ltd. v. State*, 843 S.W.2d 448, 455 n.6 (Tex. 1992).

In *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002), the trial court submitted two broad form damages questions, each of which instructed the jury to consider several elements and award a single lump-sum amount. Harris County objected to the questions on the ground that one listed element in each question was supported by no evidence. *Id.* at 231-232. The trial court overruled the objections. *Id.* On appeal, the court of appeals concluded there was no evidence of the challenged elements, but held the submission error was harmless “because there was ample evidence on properly submitted elements of damage to support the jury’s awards to both plaintiffs.” *Id.* at 232. The supreme court reversed, relying on *Casteel* and holding that the inclusion of one unsupported damages element “prevented Harris County from properly presenting its case to the appellate courts.” *Id.* at 235.

While the *Harris County* majority rejected the dissent’s contention that the opinion means the end of broad form submissions, trial counsel should consider alternatives to broad form anytime a no-evidence objection is made to a charge question that includes multiple elements or theories.

b. Harmless error

The question remained whether the supreme court would reverse an otherwise error-free submission of traditional, separate and distinct special issues solely because of failure to comply with its mandate to use broad form questions. Early challenges offered no guidance because the question had not been preserved for appeal. See, e.g., *Keetch v. Kroger Co.*, 845 S.W.2d 262, 267 (Tex. 1992).

Late in 1992, the supreme court handed down two cases that clarified the question of whether use of “granulated” submissions is harmful error. In *H.E. Butt Grocery Co. v. Warner*, 845 S.W.2d 258 (Tex. 1992), the court held that an otherwise correct separate and distinct submission would not be reversed for failure to submit broad form questions. The court noted that the charge fairly submitted the disputed issues of fact containing the proper elements of the cause of action and incorporated the correct legal standard for the jury to apply. Thus, the court concluded that failure to submit requested broad form questions and instructions was not “harmful error.” *Id.* at 259.

The same day the supreme court decided *Warner*, it also handed down *Westgate, Limited v. State*, 843 S.W.2d 448 (Tex. 1992). There, the court confirmed that it is not always reversible error to use the traditional separate and distinct special issues rather than broad form questions and accompanying instructions. *Id.* at 457. By footnote, the court observed that Rule 277 is not absolute in requiring broad form submission. The court noted that submission of alternative liability standards, particularly when the law is unsettled concerning one or more of the theories of recovery, would present an appropriate use of the old special issue practice. *Id.* at 455 n.6.

Following *Westgate*, the supreme court has held that 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.” *Casteel*, 22 S.W.3d at 390.

2. Traditional preservation requirements—object or request?

Before broad form came into vogue, error-preservation rules had developed under the old special issue practice. The current rules require charge error to be preserved by requests or objections. Requests and objections do not serve the same purpose, and they currently cannot be used interchangeably. However, some general principles apply:

- Proper *objections* are required to preserve complaints about questions, instructions or definitions actually submitted in the charge. TEX. R. CIV. P. 274, *Hernandez v. Montgomery Ward & Co.*, 652 S.W.2d 923, 924 (Tex. 1983).
- Proper *objections* can preserve error for failure to submit a question relied upon by an opposing party. TEX. R. CIV. P. 278; see *Lyles v. T.E.I.A.*, 405 S.W.2d 725, 727 (Tex. Civ. App.—Waco 1966, writ ref’d n.r.e.).
- A substantially correct *written request* is required to preserve error for failure to submit a question relied upon by the complaining party. TEX. R. CIV. P. 278; *Univ. of Tex. v. Ables*, 914 S.W.2d 712, 715 (Tex. App.—Austin 1996, no writ).

- A substantially correct *written request* is required to preserve failure to submit any instruction or definition, regardless of which party relied upon it. TEX. R. CIV. P. 278; *Dep't of Human Servs. v. Hinds*, 904 S.W.2d 629, 637-38 (Tex. 1995).

These four simple rules have spawned a huge amount of confusion and case law.

3. Requests

Each party must request the questions, instructions and definitions necessary for the party to prevail. TEX. R. CIV. P. 278.

a. Questions

Rule 278 states:

Failure to submit a question shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the question is one relied upon by the opposing party.

Thus, unless the omitted question is relied upon by the opposing party, it must be requested or error is waived.

It now appears that error in omitting a question relied upon by a party can be preserved if the *other* party requests the question. In *Morris v. Holt*, 714 S.W.2d 311, 312-13 (Tex. 1986), the defendant's request preserved error on an omitted question upon which the plaintiff bore the burden of proof. Subsequently, the court held that a defendant's request preserved error on an omitted question forming a necessary element of the plaintiff's case. *American Teachers Life Ins. Co. v. Brugette*, 728 S.W.2d 763 (Tex. 1987). *But see Island Rec. Dev. Corp. v. Republic of Tex. Sav.*, 710 S.W.2d 551 (Tex. 1986) (appearing to reach a contrary result).

b. Instructions and definitions

The rule applying to instructions and definitions is quite clear. Rule 278 continues:

Failure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested

in writing and tendered by the party complaining of the judgment.

Failure to request an instruction or definition should not be taken lightly. Under broad form submission, constituent elements of an opponent's claim or defense will likely be relegated to instructions or definitions. If Rule 278 means what it says, a substantially correct definition or instruction must be tendered by the party complaining of the judgment or the error is waived. This is true even if the instruction is part of your opponent's case.

c. When

Requests must be made before the case is submitted to the jury. They must also be made separate and apart from objections to the charge. TEX. R. CIV. P. 273; *Templeton v. Unigard Security Ins. Co.*, 550 S.W.2d 267, 269 (Tex. 1976). If you mix together objections and requests, you run the risk of waiving both. *Woods v. Crane Carrier Co.*, 693 S.W.2d 377, 379 (Tex. 1985).

d. How

(1) In writing

Requests must be in writing. TEX. R. CIV. P. 278. The rules make no provisions for oral requests, or even requests dictated on the record to the court reporter. *But see Alaniz v. Jones & Neuse, Inc.*, 907 S.W.2d 450, 452 (Tex. 1995) and *compare Hartnett v. Hampton Inns, Inc.*, 870 S.W.2d 162, 165 (Tex. App.—San Antonio 1993, writ denied).

(2) Tendered to court

Requests must be tendered to the trial court under Rule 278. In *Peterson v. Dean Witter Reynolds*, 805 S.W.2d 541, 552 (Tex. App.—Dallas 1991, no writ), an instruction was waived because the proposed charge was filed with the district clerk and never "tendered" to the trial court. *General Res. Org. Inc. v. Deadman*, 907 S.W.2d 22, 33 (Tex. App.—San Antonio 1995, writ denied).

(3) Separate from objections

Requests must be made separate and apart from objections to the court's charge. TEX. R. CIV. P. 273; *Woods v. Crane Carrier Co., Inc.*, 693 S.W.2d 377, 279 (Tex. 1985). Requests are waived even when tendered with written objections which are refused by

the court. *T.E.I.A. v. Eskeu*, 574 S.W.2d 814 (Tex. Civ. App.–El Paso 1978, no writ).

(4) Substantially correct

Requests must be in substantially correct wording. TEX. R. CIV. P. 278. ‘Substantially correct’ means that the request is in a form that would allow its submission as worded. *Yellow Cab Co. v. Smith*, 381 S.W.2d 197, 198 (Tex. App.–Waco 1964, writ ref’d n.r.e.). An often quoted explanation states:

Substantially correct . . . does not mean that it must be absolutely correct, nor does it mean one that is merely sufficient to call the matter to the attention of the court will suffice. It means one that in substance and in the main is correct. *And that is not affirmatively incorrect.*

Placencio v. Allied Indus. Int’l., Inc., 724 S.W.2d 20 (Tex. 1987) (emphasis added). Simply put, a request is not substantially correct if its insertion in the charge would, upon proper objection, constitute error upon appeal. *Adams v. Rhodes*, 543 S.W.2d 18 (Tex. Civ. App.–Fort Worth 1976, writ ref’d n.r.e.). Likewise, requests that are improperly conditioned are not substantially correct. *U.S. Fidelity & Guaranty Co. v. Hernandez*, 410 S.W.2d 224 (Tex. Civ. App.–Eastland 1966, writ ref’d n.r.e.).

The court may refuse requests lacking necessary definitions and instructions. *Select Ins. Co. v. Boucher*, 561 S.W.2d 474, 479-80 (Tex. 1978). Likewise, requests can be refused when they accompany a defective definition. *Sherwin-Williams Paint Co. v. Card*, 449 S.W.2d 317 (Tex. Civ. App.–San Antonio 1970, no writ). One court rejected the wording of an instruction in a fetal death case because part of the instruction was erroneous, even though the rest was correct. *See Edinburg Hospital Auth. v. Trevino*, 904 S.W.2d 831, 838 (Tex. App.–Corpus Christi 1995), *rev’d on other grounds*, 941 S.W.2d 76 (Tex. 1997).

In a recent case, when the defendants were denied a statutory defense by a defective question proposed by their opponent and submitted over their objection, the supreme court held that error was preserved even though the question the defendants submitted was defective. *Holubec v. Brandenberger*, 111 S.W.3d 32, 39 (Tex. 2003). ‘‘Because the question actually submitted was defective,’’ the supreme court stated, defendants did not have to submit their own substantially correct question.’’ *Id.*

(5) But not ‘en masse’

The practice of tendering a complete charge, ready for submission, also carries risk. The courts frown upon ‘en masse’ requests. The trial court is justified in refusing to give any question tendered en masse if any one of the questions is improper. *Crisp v. Southwest Bancshares Leasing Co.*, 586 S.W.2d 610 (Tex. Civ. App.–Amarillo 1979, writ ref’d n.r.e.). The appellate court’s reason that the trial judge should not be required to sift through voluminous requests in order to submit those that are proper. *Tempo Tanner, Inc. v. Crowe-Houston Four Ltd.*, 715 S.W.2d 658, 666-67 (Tex. App.–Dallas 1986, writ ref’d n.r.e.); *Hoover v. Barker*, 507 S.W.2d 299, 305 (Tex. App.–Austin 1974, writ ref’d n.r.e.).

e. Court’s action

Rule 276 provides that refused or modified questions, instructions or definitions must be endorsed, signed by the court, and filed with the clerk to preserve error. The endorsement should state ‘‘refused’’ or ‘‘modified as follows: (stating how the request was modified) and given, and exception allowed.’’ TEX. R. CIV. P. 276; *see Hirsch v. Hirsch*, 770 S.W.2d 924, 926 (Tex. App.–El Paso 1989, no writ). Without such a written ruling, the request does not preserve error. *Anderson v. Vinson Explor. Inc.*, 832 S.W.2d 657, 667 (Tex. App.–El Paso 1992, writ denied). *But see* TEX. R. APP. P. 33.1 (generally recognizing implied rulings for error-preservation purposes) (discussed in Part I.C above).

f. Invited error

Parties may not request a submission and then object to it. *General Chem. Corp. v. De La Lastra*, 852 S.W.2d 916 (Tex. 1993); *Daily v. Wheat*, 681 S.W.2d 747 (Tex. Civ. App.–Houston [14th Dist.] 1984, writ ref’d n.r.e.). Nor may a party agree to the jury charge as submitted and later attack it on appeal. *Casteel-Diebolt v. Diebolt*, 912 S.W.2d 302, 304 (Tex. App.–Houston [14th Dist.] 1995, no writ). Note, however, that Rule 279 permits objection to the factual or legal sufficiency of the evidence after the verdict, regardless of which party requested the submission.

4. Objections

The rules contemplate that errors contained in the charge will be preserved by objections. Failure to object waives affirmative error in the charge. Rule 274 states in part:

A party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection. Any complaint as to a question, definition or instruction, on account of any defect, omission, or fault in pleading, is waived unless specifically included in the objections.

The point of the objection, therefore, is to advise the trial court of the error in a manner that permits its correction. TEX. R. APP. P. 33.1; *State Dep't of Highways & Public Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992); see also *Dallas County Sheriff's Dep't v. Gilley*, 114 S.W.3d 689, 691 (Tex. App.—Dallas 2003, no pet.) (objection is properly specific if it is sufficient to bring error to trial judge's attention).

a. When

"In every instance," objections must be made before the charge is read to the jury. TEX. R. CIV. P. 272; *Missouri Pac. Ry. Co. v. Cross*, 501 S.W.2d 868, 873 (Tex. 1973). Agreements to make objections after the charge has gone to the jury will not be enforced. *Sudderth v. Howard*, 560 S.W.2d 511, 516 (Tex. App.—Amarillo, 1978, writ ref'd n.r.e.). Failure to make objections prior to submission to the jury results in waiver. *T.E.I.A. v. Neuman*, 379 S.W.2d 295 (Tex. 1964). Even if you have informally acquiesced in a question placing the burden of proof, an objection before the charge is read to the jury will nonetheless preserve the complaint. *Austin State Hosp. v. Kitchen*, 903 S.W.2d 83, 93 (Tex. App.—Austin 1995, no writ). However, unless otherwise noted in the record, it is presumed that objections were made at the proper time. TEX. R. CIV. P. 272.

Objections may not be required until the charge has been submitted to the parties or their attorneys for inspection. A reasonable time must be given both to examine the charge and to present the objections. 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 harmless).

b. How

Objections may be presented to the court in writing or be dictated to the court reporter in the presence of the court and opposing counsel. TEX. R. CIV. P. 272. Objections dictated outside the court's presence are not preserved. *Brantley v. Spargue*, 636 S.W.2d 224 (Tex. App.—Texarkana 1982, writ ref'd n.r.e.). The supreme court has indicated that an objection containing a request dictated to the court

reporter may preserve error. *Alaniz v. Jones & Neuse, Inc.*, 907 S.W.2d 450, 451 (Tex. 1995) ("Alaniz objected on the record to the omission, and this was the only objection he made to the charge.").

Most objections do not meet the dual requirements of Rule 274. A party objecting to a charge must: (1) point out distinctly the objectionable matter; and (2) the grounds of the objection.

The point of the objection is to permit the court to recognize and correct errors in the charge before it is submitted. Therefore, to preserve error, a litigant is required to distinctly point out the matter to which he is objecting. He is then required to explain the ground or reason why the matter is erroneous. "An objection that does not meet both requirements is properly overruled and does not preserve error on appeal." *Castleberry v. Branscum*, 721 S.W.2d 270, 276-77 (Tex. 1986); *Davis v. Campbell*, 572 S.W.2d 660, 663 (Tex. 1978).

In 1992, the supreme court stated that a complaint should be preserved if "the party made the trial court aware, of the complaint, timely and plainly, and obtained a ruling." *Payne*, 838 S.W.2d at 241. The court also recognized, however, that its rules are not changed by opinion, but by formal adoption of new rules.

(1) Not voluminous or unfounded

Objections obscured by voluminous unfounded objections do not preserve error. Rule 274 states in part:

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.

The rule can be violated in at least two ways. First, objections can simply be too profuse. *Monsanto Co. v. Milam*, 494 S.W.2d 534, 536 (Tex. 1973); *Mahan Volkswagen, Inc. v. Hall*, 648 S.W.2d 324, 330-31 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.). Merely making several objections does not violate Rule 274. See *Baker Material Handling Corp. v. Cummings*, 692 S.W.2d 142, 145-46 (Tex. App.—Dallas 1985, writ dism'd by agr.). The test for voluminous objections is whether the trial court was deprived of a real opportunity to correct errors in the

charge. *Northcutt v. Jarrett*, 585 S.W.2d 874 (Tex. Civ. App.–Amarillo 1979), writ *ref'd n.r.e. per curiam*, 592 S.W.2d 930 (Tex. 1979).

Second, the rule can be violated by filling the record with spurious objections that cannot be sustained. In *Smith v. Christley*, 755 S.W.2d 525, 528-29 (Tex. Civ. App.–Houston [14th Dist.] 1988, writ denied), the court concluded that objections to the factual sufficiency of the evidence to support submission could not have justified refusal to submit the issue. Questions must be submitted to the jury if there is some evidence to support them, even if it is factually insufficient. See *Strauss v. LaMark*, 366 S.W.2d 555 (Tex. 1963). A request on one piece of paper including five other requests—a question, two instructions, and two definitions—was not improper. *Lester v. Logan*, 907 S.W.2d 452, 453 (Tex. 1995).

(2) No adoption by reference

Rule 274 expressly prohibits adoption of objections made to prior issues or instructions. The trial judge should not be required to recall arguments made earlier in the charge conference in determining whether a party has met the burden of clearly and distinctly setting forth objections and grounds. The goal of Rule 274 is to give all participants, including the trial judge and the appellate courts, an opportunity to know with certainty that all objections have been made at the designated point in the proceedings. See *Robinson Drilling Co. v. Thomas*, 385 S.W.2d 725, 728 (Tex. Civ. App.–Eastland 1964, no writ).

c. Examples

In *State Department of Highways & Public Transportation v. Payne*, 838 S.W.2d 235 (Tex. 1992), the defendant objected that an instruction was a comment on the weight of the evidence because it limited the jury's consideration to one of two mutually exclusive theories of recovery. The defendant reasoned that the objectionable language amounted to an instruction to the jury to consider only one of the theories. The supreme court held that, under the circumstances, the trial court's failure to submit the other, more difficult theory of recovery, could hardly have been an oversight. *Id.* at 239. But the court also wrote that charge error preservation had become cumbersome: "The rules governing charge procedures are difficult enough; the case law applying them has made compliance a labyrinth daunting to the most experienced trial lawyer." *Id.* at 240.

Examples of effective objections include the following:

1. The question impermissibly comments on the weight of the evidence.

Plaintiff objects to [the quoted language] because it constitutes a comment by the court on the weight the jury should give to the quoted evidence. The instruction damages plaintiff because the court is singling out evidence favorable to defendant and instructing the jury to give specific attention to that evidence to the exclusion of the evidence offered by plaintiff. The jury can only assume the court favors the evidence supporting defendant's case, and is instructing the jury to find accordingly.

Molina v. Payless Foods, Inc., 615 S.W.2d 944 (Tex. Civ. App.–Houston [14th Dist.] 1981, no writ); see also *Lemos v. Montez*, 680 S.W.2d 798, 801 (Tex. 1984).

2. The question has no support in the evidence, or its answer is established as a matter of law.

Plaintiff objects to [the quoted language] because there is no evidence to support submission of the question [or instruction/definition] because this issue is established as a matter of law.

Davis v. Campbell, 572 S.W.2d 660, 663 (Tex. 1978).

3. The question or instruction is duplicative of another.

Plaintiff objects to [the quoted language] because it duplicates another question [or instruction/definition].

Thate v. Texas & P. Ry. Co., 595 S.W.2d 591 (Tex. Civ. App.–Dallas 1980, writ *dism'd*) (substantially the same submissions should be discouraged).

4. The question or instruction fails to place the burden of proof.

Plaintiff objects to [the quoted language] because it fails to place the burden of proof on either party, and fails to instruct the jury about how it should consider the evidence.

T.E.I.A. v. Olivarez, 694 S.W.2d 92 (Tex. App.–San Antonio 1985, no writ).

5. The question or instruction advises the jury of the effect of the answer.

Defendant objects to [the quoted language] because it advises the jury of the effect of their answer by impermissibly informing the jury that the plaintiff's recovery will be reduced by his percentage of fault.

See TEX. R. CIV. P. 277; *Magic Chef, Inc. v. Sibley*, 546 S.W.2d 851 (Tex. Civ. App.—San Antonio 1977, writ ref'd, n.r.e.).

6. The question or instruction should not be allowed since it submits an affirmative defense, when the defendant has only filed a general denial.

Plaintiff objects to [the quoted language] because there is no proper pleading to support its submission, since the defendant has gone to trial on a general denial. A general denial only puts the plaintiff to his proof, but does not allow affirmative defenses.

Terrett v. Wagenor, 613 S.W.2d 308 (Tex. App.—Fort Worth 1981, no writ).

7. The question or instruction allows the plaintiff a double recovery.

Defendant objects to [the quoted language] because it permits the plaintiff a double recovery of damages.

Louisiana Pac. Corp. v. Smith, 553 S.W.2d 771 (Tex. Civ. App.—Tyler 1977, no writ).

8. The question or instruction is immaterial and will confuse the jury.

Defendant objects because the question cannot alter the rest of the jury's verdict in any way, and including this question will necessarily confuse the jury because [state reason for immateriality]

City of Brownsville v. Alvarado, 897 S.W.2d 750, 752 (Tex. 1995).

d. No objection needed

Some errors need not be raised by objections to the charge. Ironically, these include most "stock objections," such as no evidence, sufficiency of the evidence, and great weight and preponderance points. These points may or must be preserved elsewhere. With the pendulum swinging back toward more granulated charges, however, proper no-evidence objections should be considered in every case.

(1) Sufficiency of the evidence

Under the last sentence of Rule 279, one need not object to the lack of sufficient evidence to warrant submission of charge questions:

A claim that the evidence was legally or factually insufficient to warrant the submission of any question may be made for the first time after verdict, regardless of whether the submission of such question was requested by the complainant.

It is clear from the supreme court's opinions in *Aero Energy, Inc. v. Circle C. Drilling Co.*, 699 S.W.2d 821 (Tex. 1985) and *Steves Sash & Door Co. v. Ceco Corp.*, 751 S.W.2d 473 (Tex. 1988) that complaints of legal insufficiency can be made by motion for new trial in addition to the various motions for judgment and objections to the charge. As a result, objections to the charge for lack of sufficient evidence are routinely reserved for post-verdict motions.

(2) Immateriality

The immateriality of a jury finding has also been recognized as a complaint that may be raised for the first time after verdict. The supreme court has long held that "a jury's answer to a special issue may be disregarded only when it has no support in the evidence or when it is immaterial." *C&R Transport, Inc. v. Campbell*, 406 S.W.2d 191, 194 (Tex. 1966). Thus, a motion to disregard a jury finding may be used to bring an immaterial issue to the trial court's attention. *Brown v. Armstrong*, 713 S.W.2d 725, 728 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

A jury question is considered immaterial when its answer can be found elsewhere in the verdict or when its answer cannot alter the effect of the verdict. *City of Brownsville v. Alvarado*, 897 SW.2d 750, 752 (Tex. 1995). A jury question is immaterial when it should not have been submitted, or, though properly submitted, answers to other questions make it void of legal significance. *Hughes v. Aycock*, 598 S.W.2d 370, 374 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.). When a response is clearly immaterial, the court can disregard the immaterial finding on its own motion. *Clearlake City Water Auth. v. Winograd*, 695 S.W.2d 632, 639 (Tex. Civ. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

The difference between an immaterial finding and an erroneously submitted material question was at the

heart of the supreme court's decision in *Spencer v. Eagle Star Insurance Co.*, 860 S.W.2d 868 (Tex. 1993). There a question asking whether the defendant insurance company had committed an "unfair practice in the business of insurance" followed by an overly-broad and ill-defined instruction was an erroneous attempt to submit the material question of whether Article 21.21 of the Insurance Code had been violated.

The supreme court noted that immaterial findings include those that are beyond the province of the jury, such as questions of law. *Id.* at 870. Curiously, the court also held that the error of the overly broad definition had been preserved by an objection that it asked the jury to determine a question of law—what duty, if any, the company owed to its insureds. The court apparently reasoned that this submission of an otherwise immaterial question of law was "merely defective" because it attempted to submit a core fact issue. *Id.* at 868, 870.

e. Court's action

Rule 272 requires the court to announce its ruling on objections "before reading the charge to the jury." The court is also required to "endorse the rulings on the objections if written or dictate same to the court reporter in the presence of counsel."

In *Acord v. General Motors Corp.*, 669 S.W.2d 111, 116, the supreme court held that when a question or instruction is submitted as proposed, in spite of objections, the overruling of the objection would be implied. It is, nonetheless, helpful to the appellate practitioner to have clear rulings to objections that form the basis of appellate complaint.

5. Object and request

Some courts have held that a substantially correct written request for an omitted question, instruction or definition is not enough to preserve error unless accompanied by an objection. *See, e.g., Johnson v. State Farm Mut. Auto Ins.*, 762 S.W.2d 267, 270 (Tex. App.—San Antonio 1988, writ denied); *Wright Way Constr. Co. v. Harlingen Mall Co.*, 799 S.W.2d 415, 418-19 (Tex. App.—Corpus Christi 1990, writ denied). The courts' basis for requiring an objection in addition to a requested submission was apparently Rule 274's statement that "[a]ny complaint . . . on account of any . . . omission . . . is waived unless specifically included in the objections." This reasoning appears to be contrary to the supreme court's holdings in *Morris v. Holt*, 714 S.W.2d at 312-13 and *American Teachers Life v. Bruggette*, 728 S.W.2d 763. *See also Clarostat*

Mfg., Inc. v. Alcor Aviation, Inc., 544 S.W.2d 788, 794 (writ ref'd n.r.e.).

Other courts have held that the party who would benefit from instructions must request them in addition to objecting to the question's submission without a limiting instruction. *See Jim Howe Homes, Inc. v. Rogers*, 818 S.W.2d 901, 903 (Tex. App.—Austin 1991, no writ); *Tex. Cookie Co. v. Hendricks & Peralta, Inc.*, 747 S.W.2d 873, 878 (Tex. App.—Corpus Christi 1988, writ denied); *Tex. Power & Lights Co. v. Barnhill*, 639 S.W.2d 331, 335 (Tex. App.—Texarkana 1992, writ ref'd n.r.e.).

6. The supreme court's interim solution to preservation complexity

Even the supreme court has struggled to determine how error in the charge should be preserved. For example, in *Keetch v. Kroger Co.*, 845 S.W.2d 262 (Tex. 1992) the supreme court declined to address whether it was error to submit a premises liability case under PJC 61.02 (separate and distinct issues) rather than PJC 61.04 (broad form). The court held on rehearing that error had not been preserved because the plaintiff did not distinctly designate the error, and the grounds for the objection as required by Rule 274. However, that language replaced the original holding that error was not preserved because the plaintiff had failed to request a substantially correct broad form submission.

a. By request

In *State Department of Highways & Public Transportation v. Payne*, 838 S.W.2d 235 (Tex. 1992), the court concluded:

The procedure for preparing and objecting to the jury charge has lost its philosophical moorings. 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.

Id. at 241. The court went on to hold that the specific requirements of the Rules of Civil Procedure should henceforth be applied to serve, rather than defeat, this principle. *Id.*

Courts of appeals have struggled to reconcile *Payne* with the current charge rules. *Compare Collins v. Beste*, 840 S.W.2d 788, 790 (Tex. App.—Fort Worth 1992, writ denied) (interpreting *Payne* as holding that, if the trial court was made aware of an objecting

party's complaint about the charge, it is immaterial whether the complaint was made by objection or request) *with Borden, Inc. v. Rios*, 850 S.W.2d 821, 827 n.3. (Tex. App.—Corpus Christi 1993, writ granted without reference to merits, 859 S.W.2d 70 (Tex. 1993) (expressing uncertainty “whether this language . . . [in *Payne*] . . . represents the present state of the law or a yet to be reached ideal. . .”).

A subsequent Texas Supreme Court decision also urges a more tolerant approach. In *Alaniz v. Jones & Neuse, Inc.*, 878 S.W.2d 244 (Tex. App.—Corpus Christi 1994), writ denied per curiam, 907 S.W.2d 450 (Tex. 1995), the court of appeals held that the plaintiff waived his complaints about the jury charge because he included his request in a complete charge, he submitted his request before trial and not after the charge was given to the parties, and he did not make his request separate and apart from his objections. *Id.* at 245. Although the supreme court denied writ because the plaintiff failed to plead or prove lost future profits to support a jury question on that element of damages, the court wrote a per curiam opinion criticizing the lower court's waiver analysis:

In each respect, the court of appeals erred. First, Alaniz' request was “written” as Rule 273 requires. The rule does not prohibit including the request in a complete charge as long as it is not obscured. Second, to say that a party does not present a request *after* the charge is given to the parties simply because he first submitted it earlier, when the trial court was clearly aware of the request, is too strained a reading of Rule 273. Alaniz raised the issue after the charge was prepared and should not be penalized for also raising it earlier. Third, Alaniz' written request was plainly separate from his oral objection, and the appeals court's view that the two were “improperly entwined,” 878 S.W.2d at 245, was incorrect.

The court of appeals also erred in concluding that *Payne* conflicts with Rule 273. In *Payne* we held that a party has preserved error in the jury charge when he has made the trial court reasonably aware of the complaint, timely and plainly, and obtained a ruling. 838 S.W.2d at 241. While *Payne* does not revise the requirements of the rules of procedure regarding the jury charge, it does mandate that those requirements be applied in a common sense manner to serve

the purposes of the rules, rather than in a technical manner which defeats them. Under the reading of Rule 273 *Payne* requires, Alaniz preserved his jury charge complaint.

Alaniz, 907 S.W.2d at 451-52.

As late as 1999, the supreme court detailed the way in which it would make *Payne* viable, despite the technical language of the rules:

Our review of the record, however, indicates that Southeastern preserved error by timely and plainly making the trial court aware of its complaint and obtaining a ruling. See *State Dep't of Highways & Public Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992). Southeastern made the trial court aware of its complaint at the very beginning of the trial, when it moved to bifurcate the issues of bad-faith pooling and drainage. During the hearing and the rehearing of its motion, Southeastern urged that it “need[ed] an answer to the unit question to know how to present damages to the jury.” It even responded to the trial court's request for a proposed charge with a detailed explanation of the need to segregate the claims. . . .

Southeastern Pipe Line Co, Inc. v. Tichacek, 997 S.W.2d 166, 172 (Tex. 1999).

b. By objection

In *Spencer v. Eagle Star Ins. Co.*, 860 S.W.2d 868 (Tex. 1993), the supreme court held that, notwithstanding the provisions of Rule 278, error in submitting a defective instruction *may be preserved* by an objection under Rule 274. *Id.* at 870-71. Thus, rather than redrafting Rule 278 to provide that failure to submit a proper instruction may be preserved by objection as well as request, the supreme court has adopted an interim solution.

Taken together, *Payne* and *Spencer* make it clear that error may be preserved by a substantially correct request *or* an objection which brings the error to the trial court's attention. These cases, along with *Alaniz*, make it plausible to argue that the “traditional” rules no longer apply. But ignoring the longstanding rules still leaves a party open to serious waiver arguments.

7. Charge preservation post-Casteel

Under broad form practice, much of what was formerly submitted as “special issues” is now

contained in instructions. As a result, to be technically correct parties must object to everything contained in the instructions that should not be there. Separate and apart from their objections, litigants have also continued to tender written requests for instructions, definitions, elements, or even words and phrases that are erroneously omitted for fear that failure to do so will result in waiver or deemed findings. See *State Dep't of Highways & Public Transp. v. King*, 795 S.W.2d 888, 893 (Tex. App.–Beaumont 1990), writ denied per curiam, 808 S.W.2d 465 (Tex. 1991); *Wright v. Cardox Corp.*, 774 S.W.2d 407, 409-10 (Tex. App.–Houston [14th Dist.] 1989, writ denied).

In the years since *Payne* was decided, it is fair to say that the situation has not improved. “[T]he process of telling the jury the applicable law and inquiring of them their verdict [remains] a risky gambit in which counsel has less reason to know that he or she has protected a client’s rights than at any other time in the trial.” *Id.* The supreme court’s recent decisions in *Crown Life Insurance Co. v. Casteel* and *Harris County v. Smith* have increased preservation anxiety even more.

a. Broad form is not feasible for invalid liability theories

After *Casteel*, the commingling of valid and invalid theories of liability within a single broad form question is reversible error, although the trial court may not know of or agree with the invalidity at the time of submission. In *Casteel*, the charge included a single question with a single answer that could have been based on any one of 13 independent grounds. Because the jury was not asked separately about each of the plaintiff’s 13 theories of liability, the supreme court concluded that the jury could have based its affirmative answer solely on one or more of the erroneously submitted theories. 22 S.W.3d at 387-88. As a result, the court held that when 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. *Id.* at 388. Likewise, “[w]hen the trial court is unsure whether it should submit a particular theory of liability, separating liability theories best serves the policy of judicial economy underlying Rule 277 by avoiding the need for a new trial when the basis for liability cannot be determined.” *Id.* at 390.

Before *Casteel*, courts rarely saw extraordinary circumstances that made broad form infeasible. See, e.g., *Scott v. Atchison, Topeka, & Sante Fe Ry. Co.*, 572 S.W.2d 273, 278-79 (Tex. 1978) (broad form “can be accomplished very simply by listing the relevant acts or omissions [those raised by both pleadings and evidence]) in a broad ultimate fact issue. . . [or] by a complementary instruction”); *Merckling v. Curtis*, 911 S.W.2d 759, 770 (Tex. App.–Houston [1st Dist.] 1995, writ denied) (different factual allegations did not present extraordinary circumstance that made broad form infeasible); *Missouri Pac. R.R. Co. v. Lemon*, 861 S.W.2d 501, 509 (Tex. App.–Houston [14th Dist.] 1993, writ dismissed) (“The fact that a jury question contains more than one factual predicate to support an affirmative answer to a controlling question, or more than one element of a cause of action, does not render it defective.”); *Crawford v. Deets*, 828 S.W.2d 795, 800 (Tex. App.–Fort Worth 1992, writ denied) (distinct medical malpractice allegations did not present extraordinary circumstance that made broad-form infeasible). In short, invalid theories in the mix rarely produced any error.

The harmfulness of any charge error lies at the heart of the *Casteel* holding. Before *Casteel*, and often since, a number of courts have ruled that other findings make a charge error immaterial; the other findings can cure any error. If other findings render the finding in which a charge error appears immaterial, then the charge error is deemed harmless. See, e.g., *U.S. Tire-Tech, Inc. v. Boeran*, 110 S.W.3d 194, 202-03 (Tex. App.–Houston [1st Dist.] 2003, pet. denied) (omission of issue on breach of implied warranty of fitness for particular purpose was harmless when jury found no timely notice of breach); *Doe v. Mobile Video Tapes, Inc.*, 43 S.W.3d 40, 50 (Tex. App.–Corpus Christi 2001, no pet.) (holding that trial court erred in omitting negligent standard of liability for defamation or libel, but finding no harm when jury answered predicate question in the negative); *Balusik v. Kollatschny*, 2002 WL 1822360 (Tex. App.–Houston [1st Dist.] 2002, no pet.) (not designated for publication) (to extent fiduciary duty instruction erroneous, finding was immaterial because no damages were awarded based on breach of fiduciary duty).

b. Broad form is not feasible for lump-sum damages when any element of damages lacks evidentiary support

Before *Casteel*, courts routinely upheld damages awarded in a lump sum as long as the evidence

supported the total. *See, e.g., Brookshire Bros., Inc. v. Lewis*, 997 S.W.2d 908,921-22 (Tex. App.—Beaumont 1999, pet. denied.) (“to successfully challenge a multi-element damage award on appeal, an appellant must address all of the elements and show the evidence is insufficient to support the entire damage award”) In *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002), the supreme court rejected the approach of these cases and clarified that a broad form damage finding may be reversible if any single element of damages lacks evidentiary support.

In *Harris County v. Smith*, the trial court submitted two broad form damages questions, each of which instructed the jury to consider several elements and award a single lump-sum amount. Harris County objected to the questions and asked the trial court to submit each element separately. *Id.* at 231. After the court denied the request for separate submissions, Harris County objected on the ground that one listed element in each question was supported by no evidence. *Id.* at 231-32. The trial court overruled the objections. *Id.* The court of appeals concluded there was no evidence of the challenged elements, but held the submission error was harmless “because there was ample evidence on properly submitted elements of damage to support the jury’s awards to both plaintiffs.” *Id.* at 232. The supreme court reversed, relying on *Casteel* and holding that “the trial court erred in overruling [the defendant’s] timely and specific objection to the charge, which mixed valid and invalid elements of damage 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.

c. Is broad form feasible for multiple-liability apportionment questions?

The supreme court has not yet expressly considered whether *Casteel* applies to the failure of a single element of a broad form liability question on evidentiary grounds. The court’s decision in *Harris County v. Smith* arguably presages the result the court will reach should the question be presented.

The supreme court has granted review on a related issue in *KPH Consolidation, Inc. v. Romero*, 102 S.W.3d 135 (Tex. App.—Houston [14th Dist.] 2003, pet. granted). There, the plaintiffs submitted two separate liability questions—one asking the jury to decide the Hospital’s negligence and one asking the

jury to decide the Hospital’s malice in medical credentialing. The Hospital did not challenge the jury’s negligence finding. The Hospital did challenge the malicious credentialing claim, and the court of appeals concluded that there was no evidence the Hospital acted with conscious indifference. *Id.* at 146-55.

After concluding that no-evidence supported the credentialing claim, the court of appeals reversed the entire judgment, including the jury’s unchallenged negligence finding. *Id.* at 155-60. The court of appeals did so because the jury had answered a single apportionment question and single damages questions predicated on an affirmative answer to either liability theory. *Id.* The court of appeals found 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).” *Id.* at 159. The court likewise concluded that “the jury must have based part of the actual damages on negligence and part on malicious credentialing.” *Id.* at 160. The court therefore “reversed and remanded for a new trial on negligence and damages.” *Id.*

At least one court has held that harm arises from the tying damages to multiple theories, one of which fails. *See San Antonio Credit Union v. O’Connor*, 115 S.W.3d 82, 102 (Tex. App.—San Antonio 2003, pet. denied) (linking intentional infliction, malicious prosecution, and defamation to single damage question was reversible error when intentional infliction claim failed as a matter of law). Other courts, have held that *Casteel* does not apply and no error results from the failure of one of multiple liability theories tied to a single damages question. *See, e.g., Durban v. Guajardo*, 79 S.W.3d 198, 207 (Tex. App.—Dallas 2002, no pet.) (“*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 Center Joint Venture*, 50 S.W.3d 531, 548-49 (Tex. App.—El Paso 2001, no pet.) (even though several of questions on different theories of liability failed, remaining question also tied to same damage question did not leave the court wondering whether jury based its award on valid theory); *Colonial County Mut. Ins. Co. v. Valdez*, 30 S.W.3d 514, 518-19 (Tex. App.—Corpus Christi 2000, no pet.) (*Casteel* error in one question to which single damage question tied rendered harmless in light of survival of other liability question tied to same damage

question). The supreme court will presumably resolve this split when it decides *Romero*.

d. What type of objection will preserve a *Casteel* complaint?

A major question in the wake of *Casteel* and *Harris County v. Smith* is the type of objection necessary to preserve and obtain the same type of review. In *In re A.V.*, 113 S.W.3d 355 (Tex. 2003), a parental rights termination case, the state alleged that a father's rights should be terminated under Family Code §§ 161.001(1)(N) and (Q). The trial court submitted two broad form questions asking whether the father's rights to each of two children should be terminated based on either or both sections (N) and (Q). *Id.* at 357. The father did not object to the form of the charge. *Id.* Apparently, the father also did not object on the ground that no evidence supported one or the other statutory bases for termination included in the charge. *Id.* at 362-63.

On appeal, the father argued that both of the submitted theories were unconstitutional, and he argued that there was no evidence to support termination of his parental rights under § 161.001(1)(N). *Id.* at 357. Presumably, the father preserved his no-evidence complaint in a post-judgment motion; the supreme court's opinion does not suggest that this complaint was waived.

Nonetheless, after the supreme court overruled the father's constitutional challenge to subsection (Q), the court held that it could affirm without reaching any of the father's other complaints. *Id.* at 362. The court explained:

Puig did not argue to the trial court that because the charge was based on a theory without evidentiary support, the charge should not be submitted in broad form. To preserve this complaint, 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" The only specific objections Puig made to the charge were to request an instruction or definition on constructive abandonment and to argue the constitutionality of the statutes

The [trial] court overruled the objections. The record is clear—and Puig does not dispute—that he never objected to the

question being submitted to the jury in broad form. 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. Because Puig did not make a specific and timely objection to the broad-form charge, he did not preserve a claim of harmful charge error.

Thus, any complaint regarding harmful charge error on broad-form submission was not preserved for review by the court of appeals, or by us. And because any complaint about the trial court submitting a broad-form question to the jury was waived, we look only to see if one of the grounds submitted to the jury is a valid ground upon which termination of parental rights could be based.

Id. at 362-63 (footnotes omitted).

What remains unclear after *A.V.* is whether the supreme court would have reached the same result if the father had lodged a no-evidence objection to submission of the subsection (N) ground before the charge was submitted. In other words, is it enough to object that a particular theory is supported by no evidence, or must a party also specifically complain that the charge should not be submitted in broad form?

The supreme court may answer this preservation question when it decides *Southwestern Bell Telephone Co. v. Garza*, No. 01-1142 in the Supreme Court of Texas, a case argued in October 2003. In that case, Southwestern Bell challenges the trial court's submission of a single liability question that asked whether the it had disqualified or discharged the plaintiff in retaliation for filing a worker's comp claim. Southwestern Bell asserts that the disqualification theory is invalid, and that because this invalid theory was commingled with the (valid) discharge theory, the entire case should be reversed. *See Southwestern Bell Tel. Co. v. Garza*, 58 S.W.3d 214 (Tex. App.—Corpus Christi 2001, pet. granted).

The only preservation issue Southwestern Bell has raised in the supreme court is that it tendered a question that included only the discharge theory, which the trial court implicitly overruled. Southwestern Bell did not make any objections to the charge, including no objection about the broad form submission. Depending on the supreme court's ruling on the merits, the case may teach us more about preservation

requirements post-*Casteel*. In the meantime, trial counsel should consider alternatives to broad form anytime a no-evidence objection is made to a charge that includes multiple elements or theories.

E. Federal Court

1. Picking the jury

The test for a viable voir dire examination in federal court is whether the process affords reasonable assurances that prejudice would be discovered. *United States v. Quiroz-Hernandez*, 48 F.3d 858, 868 (5th Cir. 1995). The test for reversible error reflects the federal courts' deferential view of the trial court's role. Reversible error is seldom found in a federal appeal, because the district court has wide discretion to conduct the voir dire examination. *De La Cruz v. Atchison, T. & S.F. Ry.*, 405 F.2d 459, 462 (5th Cir. 1968).

To preserve errors in voir dire conducted by the district court, counsel must (before the court's questions are concluded) tell the trial judge any additional questions that the party considers should be asked for a fair voir dire. *King v. Jones*, 824 F.2d 324, 326 (4th Cir. 1987). However, the trial judge is not required to sort through a stack of questions searching for appropriate ones to ask the panel. *Id.*

The United States Supreme Court has recently addressed Fifth Amendment concerns about preemptory challenges and challenges for cause. *See United States v. Martinez-Salazar*, 528 U.S. 304 (2000). The Court did not resolve whether a case should be reversed when a district court erroneously refuses to grant a challenge for cause and the litigant then runs out of jury strikes. *Id.* at 316. The complaining party had not asked for additional strikes or complained that an objectionable juror had been seated.

Challenges to the jury panel based on *Batson v. Kentucky* and its civil progeny must be made before the panel is dismissed and the jury seated. *See Garcia v. Excel Corp.*, 102 F.3d 758 (5th Cir. 1997). If the objecting party who makes a prima facie showing of discrimination puts the burden on opposing counsel to articulate a race-neutral explanation for a strike, and if there is a race-neutral explanation given, the trial judge must then decide whether the strike was exercised purposefully to exclude a juror based on race. *See Palmer v. Lares*, 42 F.3d 975 (5th Cir. 1995).

2. Motions for judgment during trial

Timing is critical for any pleading or motion filed requesting a judgment from the trial court. There are specific requirements for when these motions must be heard by the trial judge. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. 9A WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2521. To preserve a complaint for appeal about sufficiency of the evidence, parties must make a Rule 50 motion after the plaintiff puts on evidence. *See Satcher v. Honda Motors Co.*, 52 F.3d 1311, 1315 (5th Cir. 1995). If a party files a motion for judgment as a matter of law (JML) at the close of all evidence, but does not renew that motion after trial, the party waives any sufficiency-of-evidence rendition points on appeal. *Cone v. West Va. Pulp & Paper Co.*, 330 U.S. 212, 217-18 (1947). The only proper remedy then is a remand for a new trial. *Satcher*, 52 F.3d at 1315. To properly cover all timing issues, parties should re-urge a motion for JML at the close of all the evidence. *McKenzie v. Lee*, 259 F.3d 372, 374 (5th Cir. 2001). If a party fails to urge its motion for JML after the close of the evidence, it usually is prohibited from making a renewed motion for JML after the verdict. *Purcell v. Seguin State Bank & Trust Co.*, 999 F.2d 950, 956 (5th Cir. 1993).

3. Jury charge

a. Rule 51 requirements

Rule 51 of the Federal Rules provides:

INSTRUCTIONS TO JURY: OBJECTION At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the question. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after the argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

For a party to complain of the failure to give an appropriate jury instruction, she must state distinctly the matter objected to and the grounds for the objection.

b. Timing

Objections to the charge must be made before the jury returns to consider its verdict. *See* FED. R. CIV. P. 51; *Int'l Meat Traders, Inc. v. H&M Food Sys.*, 70 F.3d 836, 841 (5th Cir. 1995). Most cases hold that an objection must be stated “after the charge” is read, and before the jury retires to consider its verdict. *See, e.g., Crist v. Dickson Welding, Inc.*, 957 F.2d 1281, 1286 (5th Cir. 1992). The district court may modify the jury charge even after it is read to the jury. *See id.* 1287. Accordingly, stating an objection after the charge is read, while making reference to an earlier filed request for instruction, is the most admissible way to preserve error.

c. Form and specificity

A party makes objections to the charge either orally or in writing. *Bender v. Brumley*, 1 F.3d 271, 276 (5th Cir. 1993). The objection must contain enough specificity “to bring into forms the precise nature of the alleged error.” *Delancet v. Motichek Towing Serv., Inc.*, 427 F.2d 897, 900 (5th Cir. 1970). This specificity demands that the grounds for the objection be stated. *See* FED. R. CIV. P. 51; *Baumstimler v. Rankin*, 677 F.2d 1061, 1069 (5th Cir. 1982).

A party also may file written requests for a jury instruction. However, to preserve error, filing the requests is not enough. *Samara Bros., Inc. v. Wal-Mart Stores, Inc.*, 165 F.3d 120 (3d Cir. 1998). Rule 51’s error-preservation standard does not presume that a trial judge has knowledge of all filed requests. Parties must specifically object and state the grounds for the objection. FED. R. CIV. P. 51(C)(1).

CONCLUSION

Every trial lawyer should recognize that preservation of appellate complaints is a technical and ongoing process. It requires a balancing of interests between the need to preserve an error and the desire to win the case outright at trial. Knowing how to preserve error is critical to making an effective decision, even if judgment and strategy ultimately advise against it.